STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 24, 2002
V	No. 196550 Oakland Circuit Court
JOE LEWIS POWELL, JR., Defendant-Appellant.	LC No. 91-110424 FC ON REMAND

Before: Jansen, P.J., and Hood and Wilder, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court to consider whether, in light of *People v Mass*, 464 Mich 615; 628 NW2d 540 (2001), defendant's jury conviction of conspiracy to deliver between 50 and 224 grams of cocaine, MCL 750.157a, must be vacated because the trial court failed to instruct the jury that the prosecution was required to prove that defendant knowingly conspired to deliver at least 50 grams of cocaine. After reconsidering this issue, we again affirm.

In our previous opinion, we rejected defendant's argument concerning the trial court's failure to properly instruct the jury on the elements of conspiracy. Specifically, our opinion stated:

> Although the trial court did not specify the quantity involved in the conspiracy, such omission does not require reversal of defendants'[1] conspiracy convictions where the conspiracy instruction was preceded by an instruction on delivery of over 50 grams of cocaine which explicitly required proof that the cocaine weighed between 50 and 224 grams. See *People v Marji*, 180 Mich App 525, 536; 447 NW2d 835 (1989). Moreover, the conspiracy instruction referenced the offense of delivery between 50 and 224 grams of cocaine several times such that the jury was adequately informed of that element of the crime.

[1] Defendant's appeal was originally consolidated with that of his codefendant, Demetrius Titus. However, Titus did not appeal our previous decision; thus, on remand, this case concerns only defendant.

> Further, the uncontroverted evidence was that defendants delivered over 50 grams[2] of cocaine to the informant, thereby establishing the requisite element of the offense. Under these circumstances, the trial court's omission of the amount of cocaine involved in the conspiracy from the instruction was harmless and does not warrant reversal. *Marji, supra*. [*People v Powell*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2000, (Docket Nos. 196550), slip op, 5.]

In *Mass*, *supra* at 645-646, the Supreme Court held that

> a defendant charged with conspiracy to deliver 225 grams or more but less than 650 grams of cocaine is entitled to have the jury instructed that the defendant is guilty only if the prosecution has proved beyond a reasonable doubt that defendant conspired to deliver, not just some amount of cocaine, but at least 225 grams of cocaine.

The Supreme Court also found that where a trial court erred by failing to instruct the jury that the prosecution must prove beyond a reasonable doubt that the defendant conspired to deliver a specific amount of cocaine, but defendant forfeited the error by failing to object, defendant's conviction should only be reversed if "'the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence.'" *Id*. at 640, quoting *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). On the basis of this standard of review, the Supreme Court concluded:

> Here, the trial court omitted an element from its conspiracy instruction, i.e., the requirement that the prosecution show that defendant specifically agreed to deliver at least 225 or more grams of cocaine. We conclude that this error seriously affected the fairness, integrity, or public reputation of defendant's trial. [*Mass, supra* at 640-641.]

We conclude based on our renewed review on remand that reversal of defendant's conviction is not required, because the trial court's failure to specifically instruct that the prosecution was required to prove that the conspiracy was to deliver more than 50 grams of cocaine did not "seriously affected the fairness, integrity, or public reputation of defendant's trial." *Id*. at 640-641. In this regard, we find the facts of this case are distinguishable from those in *Mass.*

In *Mass*, the trial court gave the following conspiracy instruction:

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[2] The evidence clearly established that defendant and Titus sold an informant approximately 83 grams of cocaine on May 15, 1991, and approximately 165 grams of cocaine on June 13, 1991. *People v Powell*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2000, (Docket Nos. 196550), slip op, 6.]

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> The defendant is charged with the crime of Conspiracy to Commit the Delivery of Cocaine. Anyone who knowingly agrees with someone else to commit the Delivery of Cocaine is guilty of Conspiracy. To prove the defendant's guilty the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant and someone else knowingly agreed to commit Delivery of Cocaine. [*Id*. at 639.]

In the instant case, the trial court's conspiracy instruction referred to the amount at issue and stated, in relevant part, as follows:

> Now, the defendants are charged with the crime of conspiracy to deliver 50 to 224 grams of cocaine. Anyone who knowingly agrees with somebody else to deliver cocaine is guilty of conspiracy.
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> * * *
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> Now the crime of conspiracy to deliver 50 to 224 grams of cocaine requires proof of a specific intent. This means that the prosecution must prove not only that the defendants did certain acts, but that they did these acts with the intent to cause a particular result.
>
> For the crime of conspiracy to deliver 50 to 224 grams of cocaine, this means that the prosecution must prove that the defendant intended to deliver cocaine to someone else. The defendants' intent may be proved by what they said, what they did, how they did it, or by any other facts and circumstances in evidence. [*Powell*, *supra* at 4-5.]

Unlike the instructions in *Mass*, the instructions in this case clearly described the charge against defendant as conspiracy to deliver the specific amount of 50 to 224 grams of cocaine. Because the jury was instructed of the specific amount being charged, and further, because there was evidence that defendant Titus knowingly delivered between 50 and 224 grams of cocaine, we conclude that the trial court's failure to specifically instruct the jury that the prosecution had to prove beyond a reasonable doubt that defendant specifically intended to deliver a specific amount of cocaine did not result in the conviction of someone who was actually innocent or "seriously affect[] the fairness, integrity, or public reputation" of defendant's trial. *Mass*, *supra* at 640, quoting *Carines*, *supra*.

Our conclusion is buttressed by the Supreme Court's recent decision in *People v Hunter*, ___ Mich ___; ___ NW2d ___ decided April 24, 2002 (Docket No. 112713). There, the Supreme Court reversed this Court and reinstated the defendant's conviction for conspiracy to deliver 650 grams or more of cocaine:

> [W]e conclude that the evidence was sufficient for the jury to find that the defendant and Jenkins conspired to possess with intent to deliver 650 or more grams of a controlled substance. The evidence clearly showed that defendant and Jenkins conspired to possess cocaine with intent to deliver. . . .

Other evidence in the case was sufficient for the jury to infer that the amount involved met the statutory minimum.

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Finally, the amount of drugs the defendant mailed from California . . . may be considered in evaluating the coconspirators' intent regarding the amount to be obtained. What the conspirators actually did in furtherance of the conspiracy is evidence of what they had agreed to do. See *Mass*, 464 Mich 634; *People v Kanar*, 314 Mich 242, 249; 22 NW2d 359 (1946); *People v Newsome*, 3 Mich App 541, 560; 143 NW2d 165 (1966). In this case, the package contained 1,040 grams, well above the statutory amount of 650 grams.

From all this evidence the jury could have concluded that the defendant and Jenkins intended to possess an amount of cocaine in excess of the statutory minimum. [*Hunter*, slip op 7-9.]

Affirmed.

/s/ Kathleen Jansen
/s/ Harold Hood
/s/ Kurtis T. Wilder