STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2004
v	No. 245708 Berrien Circuit Court
CHRISTOPHER LAMAR ANDERSON, Defendant-Appellant.	LC No. 99-404858-FH

Before: White, P.J, and Markey and Owens, JJ.

PER CURIAM.

Defendant appeals by right from his jury trial convictions for possession with intent to deliver 225 grams or more but less than 650 grams of a mixture containing cocaine, MCL 333.7401, and conspiracy to commit the same offense, MCL 750.157a. We affirm.

Defendant argues he was subjected to double jeopardy when after his first trial ended in a mistrial, he was retried. We disagree.

A constitutional double jeopardy challenge presents a question of law that this Court reviews de novo. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002). Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, sec 15; *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001). "The Double Jeopardy Clause of the Fifth Amendment protects against two general governmental abuses: (1) multiple prosecutions for the same offense after an acquittal or conviction; and (2) multiple punishments for the same offense." *Id.* Generally, jeopardy attaches in a jury trial once the jury is impaneled and sworn. *Lett*, *supra* at 215. Absent manifest necessity or the defendant's consent to a mistrial before a determination on the merits, the defendant cannot be brought to trial again. *People v Grace*, 258 Mich App 274, 280; 617 NW2d 554 (2003).

In this case, the record from the first trial indicates that when the trial originally began, the prosecutor, because of the initial fingerprint report, mistakenly believed that there were no identifiable fingerprints on the drug evidence seized in the case. In fact, both the prosecutor and

defense counsel remarked in their opening statements that there would be no fingerprint evidence during the trial. But, during the second day of the first trial, it was discovered that there were actually two fingerprint reports, and that the second report indicated that prints belonging to defendant and another person were found on duct tape used in wrapping the package of cocaine. After the court determined that the newly discovered fingerprint evidence was admissible, defendant moved for a continuance for the purpose of obtaining an independent fingerprint expert, estimating that at least three weeks would be required. The trial court denied defendant's request for the continuance on the basis that it would be unfair to a co-defendant who shared the same jury and wished to go forward with the trial The court gave defendant the option of either continuing with the trial or requesting a mistrial.

Defendant now argues he did not voluntarily consent to a mistrial because he was actually coerced into accepting the mistrial. Defendant alleges that he had a right to continue his original trial, but that he should have been allowed a continuance in order to have an expert analyze the fingerprint evidence. Defendant argues that the option of going forward in the trial without first having his own expert analyze the evidence was so prejudicial to his case that he essentially had no option but to take the mistrial. Because of this alleged "Hobson's choice," defendant insists there was no consent to a mistrial during the first trial, so plaintiff should have been precluded from bringing charges against him in the second trial.

Michigan case law provides that a retrial is not barred by double jeopardy if a mistrial is granted because of error of the prosecutor or the trial judge due to reasons that were innocent or beyond their control. *People v Dawson*, 431 Mich 234, 236, 252; 427 NW2d 886 (1988); *People v Echavarria*, 233 Mich App 356, 363; 592 NW2d 737 (1999). Here, the trial court's determination that the prosecutor did not intentionally withhold evidence is well supported by the record. Moreover, the United States Supreme Court specifically stated in *United States v Dinitz*, 424 US 600, 609; 96 S Ct 1075; 47 L Ed 2d 267 (1976), that the existence of a "Hobson's choice" is not enough to vitiate consent to a mistrial, even where the problem is created by prosecutorial error:

> In such circumstances, the defendant generally does face a "Hobson's choice" between giving up his first jury and continuing a trial tainted by [potentially] prejudicial judicial or prosecutorial error. The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed in the event of such error.

In this case, the record indicates that defendant retained primary control over the decision whether to continue with the same jury in light of the court's decision not to grant a continuance or to request a mistrial, the defendant chose the latter. Therefore, double jeopardy grounds did not bar defendant's subsequent trial.

Defendant next argues that the drug evidence seized by police should have been suppressed at trial because the police illegally stopped his car, because he was unlawfully detained during that stop and because defendant's consent to search his vehicle was not valid.[1] We disagree.

We review findings of fact at a motion to suppress for clear error but whether a violation of the federal constitutional prohibition against unreasonable searches and seizures requires exclusion of the evidence is a question of law which we review de novo on appeal. *People v Wilson*, 257 Mich App 337, 351; 668 NW2d 371 (2003), vacated in part ___ Mich ____ (March 11, 2004). The police may conduct an investigatory stop where they have a reasonably articulable suspicion that a crime is afoot or has been committed. *Terry v Ohio*, 392 US 1, 21-22, 30-31; 88 S Ct 1868; 20 L Ed 2d 889 (1968). Moreover, our Supreme Court recently reiterated the requirements for police to make a valid investigatory stop:

> The brief detention of a person following an investigatory stop is considered a reasonable seizure if the officer has a "reasonably articulable suspicion" that the person is engaging in criminal activity. The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances. "In determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." [*People v Oliver*, 464 Mich 184, 192; 627 NW2d 297 (2001), quoting *People v LoCicero*, 453 Mich 496, 501-502; 556 NW2d 498 (1996).]

Further, the determination whether the police had reasonable suspicion to support an investigatory stop is made considering the totality of the circumstances "'as understood and interpreted by law enforcement officers, not legal scholars.'" *Oliver*, *supra*, quoting *People v Nelson*, 443 Mich 626, 632; 505 NW2d 266 (1993).

Here, we find that based on the totality of the circumstances, the Michigan State Police trooper who stopped defendant had a reasonably articulable suspicion for making an investigatory stop of defendant's vehicle. The trooper testified that based on his extensive experience in drug trafficking, he believed that defendant's automobile was traveling with another in a drug transportation "caravan" because over the roughly six miles he followed the two cars, they drove in unison and remained close to each other. The state trooper also testified that his suspicions grew when he began to position his cruiser between defendant's vehicle and the other automobile, because defendant immediately slowed down and fell back a considerable distance.

[1] Defendant frames this issue in terms of the stop being improper because it was based on improper racial profiling; however, defendant does not actually argue that point and instead makes the arguments described here.

But even if the state trooper had not had a reasonably articulable suspicion that he was witnessing a drug caravan, there was evidence presented at trial that the trooper had probable cause to believe a traffic violation had occurred. And when an officer has probable cause to believe a traffic violation has occurred, the resulting investigative stop is lawful. *People v Davis*, 250 Mich App 357, 363; 649 NW2d 94 (2002). The trooper testified that he stopped defendant because a LIEN search indicated that the license plate of his car was registered to a different make and model. MCL 257.224(7) provides, in part: "A person shall not operate a vehicle on the public highways or streets of this state displaying a registration plate other than the registration plate issued for the vehicle by the secretary of state . . . ." Therefore, we find the state police lawfully stopped defendant.

Defendant next argues he was unlawfully detained for an unreasonable period of time while a state trooper stopped and searched the car he was allegedly following. At the moment a police officer stops and detains one, and the person is not free to leave, the officer has "seized" that person under the Fourth Amendment. *Terry, supra* at 16; *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1992). However, not all seizures are forbidden, only unreasonable ones. *Id.* Accordingly, "[a] brief stop of a suspicious individual, in order to maintain the status quo momentarily while more information is obtained, may be reasonable." *Id*. In assessing whether a detention is too long to be justified as an investigatory stop, one must ask whether the police were diligently pursuing an investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain those stopped. *Id.* at 123. In this case, the trooper only detained defendant during the time in which another trooper searched the other automobile in order to confirm or dispel his suspicion that the cars were involved in a drug caravan. And it was during this detainment that the troopers' suspicions were confirmed when the package of cocaine was found wrapped in duct tape. Therefore, we find defendant's detainment was reasonable because it was necessary to confirm suspicions that the drivers of the two cars were working together.

Defendant also argues that because he was never given the right to refuse a search of his vehicle, the evidence found in the vehicle should have been suppressed. The consent exception to the warrant requirement allows search and seizure when consent "is unequivocal, specific, and freely and intelligently given." *People v Frohriep*, 247 Mich App 692, 702; 637 NW2d 562 (2001). The validity of a consent depends on the totality of the circumstances. *Id.* A person's knowledge of the right to refuse consent is not a prerequisite to his giving valid consent to search. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). Instead, "knowledge of the right to refuse is but one factor to consider in determining whether consent was voluntary under the totality of the circumstances." *Id.*, citing *Schneckloth v Bustamonte*, 412 US 218, 248-249; 93 S Ct 2041; 36 L Ed 2d 854 (1973). Therefore, defendant's contention that the evidence found in the vehicle should be suppressed because he was not informed of his right to refuse consent to a search is not, standing alone, a valid basis for suppressing the evidence.

Next, without any reference to the context in which the statement was made, defendant contends he was denied a fair trial because the prosecutor improperly interjected his personal beliefs into the trial during cross-examination by stating, "this sure looks like a lie to me to suit your purposes." Defendant also claims the prosecutor improperly questioned defendant regarding statements he made to his attorney. We disagree.

We review de novo preserved claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The propriety of a prosecutor's remarks will depend upon the particular facts of each case. *People v Schutte,* 240 Mich App 713, 721; 613 NW2d 370 (2000). In addition, a prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id*. The test is whether the defendant was denied a fair and impartial trial. *Watson, supra.*

In this case, we find the prosecutor's remark did not deny defendant a fair trial because the statement was made in light of a patent discrepancy between defendant's direct testimony as to his fingerprints on the duct tape and a previous sworn affidavit in which defendant claimed he never touched the duct tape. A prosecutor may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). When the prosecutor's remarks are viewed as a whole, in the context of defendant's inconsistent statements, defendant was not denied a fair trial because the prosecutor's questions were not attempts to express the prosecution's belief in defendant's guilt. Rather, the statements about whether defendant was lying arose in response to defendant's contention that he was telling the truth as a witness. Additionally, we note that because of the patent differences between his sworn statement and his remarks during direct examination, the prosecutor also asked defendant on cross-examination if his attorney had authorized him to lie. We conclude that the prosecutor asked this question about defendant's attorney to further highlight the inconsistencies in defendant's statements. Therefore, when the prosecutor's comments are read as a whole and in the context of defendant's direct testimony, the statement was proper and did not deny defendant his right to a fair trial.

Finally, defendant argues that expert testimony regarding drug caravans was improperly prejudicial drug profile testimony because it was used as substantive evidence to prove defendant's guilt. We disagree.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000). An abuse of discretion exists only if an unprejudiced person considering the facts on which the trial court acted would say that there was no justification or excuse for the ruling made. *Id.* This Court has listed four factors to apply in determining whether drug profile evidence should be admitted.

> First, the drug-profile evidence must be offered as background or modus operandi evidence, and not as substantive evidence of guilt, and the distinction must be carefully maintained by the attorneys and the court. Second, something more than drug profile evidence must be admitted to prove a defendant's guilt; multiple pieces of profile do not add up to guilt without something more. Third, the trial court must make clear to the jury what is and is not an appropriate use of the drug-profile evidence by, e.g., instructing the jury that drug-profile evidence is properly used only as background or modus operandi evidence and should not be used as substantive evidence of guilt. Fourth, the expert witness should not be permitted to express an opinion that, on the basis of the profile, defendant is guilty, and should not expressly compare the defendant's characteristics to the

> profile in a way that implies that the defendant is guilty. [*Id.* at 320-321, citing *People v Murray*, 234 Mich App 46, 56-57; 593 NW2d 690 (1999).]

In analyzing defendant's claim that the profile testimony from Mays was improper, we note that defendant provides only a cursory page-long argument for this issue in his brief. Noticeably absent is any analysis of the facts or reference to the above factors concerning the admissibility of profile testimony. Defendant simply concludes in his brief that:

> It is clear that the testimony of Lieutenant Mays renders the guilt of the defendant more probable than not. His testimony is more prejudicial than probative as it appears to fill in the missing gaps in the prosecutor's case. This testimony should not have been allowed, and to do so renders the court's decision to do so, an abuse of discretion.

Therefore, defendant has impermissibly announced his position and left it to this Court to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

In any event, the trial court did not abuse its discretion in admitting the testimony of an expert on drug trafficking because the testimony was offered only as background evidence, the trial court gave a proper instruction regarding the testimony, other evidence of defendant's guilt was offered, and the expert did not specifically opine as to defendant's guilt.

We affirm.

/s/ Jane E. Markey
/s/ Donald S. Owens