Court of Appeals, State of Michigan

ORDER

People of MI v Otis Lee Seals

Docket No. 277507

LC No. 06-003034-FH

Alton T. Davis
Presiding Judge

Christopher M. Murray

Jane M. Beckering
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued May 29, 2008 is hereby VACATED. A new opinion is attached to this order.

COURT OF APPEALS OF THE STATE OF MICHIGAN
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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2008
v	No. 277507 Midland Circuit Court
OTIS LEE SEALS, Defendant-Appellant.	LC No. 06-003034-FH

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of delivery of less than 50 grams of a narcotic (methadone), MCL 333.7401(2)(a)(iv), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with delivery of less than 50 grams of a narcotic after Elizabeth Meister agreed to do a controlled buy for BAYANET Officer Joshua McMillan. Meister's boyfriend at the time, Miles Luft, was present when the purchase occurred.

The prosecution endorsed Luft[1] as a witness, but did not call him to testify, and did not seek to delete his name from the witness list as authorized by MCL 767.40a(4). The prosecutor indicated that efforts had been made to find Luft, but that he could not be located. Defense counsel asked that the trial court instruct the jury that Luft's testimony would have been unfavorable to the prosecution. The trial court denied the request, concluding as a matter of law that the instruction was no longer required because the prosecution was not required to produce res gestae witnesses at trial.[2]

[1] Luft was identified only as a confidential informant on the list.

[2] The trial court relied on *People v Perez*, 255 Mich App 703, 708; 662 NW2d 446 (2003). However, in *People v Perez*, 469 Mich 415, 420-421; 670 NW2d 655 (2003), our Supreme Court vacated that portion of this Court's opinion that held that CJI2d 5.12 is no longer viable.

The jury convicted defendant as charged. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to two to 20 years in prison.

We review a claim of instructional error de novo. *People v Marion*, 250 Mich App 446, 448; 647 NW2d 521 (2002).

CJI 5.12 provides:

> *[State name of witness]* is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case.

MCL 767.40a provides in part:

> (1) The prosecuting attorney shall attach to the filed information a list of all 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.
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> * * * *
>
> (4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

Under the former version of MCL 767.40a, a prosecutor was required to list all res gestae witnesses on the witness list, and to produce those witnesses at trial. If the prosecutor failed to do so, the defendant was entitled to have CJI 5.12 read to the jury. The amended version of MCL 767.40a requires the prosecutor to include the names of known witnesses on the witness list. MCL 767.40a(1). The name of a listed witness may be removed under certain circumstances. MCL 767.40a(4). If the prosecutor fails to produce an endorsed witness, he may be relieved of the duty to do so by showing that the witness could not be produced notwithstanding the exercise of due diligence.[3] *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). An evidentiary hearing to determine if the defendant was prejudiced by the absence of a witness is no longer required. *People v Cook*, 266 Mich App 290, 295-296; 702 NW2d 613 (2005). Nevertheless, the reading of CJI2d may be appropriate. The propriety of giving the instruction depends on the facts of the particular case. *People v Perez*, 469 Mich 415, 420-421; 670 NW2d 655 (2003).

Defendant argues that the trial court erred by failing to read CJI2d 5.12 to the jury. He notes that the testimony given by Meister and McMillan differed on various points, and contends

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[3] Due diligence is the attempt to do everything reasonable, not everything possible, to obtain the presence of a witness at trial. *People v Cummings*, 171 Mich App 577, 585; 430 NW2d 790 (1988).

that because Luft was the only other eyewitness to the incident (and was the perpetrator, according to defendant), his absence severely undermined the prosecution's case.

We affirm. The trial court concluded erroneously that reading CJI2d 5.12 is no longer required under any circumstances.[4] The trial court failed to make any findings regarding due diligence; however, we conclude that this preserved nonconstitutional error was not outcome-determinative. The prosecutor stated that warrants had been issued for Luft's arrest, and that despite efforts the People were unable to locate the witness. Further, neither Meister (the mother of Luft's child) nor Luft's brother could locate Luft. Moreover, defendant has made no showing that Luft would have testified that he (Luft) supplied the methadone to Meister. Defendant has pointed to nothing that would support a finding that Luft's testimony would have been favorable to him.

Defendant has not demonstrated that the trial court's failure to give the missing witness instruction resulted in prejudice. Furthermore, given that defendant's assertions regarding the value of Luft's testimony are based entirely on speculation, a remand for a hearing in the trial court would be a waste of judicial resources.

Affirmed.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering

[4] Plaintiff concedes that the trial court erred in so concluding.