STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES JEFFREY ROSS,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

No. 186835
LC No. 94-010665

Before: Taylor, P.J., and Markman and P. J. Clulo,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of possession with intent to deliver over 650 grams cocaine, MCL 333.7401(2)(a)(i); MSA 14.15 (7401)(2)(a)(i). Defendant was sentenced to life in prison without the possibility of parole. We affirm.

Defendant first argues that the trial court erred in denying his motion to suppress the introduction into evidence of the cocaine found in his van, because the police had no probable cause and no warrant to stop and to search the van, and because he was detained for an impermissibly long time. We disagree.

Defendant contends that the police officers, in violation of US Const, Am IV, and Const 1963, art 1 § 11, did not have probable cause to stop his van. Law enforcement officers may make constitutionally proper investigative stops when the totality of the circumstances as understood by the officers yields a particular suspicion that the individual being investigated has been, is, or is about to be, engaged in criminal activity. *People v Nelson,* 443 Mich 626, 632; 505 NW2d 266 (1993). Reasonable cause necessary to stop a motor vehicle need not arise from a police officer's personal observation, but may also be supplied by a citizen-informant if the information carries enough indicia of reliability to provide the officer with a reasonable suspicion that criminal activity is afoot. *People v Armendarez,* 188 Mich App 61, 67; 468 NW2d 893 (1991). We examine three factors to determine whether an informant's tip carried enough indicia of reliability to supply the basis for reasonable cause to

* Circuit judge, sitting on the Court of Appeals by assignment.

stop a defendant's vehicle: (1) the reliability of the informant; (2) the nature of the information given the police; and (3) the reasonableness of the suspicion in light of these factors. *Id.*

We hold that the informant's tip in this case carried sufficient indicia of reliability to provide the officers with reasonable cause to stop defendant's vehicle. The informant was familiar with defendant's past, telling the officer she spoke with about past police investigations of defendant's home. The police officer was able to verify that defendant had gone to New York, as the informant said he had. The officer's suspicion of defendant was reasonable in light of the fact that defendant had been under surveillance by police for suspected drug activity. Because the police knew, through a reliable tip, that defendant had been engaging in criminal activity, i.e., buying and transporting cocaine, they properly stopped his van.

Assuming, arguendo, that the informant's tip did not provide reasonable cause to stop defendant's vehicle, we find the stop was otherwise valid because defendant was speeding and his vehicle had a non-working taillight when he was stopped. The decision to stop an automobile is reasonable where the police have probable cause to believe a traffic violation has occurred, regardless of the actual motivations of the individual officers involved. *Whren v United States*, 517 US ___; 116 S Ct 1769; 135 L Ed 2d 89, 95 (1996). See also *Ohio v Robinette*, ___ US ___; US Lexis 6971, opinion issued November 18, 1996.

Defendant asserts that he was held for an impermissibly long time before the search warrant for his van finally arrived at the site where his van had been stopped. Although it is true, as defendant contends, that the United States Supreme Court ruled in *United States v Place,* 462 US 696; 103 S Ct 2637; 77 L Ed 2d 110 (1983), that a detention of ninety minutes was an unreasonable seizure under the Fourth Amendment, *Place* involved different facts. The defendant in *Place* was an airline passenger, not a driver with the inherent mobility that a motor vehicle confers. Further, no warrant was ever sought for the contested search in *Place*. In the instant case, the police officers had started the process necessary to obtain a search warrant before defendant entered Michigan.

Moreover, in *United States v Sharpe,* 470 US 675; 105 S Ct 1568; 84 L Ed 2d 605 (1985), the United States Supreme Court ruled that a twenty-minute detention *was* proper under the Fourth Amendment where it allowed a law enforcement officer to pursue his investigation in a diligent and reasonable manner that was likely to confirm or dispel his suspicions as quickly as possible. *Sharpe, supra* at 686-687. The *Sharpe* Court also declined to place a rigid time limit on investigatory stops, preferring to allow law enforcement officers to take the time reasonably needed to effectuate their purposes. *Sharpe, supra* at 685. In defendant's case, the lengthy detention was necessary to effectuate the purpose of the stop, which was to give the police officer preparing the request for a warrant time to add the information that defendant had been stopped while driving his van, as the informant had said he would be. The detention was thus reasonable.

Defendant also contends that if the police officers had probable cause to search his van, they should have had a search warrant ready and waiting when he arrived in Michigan. We disagree.

Indeed, a police dog gave positive indications of the presence of narcotics in the van after it had been stopped. Moreover, we hold that suppression was not required by the police officers' violation of MCL 780.655; MSA 28.1259(5). Defendant was allowed to see the search warrant within a few days of his arrest, ultimately received a copy, and has not demonstrated any harm or prejudice as a result of the failure of the officers to give him a copy of the warrant "forthwith." *People v Lucas*, 188 Mich App 554, 573; 470 NW2d 460 (1991). On the basis of all of the above, we cannot say that the trial court's failure to grant defendant's suppression motion was clearly erroneous. *People v Bordeau*, 206 Mich App 89, 92; 520 NW2d 374 (1994).

Defendant further argues that the trial court abused its discretion in admitting the cocaine into evidence, when the cocaine had been repackaged into larger, looser packaging than it had been in when found in his van. We disagree.

An adequate foundation for the admission of tangible evidence requires that the prosecution show that the object offered is the object involved in the incident and that the condition of the object is substantially unchanged. *People v Prast (On Rehearing)*, 114 Mich App 469, 490; 319 NW2d 627 (1982). When determining if the object should be admitted, the trial court should consider the nature of the article, the circumstances surrounding the preservation and custody of it, and the possibility of intermeddlers tampering with it. *Id.*

The prosecution's proof regarding the repackaged cocaine fulfilled all the requirements of *Prast*. The same police officer who found the cocaine was present when it was repackaged, and was able to testify that the cocaine presented at trial was the same cocaine that he had found. The officer in charge of defendant's case and the Michigan State Police chemist who tested the cocaine both testified that it was necessary to remove the cocaine from its original packaging in order to accurately test and weigh it. No evidence of tampering, error, or chemical alteration of the cocaine was brought out during cross-examination of the chemist. Looking at all the facts, we hold that the trial court did not abuse its discretion in admitting the repackaged cocaine into evidence. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996).

Defendant next argues that the trial court erred in failing to instruct the jury as to lesser included offenses of possession and possession with intent to deliver amounts between 51 and 649 grams of cocaine. We disagree.

The duty of the trial judge is to instruct the jury regarding the law applicable to the case. MCL 768.29; MSA 28.1052; *People v Hendricks*, 446 Mich 435, 440-441; 521 NW2d 546 (1994). Possession of a controlled substance is a cognate lesser included offense of possession with intent to deliver involving a differently categorized statutory amount. *Lucas, supra* at 581. A properly requested instruction for a cognate lesser included offense is required where two elements are satisfied. First, the principal offense and the lesser offense must be of the same class or category. Second, the evidence adduced at trial must be examined to determine whether that evidence would support a conviction on the lesser offense. *Hendricks, supra* at 444.

The evidence adduced at trial did not support a conviction of possession or possession with intent to deliver any amount less than 650 grams of cocaine. Two packages of cocaine were found together in defendant's van. The officer who found the cocaine recognized the packages as "kilogram level" packages. The larger of the two packages was eight inches long, seven inches wide, and two inches thick. The contents of both packages tested positive for cocaine. The larger package weighed 1,011 grams. The smaller package weighed 498.9 grams. Moreover, the trial court instructed both as to possession and possession with intent to deliver 650 or more grams of cocaine. Looking at the jury instructions in their entirety, we hold that they fairly presented the issues to be tried and protected the defendant's rights. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994).

Defendant further argues that the trial court abused its discretion by preventing him from testifying that he could not post his $5,000 bond. We disagree.

Evidence of poverty, dependence on welfare, or unemployment is not admissible to show motive or as evidence of a witness' credibility. *People v Conte*, 152 Mich App 8, 14; 391 NW2d 763 (1986). It may, however, be admissible in some situations. *Id.* In the instant case, defendant was allowed to bring forth evidence of poverty to support his theory that he was too poor to be a large-scale drug dealer. Defendant and his living companion were five to seven payments behind on their land contract. Defendant's van had been repossessed for nonpayment. Defendant also called himself "destitute" and said he had no large sums of money stashed away. This evidence was sufficient to establish that defendant was poor. Evidence that defendant was incarcerated because he could not post his bond might have caused the jury to compromise its integrity and render a verdict based on factors other than the evidence. *People v Mumford*, 183 Mich App 149, 151; 455 NW2d 51 (1990). Where defendant was otherwise allowed to present evidence that he was poor, we hold that the trial court did not abuse its discretion in excluding specific testimony that he could not afford to post bond. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Defendant next argues that the trial court erred in failing to ask one of the jurors why she was crying while the verdict was read and the jury was polled. Defendant has not properly preserved this issue for appeal, so we review it only for manifest injustice. *People v Lewis*, 98 Mich App 142, 144-145; 296 NW2d 209 (1980). We find no manifest injustice in this case. The juror in question was polled and, when asked if the verdict rendered was her verdict answered, "Yes." So did all the other jurors. The jury verdict was thus unanimous.

Defendant further argues that the trial court erred in failing to give defendant's requested instruction that "[i]t is the duty of the judge to impose the penalty required by law," instead of CJI2d 3.13, which states that the duty of the judge is "to fix the penalty within the limits of the law." We disagree.

The rule in Michigan has always been that neither the court nor counsel should address the question of the disposition of a defendant after the verdict. *People v Goad*, 421 Mich 20, 25; 364 NW2d 584 (1984). Indeed, it is proper for the court to instruct the jury that they are not to speculate

upon such matters, and that they are to confine their deliberations to the issue of guilt or innocence. *Goad*, *supra* at 25-26.

The trial court's giving of CJI 2d 3.13 kept jurors from considering possible penalties in the instant case. Had the trial court given the instruction requested by counsel, the jury would have been alerted to the fact that only one, substantial penalty was available for defendant. This inference could have turned the jury away from considering only defendant's guilt or innocence. *Goad*, *supra* at 25-26. Moreover, we have held that it is error for the trial court to inform the jury that a defendant charged with possession with intent to deliver 650 or more grams of cocaine is subject to a mandatory life sentence if convicted as charged. *People v Houston*, 179 Mich App 753, 759; 446 NW2d 543 (1989). Looking at the jury instructions in their entirety, we hold that they fairly presented the issues to be tried and protected the defendant's rights. *Daniel*, *supra* at 53.

Finally, defendant asks this Court to raise its voice in protest against the mandatory statutory penalty imposed on him, that of life in prison without possibility of parole. We decline this invitation. *People v Morris*, 450 Mich 316, 335-336; 537 NW2d 842 (1995); *People v Lopez*, 442 Mich 889; 498 NW2d 251 (1993).

Affirmed.

/s/ Clifford W. Taylor
/s/ Stephen J. Markman
/s/ Paul J. Clulo