

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LYMAN GENE KOONCE,

Defendant-Appellant.

UNPUBLISHED

October 15, 2002

No. 210326

Monroe Circuit Court

LC No. 96-027645-FH

ON REMAND

Before: Hoekstra, P.J. and Markey and Kelly, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court. On original submission, we relied on *People v O'Quinn*, 185 Mich App 40; 460 NW2d 264 (1990), to resolve defendant's claim that the trial court erred in denying his motion to dismiss, or alternatively, in failing to give a "missing witness" instruction on the basis of the prosecution's failure to produce a witness identified in the prosecution's witness list.¹ On application for leave to appeal, the Supreme Court, in lieu of granting leave, reversed and remanded the case to us for reconsideration in light of its opinion. *People v Koonce*, 466 Mich 515, 516, 523; 648 NW2d 153 (2002). In its opinion, the Supreme Court overruled this Court's holding in *O'Quinn* "to the extent that it applied an exception to the reasonable assistance requirement found in MCL 767.40a(5)." *Id.* at 516. Consequently, pursuant to the Supreme Court's direction, *id.* at 523, we now address whether the prosecution complied with MCL 767.40a(5) by providing reasonable assistance. We conclude that it did and, therefore, we again affirm defendant's conviction.

MCL 767.40a(5) provides in relevant part:

The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness.

Initially, we reject defendant's argument that the prosecution was required to demonstrate due diligence in its attempt to locate the witness. Contrary to defendant's assertion, the record

¹ *People v Koonce*, unpublished opinion per curiam of the Court of Appeals, issued July 21, 2000 (Docket No. 210326).

reveals that the prosecution did not identify the witness in question as a witness that the prosecution intended to produce at trial. Rather, the record reveals that pursuant to MCL 767.40 and MCL 767.40a, the prosecution included the witness' name on its "list of witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers." Presumably, the prosecution listed the witness in order to fulfill its responsibility pursuant to MCL 767.40a(1), which requires the prosecution to identify all known res gestae witnesses. As we stated in our previous opinion, the witness was a res gestae witness. However, neither the original witness list nor the amended witness list contained an "X" by the name of the witness in question to designate him as one that the prosecution intended to produce at trial. Accordingly, the level of assistance that the prosecution, upon proper request, must afford defendant in locating that person is one of reasonable assistance, not due diligence. MCL 767.40a(5); *People v Burwick*, 450 Mich 281, 288-289; 537 NW2d 813 (1995); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To meet the responsibility to provide reasonable assistance requires less investigation and action than due diligence. See *People v Long*, 246 Mich App 582, 586; 633 NW2d 843 (2001).

Here, the prosecution, in response to defendant's written request for assistance in locating the witness, informed defendant, in writing, of the witness' last-known address, which was in Baltimore, Maryland, his date of birth, and his social security number, and that the "[c]urrent lien [sic] information also is the same." The answer also indicated that the witness had been convicted of possession of cocaine from events occurring at the same time as those that gave rise to the charges made against defendant, but that he had failed to appear at sentencing, that his present whereabouts were unknown, and that a bench warrant for his arrest was outstanding. In the trial court and on appeal, defendant does not challenge the accuracy of the information provided; defendant merely maintains that the prosecution and the investigating agency should have done more to locate the witness. Were the standard due diligence, we might agree, but against a standard of reasonable assistance, we believe the information provided was sufficient. The witness was not a Michigan resident, and his whereabouts were unknown. Consequently, there is no indication in the record that further investigation within the state was likely to result in locating the witness or even that reasonable avenues of investigation existed that could have been, but were not, pursued.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly