STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 8, 2010
v	No. 291067 Wayne Circuit Court
PEDRO PAREDES-MEZA, Defendant-Appellant.	LC No. 08-012357

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession with intent to deliver 50 to 449 grams of cocaine, MCL 333.7401(2)(a)(iii). He was sentenced to 2 to 20 years' imprisonment for the conviction. We affirm.

Defendant's first issue on appeal is that the trial court erred in refusing to order an *in camera* review of the testimony of the confidential informant ("CI") or the CI's file. We disagree.

A trial court's decision regarding whether to order the production of a confidential informant is reviewed for an abuse of discretion. *People v Poindexter*, 90 Mich App 599, 608; 282 NW2d 411 (1979). An abuse of discretion occurs only when the court chooses an outcome outside the principled range of outcomes. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008).

Generally, a prosecutor is not required to disclose the identity or testimony of confidential informants as a result of the "informer's privilege." *People v Sammons*, 191 Mich App 351, 368; 478 NW2d 901 (1991). However, if the defendant demonstrates a possible need for the informant's testimony, the trial court should order the informant produced and conduct an *in camera* hearing in order to determine whether he could offer any testimony helpful to the defense. MCR 6.201(C); *People v Underwood*, 447 Mich 695, 706; 526 NW2d 903 (1994). Determining whether there is a need depends on the circumstances of the case. *Underwood*, 447 Mich at 705, citing *Roviaro v United States*, 353 US 53; 77 S Ct 623; 1 L Ed 2d 639 (1957). To determine the need, a court should consider "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." *Underwood*, 447 Mich at 705, citing *Roviaro*, 353 US at 62.

Defendant argues that the testimony of the CI could corroborate defendant's belief that the alleged recording between the CI and defendant occurred between the CI and someone other than defendant. And, furthermore, that the CI could support defendant's argument that he was merely present in the vehicle and did not possess the cocaine. Both arguments ignore the fact that the trial court listened to the tape-recorded conversation and did not find it exculpatory. In fact, the trial court noted that at least once during the recording, the CI refers to the person with whom he is talking as "Pedro," defendant's first name. Moreover, defendant has provided no evidence that the conversation was with someone other than him or that the CI's testimony would show that defendant was merely present when the drugs were found. In fact, Department of Homeland Security Agent Jeffrey Schmidt testified that when he approached the vehicle in which defendant was a passenger, he observed defendant shoving a bag of what turned out to be cocaine into the glove compartment of the vehicle. There is direct evidence, through the testimony of Schmidt, that defendant possessed the cocaine. The trial court did not abuse its discretion in refusing to hear the *in camera* testimony of the CI or to do an *in camera* review of the CI's file.

Defendant's next issue on appeal is that he was denied a fair trial where the trial court refused to order the prosecution to disclose the identity of the CI, despite the fact that the CI was actually a *res gestae* witness, given that he was present when defendant was arrested. We disagree. A trial court's decision regarding whether to order the production of a confidential informant is reviewed for an abuse of discretion. *Poindexter*, 90 Mich App at 608. Constitutional issues are reviewed de novo on appeal. *People v Gillam*, 479 Mich 253, 260; 734 NW2d 585 (2007).

A prosecutor is not obligated to produce *res gestae* witnesses, but has a continuing duty to advise the defense of all known *res gestae* witnesses, and to provide reasonable assistance to the defense in locating witnesses upon request of the defense. MCL 767.40a; *People v Kevorkian*, 248 Mich App 373, 441; 639 NW2d 291 (2001).[1] A *res gestae* witness is a person who witnessed some event in the continuum of the criminal transaction whose testimony would aid in developing a full disclosure of the facts at trial. *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). The purpose of the requirement that the prosecutor list known *res gestae* witnesses is to notify the defendant of the existence of the witnesses and their *res gestae* status. *People v Gadomski*, 232 Mich App 24, 36; 592 NW2d 75 (1998). However, there is no

[1] Prior to the amendments in 1986, MCL 767.40a was interpreted as requiring the prosecution to endorse and produce all *res gestae* witnesses. *People v Burwick*, 450 Mich 281, 287; 537 NW2d 813 (1995). After the amendments, the prosecutor no longer has a duty to produce *res gestae* witnesses. *Burwick*, 450 Mich at 289. Instead, he or she has an obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request. *Burwick*, 450 Mich at 289. The Michigan Supreme Court in *Burwick* held that with 1986 amendments"[t]he Legislature has thus eliminated the prosecutor's burden to locate, endorse, and produce unknown persons who might be *res gestae* witnesses and has addressed defense concerns to require the prosecution to give initial and continuing notice of all known *res gestae* witnesses, identify witnesses the prosecutor intends to produce, and provide law enforcement assistance to investigate and produce witnesses the defense requests." *Burwick*, 450 Mich at 289.

requirement that the prosecutor use due diligence to discover the names of witnesses. *Gadomski*, 232 Mich App at 36.

As noted above, a prosecutor need not disclose the identity of confidential informants. *People v Cadle*, 204 Mich App 646, 650; 516 NW2d 520 (1994), overruled in part on other grounds *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999). However, a prosecutor should disclose the identity of an informant if the disclosure of an informant's identity or the contents of his communication is relevant and helpful to the defense, or is essential to a fair determination of the case. *Cadle*, 204 Mich App at 650.

Based on the testimony of agent Schmidt, defendant argues that the CI was a *res gestae* witness whose identity should have been disclosed to him. We disagree. First, there is no evidence that the CI was a *res gestae* witness. Agent Schmidt testified that the CI was in the car with him and Immigration and Customs Enforcement Agent Leslie Defreitas, but there was no evidence presented that the CI witnessed any events leading to defendant's arrest that were not also witnessed by agents Schmidt and Defreitas. Thus, the CI's testimony would not have aided in developing a full disclosure of the facts because other witnesses addressed anything the CI would have testified to in the continuum of the criminal transaction. Moreover, once again, based on the 1986 amendments to MCL 767.40a, the prosecution is not required to produce all *res gestae* witnesses for the defendant, but is only required to identify known *res gestae* witnesses and those witnesses it intends to call at trial, and to provide reasonable assistance to defendant to find requested witnesses. *Burwick*, 450 Mich at 289. The CI in this case was not being called by the prosecution and is protected by the informer's privilege. As the trial court found, the disclosure was not required because it was not helpful to the defense and was not essential to a fair determination of the case. Therefore, we conclude the prosecution did not have a duty to disclose the CI's identity to defendant. Defendant's argument that disclosure is required because the CI was a *res gestae* witness is without merit.

Defendant also argues that the trial court erred in allowing agent Defreitas to testify regarding impermissible hearsay. We disagree. Generally, review of evidentiary decisions is for an abuse of discretion. *People v Starr*, 457 Mich 490, 491; 577 NW2d 673 (1998). An abuse of discretion occurs only when the court chooses an outcome outside the principled range of outcomes. *Miller*, 482 Mich at 544.

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Breeding*, 284 Mich App 471, 487; 772 NW2d 810 (2009). Hearsay is inadmissible unless it falls within an exception provided in the rules of evidence. MRE 802; *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). A statement not offered for the truth of its contents is not hearsay. MRE 801(c); *People v Mesik (On Reconsideration)*, 285 Mich App 535, 540; 775 NW2d 857 (2009). A statement offered to prove an effect on the listener, rather than its truth, is admissible, when the effect is relevant. *People v Fisher*, 449 Mich 441, 449; 537 NW2d 577 (1995).

In this case, Defreitas testified, in response to a question about why he was at a specific location on July 28, 2008, "I had received information about a narcotics transaction." He then went on to detail what he did after reaching the location. Agent Defreitas's testimony did not amount to impermissible hearsay. He did not testify to exactly what the CI stated. Moreover, the testimony was not offered to prove the truth of the matter asserted but, instead, was offered to

explain why Defreitas had gone to a certain area of Detroit and set up surveillance around defendant's home. Therefore, the trial court did not abuse its discretion in admitting the statement into evidence.

Defendant further argues that the trial court clearly erred in denying defendant's motion to suppress seized evidence, as agents Schmidt and Defreitas initiated an illegal stop of the vehicle in which defendant was a passenger. We disagree.

A trial court's findings of fact regarding a motion to suppress evidence are reviewed for clear error, but the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference, and the trial court's ultimate ruling is reviewed de novo. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005). A finding is clearly erroneous if the reviewing court is left with a definite and firm conviction that a mistake was made. *People v Milstead*, 250 Mich App 391, 397; 648 NW2d 648 (2002).

Both the United States Constitution and the Michigan Constitution guarantee the right against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. The Michigan Constitution is generally construed to provide the same protection as the federal constitution in this regard. *People v Chowdhury*, 285 Mich App 509, 516; 775 NW2d 845 (2009). Whether a search or seizure is reasonable depends upon the circumstances of each case. *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). Generally, a search conducted without a warrant is unreasonable unless there was both probable cause and exigent circumstances that established an exception to the warrant requirement. *Brzezinski*, 243 Mich App at 433.

Under certain circumstances, an officer may stop and briefly detain a person on the basis of reasonable suspicion that criminal activity may be occurring. *People v Oliver*, 464 Mich 184, 193; 627 NW2d 297 (2001), citing *Terry v Ohio*, 392 US 1, 30-31; 88 S Ct 1868, 20 L Ed 2d 889 (1968). Fewer facts are needed to establish reasonable suspicion when a person is in a moving vehicle rather than in a house, but a minimum threshold of reasonable suspicion must be established to justify an investigatory stop, even if a person is in a vehicle or on the street. *Oliver*, 464 Mich at 192. A police officer may make a stop on the basis of information provided by a confidential informant, rather than on the basis of personal observation, if the information is sufficiently reliable. *People v Tooks*, 403 Mich 568, 576; 271 NW2d 503 (1978), citing *Adams v Williams*, 407 US 143; 92 S Ct 1921; 32 L Ed 2d 612 (1972). With regard to whether information from an anonymous informant has sufficient indicia of reliability to allow police officers to make an investigatory stop, a court should consider the reliability of the particular informant, the nature of the particular information given, and the reliability of the suspicion. *People v Horton*, 283 Mich App 105, 109; 767 NW2d 672 (2009).

Defendant argues that the CI here did not provide reasonable suspicion because he was not a known informant, and agents Defreitas and Schmidt prior to their effectuating the stop of the vehicle did not corroborate the information he provided. We disagree.

Agent Defreitas testified at the preliminary examination that he received information from the CI that defendant would be leaving his residence at 2420 Livernois Avenue and proceeding to an address to pick up a large quantity of cocaine. Agent Defreitas further testified that he took steps to verify the information from the CI. He verified defendant's name and the

address given to him by the CI. Moreover, Defreitas conducted surveillance on the address given by the CI and found a vehicle belonging to defendant, which the CI correctly stated was a white Chevy Avalanche.[2] Agent Defreitas also testified that he had tape-recorded conversations between the CI and defendant, which further corroborated the information from the CI. The trial court listened to these conversations through an *in camera* review and indicated that the CI referred to the person he was speaking with as "Pedro," defendant's first name, and that there was no exculpatory evidence in the tape recording. Agent Defreitas further testified that the surveillance teams saw defendant leave his residence in a vehicle shortly after the CI had told agent Defreitas defendant would be leaving. Another agent saw someone from the vehicle enter a residence on Morrell Street. Agents Defreitas and Schmidt saw the same vehicle, empty, parked outside of a residence on Morrell Street. They later saw defendant again as a passenger in the same vehicle, at which time agents Defreitas and Schmidt effectuated a stop.

Defreitas and Schmidt had a reasonable suspicion that a crime was occurring, sufficient to stop the vehicle in which defendant was a passenger. Again, the CI correctly gave them the name and address of defendant and the make and model of defendant's car. Moreover, the CI told the agents when defendant would be leaving his home and for what purpose. The information provided by the CI was further corroborated by tape-recorded conversations between defendant and the CI. Defendant's characterization of the evidence, that "[t]his informant could have been anyone playing a practical joke intended to harass and embarrass [defendant], or this informant could have been merely trying to get [defendant] in trouble with INS," does not comport with the evidence presented at the preliminary examination. The CI gave Defreitas and Schmidt significant information, all of which was verified prior to the stop. It did not merely amount to a practical joke and, given that defendant had legal status in the United States, it was not intended to get defendant in trouble with ICE. Therefore, the trial court did not err in denying defendant's motion to suppress the evidence.

Finally, defendant argues that the trial court denied defendant a fair trial when it refused defendant's discovery request for the tape-recorded conversation. We disagree. Constitutional issues are reviewed de novo on appeal. *Gillam*, 479 Mich at 260.

There is no general constitutional right to discovery in a criminal case. *People v Stanaway*, 446 Mich 643, 664; 521 NW2d 557 (1994). However, defendants have a due process right to obtain evidence in the prosecutor's possession, which is favorable to the defendant and material to guilt or punishment. US Const, Am XIV; Const 1963, art 1, § 17; *Stanaway*, 446 Mich at 666, citing *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Exculpatory information is material if it would raise a reasonable doubt about the defendant's guilt. *Stanaway*, 446 Mich at 666. The prosecutor must disclose such evidence to the defendant regardless of any request for disclosure. *Id.*

[2] The white Chevy Avalanche belongs to defendant, but it was not the vehicle that was stopped by Defreitas and Schmidt. That vehicle was a green Windstar van. It is unclear from the record who owns that vehicle.

In order to establish a *Brady* violation, "a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Lester*, 232 Mich App at 281, citing *United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985).

Defendant has failed to show there was a *Brady* violation. In particular, defendant has failed to show that the tape-recorded conversation with the CI contained exculpatory evidence. In fact, the trial court determined, after performing an *in camera* review of the recording, that it did not contain exculpatory material and may have contained inculpatory material. As a result, defendant cannot show a reasonable probability that the outcome of the trial would have been different if he had received the tape-recorded evidence. Therefore, no *Brady* violation occurred.

Defendant further argues that Michigan allows for liberal discovery, which means that the trial court should have allowed defendant access to potentially inculpatory material, i.e., the tape-recorded conversation. MCR 6.201 governs discovery in criminal cases. Under MCR 6.201, while there is some mandatory discovery, not all information is discoverable. MCR 6.201(C). In fact, evidence that is protected under the constitution, a statute or a privilege is not discoverable, unless it is reasonably probable that the evidence is necessary for the defense. MCR 6.201(C)(1) and (C)(2). As noted above, evidence from a confidential informant is protected by the informer's privilege. *Sammons*, 191 Mich App at 368.

In this case, the tape-recording was privileged and defendant has failed to show that the tape-recording was necessary for his defense. In fact, based on the *in camera* review by the trial court, it appears that the tape-recording might have been damaging to defendant's defense. Therefore, the trial court did not err in refusing to produce the tape-recording.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering