STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN VINCENT THOMPSON,

Defendant-Appellant.

UNPUBLISHED
December 30, 1996

No. 150335
LC No. 91-000411-FC

Before: Fitzgerald, P.J., and Cavanagh and N.J. Lambros,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of more than 650 grams of cocaine, MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i), and was sentenced to life imprisonment. Defendant now appeals as of right. We affirm.

This state prosecution was the result of the combined investigative efforts of various federal agencies, including the Federal Bureau of Investigation (FBI) and the Macomb County Narcotics Enforcement Team. Information gathered from many sources, such as wiretaps placed on defendant's home and cellular phones, tied defendant to a multi-state cocaine trafficking network. On December 10, 1990, state and federal authorities executed a federal warrant authorizing the search of defendant's residence for quantities of cocaine and marijuana, drug paraphernalia, and records of illegal narcotics trade. Federal investigators found a 1969 Camaro racing car in defendant's garage, which they seized. The Camaro was towed to a storage facility, where it was searched two days later. Investigators found one kilogram of cocaine in the trunk of the car. This cocaine forms the basis of the instant prosecution.

I

Defendant first argues that the trial court clearly erred in refusing to grant his motion for dismissal on the basis of vindictive prosecution. Defendant claims that he was subjected to state prosecution for

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

possession of more than 650 grams of cocaine because he exercised his right to counsel during police interrogation. We disagree.

Michigan law invests the prosecutor with broad discretion to determine whether to prosecute and what charges to file. *People v Morrow*, 214 Mich App 158, 160; 542 NW2d 324 (1995); *People v O'Shea*, 149 Mich App 268, 276; 385 NW2d 768 (1986). Thus, the trial court's authority over the discharge of the prosecutor's duties is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires. *People v Siebert*, 450 Mich 500, 510; 537 NW2d 891 (1995); *People v Barksdale*, ___ Mich App ___; ___ NW2d ___ (Docket No. 187328, rel'd 10/15/96), slip op p 2. To punish a person for exercising a protected statutory or constitutional right violates due process of law. *People v Goeddeke*, 174 Mich App 534, 536; 436 NW2d 407 (1988). Prosecutorial vindictiveness is not presumed. Rather, in order to establish a claim of denial of due process, a defendant must be able to affirmatively prove vindictiveness. *People v Watts*, 149 Mich App 502, 511; 386 NW2d 565 (1986).

The trial court's conclusion that defendant's prosecution was not the product of prosecutorial vindictiveness is a finding of fact that this Court reviews for clear error. MCR 2.613; see also MCR 6.508(E); *id.* at 511 (denial of defendant's motion to dismiss on the basis of vindictive prosecution reviewed for "error"). This Court will find clear error only where, after a review of the record, it is left with a definite and firm conviction that a mistake has been made. *People v Lyons (On Remand)*, 203 Mich App 465, 468; 513 NW2d 170 (1994). In application of this principle, this Court gives regard to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it. MCR 2.613(C).

Upon reviewing the evidence, we are not left with a definite and firm conviction that the trial court was mistaken in refusing to dismiss defendant's prosecution on the basis of vindictive prosecution. First, the outcome of the hearing on defendant's motion to dismiss was ultimately reduced to a credibility contest. The trial court apparently believed the State's witnesses, who denied that they punished defendant for requesting counsel by instituting state charges against him. We defer to the trial court's credibility determination. MCR 2.613(C). Second, evidence supports the finding that defendant failed to prove the existence of actual prosecutorial vindictiveness. Defendant only alleges that investigators withdrew their offer of leniency in return for his cooperation once he exercised his right to counsel. However, the prosecutor, not the investigators, made the decision to prosecute defendant for more than 650 grams of cocaine, not the investigators. Defendant presented no evidence suggesting that the prosecutor engaged in vindictive conduct after defendant exercised his right to counsel. In fact, defendant and his lawyer met with the prosecutor and discussed the possibility of a reduction in charges in return for defendant's guilty plea and cooperation. The evidence shows that the prosecutor was willing to negotiate with defendant, notwithstanding that he had retained counsel.

Lastly, the fact that defendant was subjected to state prosecution does not, in light of the circumstances, appear suspicious. Defendant's prosecution arose out of a joint state and federal investigative effort. Defendant was one of the only persons linked to the cocaine distribution ring who was found in possession of a large quantity of cocaine. Since the goal of prosecution is punishment, it

does not seem out of the ordinary that the state and federal prosecutors involved would agree to charge defendant with a violation of MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i), which carries an exceptionally harsh punishment, life imprisonment. Accordingly, we affirm the trial court's refusal to dismiss defendant's prosecution on the basis of prosecutorial vindictiveness.

II

Next, defendant urges us to find clear error in the trial court's refusal to suppress evidence of cocaine found pursuant to the search of his Camaro.[1] This we cannot do.

General search warrants are illegal. *People v Toodle*, 155 Mich App 539, 548; 400 NW2d 670 (1986). A search warrant must particularly describe the place to be search and the persons or things to be seized. US Const Am IV; Const 1963, art 1, § 11; *Toodle*, *supra* at 543. A lawful search of a premises generally extends to the entire area in which the object of the search might be found. It is not limited to the possibility that separate acts of entry might be required. *United States v Ross*, 456 US 798, 820-821; 102 S Ct 2157, 2170-2171; 72 L Ed 2d 572, 591 (1982); *People v Hahn*, 183 Mich App 465, 469; 455 NW2d 310 (1989), vacated in part on other grounds 437 Mich 867 (1990). As the Supreme Court stated in *Ross*, *supra*, "[A] warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found. A warrant to open a footlocker to search for marijuana would also authorize the opening of packages found inside." *Id.* at 821. Thus, a warrant authorizing the search of a premises authorizes the search of containers within the premises which might contain the sought items. *People v Daughenbaugh*, 193 Mich App 506, 516; 484 NW2d 690 (1992).

In light of these considerations and upon review of the circumstances surrounding the seizure and search of the Camaro, we conclude that the trial court did not clearly err in denying defendant's motion to suppress the cocaine evidence. The search of defendant's garage was well within the scope of the federal warrant, as the garage was explicitly mentioned in the document as part of the premises to be searched. *Toodle*, *supra*. The warrant further invested agents with the authority to search for quantities of cocaine and marijuana, drug paraphernalia, and records of illegal narcotics trade. The police were therefore justified in seizing and searching the Camaro that was found in defendant's garage because it was, in effect, a "container" in which defendant could have secreted such items. *Hahn*, *supra* at 469 ("A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search."). The fact that police seized the car and took it to the storage facility before they searched the car two days later is irrelevant. The warrant that implicitly authorized searches of automobiles found in defendant's garage had not yet expired when investigators searched the Camaro. See Fed Rule Crim Proc 41(c) (warrant valid for ten days from date of issuance). Because it was conducted pursuant to a valid warrant, the search of the Camaro was legal. Accordingly, the trial court did not clearly err when it refused to suppress evidence of cocaine found in defendant's car.[2]

III

Next, defendant contends that the trial court clearly erred in refusing to suppress evidence of telephone conversations recorded pursuant to federal warrants authorizing the placing of wiretaps on defendant's home and cellular telephones. We disagree.

In state prosecutions for possession of more than 650 grams of cocaine, evidence collected "pursuant to an order authorizing or approving the interception of wire or oral communications issued by a federal court in compliance with . . . 18 U.S.C. . . . 2515 to 2521, that is otherwise admissible under the rules of evidence of this state, may be admitted in evidence in a court of this state." MCL 768.28a(a); MSA 28.1051(1)(a). In turn, 18 USC 2518(1)(c) and (3)(c) require the government to make an adequate showing of "necessity" in an affidavit supporting the issuance of a federal wiretap warrant. To do this, the affidavit must contain a "full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 USC 2518(1)(c); *United States v Giacalone*, 853 F2d 470, 480 (CA 6, 1988).

The Sixth Circuit has consistently stated that "the government is not required to prove that every other conceivable method [of investigation] has been tried and failed or that all avenues of investigation have been exhausted" in order to obtain a wiretap warrant. See *id.* at 479; *United States v Alfano*, 838 F2d 158, 163 (CA 6, 1986). Rather, the government must show that "the investigators g[a]ve serious consideration to the non-wiretap techniques prior to applying to wiretap authority" and must inform the issuing court "of the reasons for the investigators' belief that such non-wiretap techniques have been or will likely be inadequate." *Id.* at 163-164; *United States v Lambert*, 771 F2d 83, 91 (CA 6, 1985). The goal is to show that wiretaps are not the first step in the process of criminal investigation. *Alfano*, *supra* at 163. However, wiretaps need not only be used as a "last resort" investigative tool. See *Lambert*, *supra*.

Upon review of the affidavits that FBI Special Agent Louis Reigel submitted in support of the wiretapping of defendant's telephones, it is clear that the government made an adequate showing of necessity as required by 18 USC 2518(1)(c). Reigel's affidavits set forth with particularity the traditional investigative methods that his and other agencies had tried and described how these methods failed or were likely to be inadequate in achieving the goal of complete eradication of the extensive cocaine smuggling ring with which defendant was involved. This showing comported with the requirements of the federal wiretapping statute. *Alfano*, *supra* at 163-164; *Lambert*, *supra*. While defendant's argument suggests that traditional investigative techniques must prove to be entirely ineffective in order to justify the issuance of a wiretapping order, there is no support for his position in the relevant case law. Additionally, we note that federal courts have recognized the appropriateness of wiretapping where, as here, "the telephone is routinely relied upon to conduct the criminal enterprise under investigation." *United States v Steinberg*, 525 F2d 1126, 1130 (CA 2, 1975); see also *United States v Landmesser*, 553 F2d 17, 20 (CA 6, 1977). Moreover, we find that Reigel's affidavits in support of extending the original wiretapping orders were sufficient to show necessity as required by 18 USC 2518(1)(c). Like the other affidavits considered, these documents fully catalog the use of other, more traditional investigative techniques and specify either how these techniques failed or why they were unlikely to lead to the prosecutions of high-ranking participants in the cocaine trafficking conspiracy. In

sum, the affidavits sufficiently showed that wiretapping was necessary to further investigation of defendant's and others' illegal activities in accordance with 18 USC 2518(1)(c).

Defendant offers two other arguments that deserve cursory attention. First, defendant advances that Reigel's averment that defendant "has proven successful at frustrating surveillance efforts," which is contained in his affidavit seeking authorization to tap defendant's home telephone, is merely conclusory. We acknowledge that "purely conclusory affidavits" do not comply with the requirements of 18 USC 2518. *Landmesser*, *supra*. However, elsewhere in the affidavit Reigel states that surveillance teams had been unable to monitor defendant's activities for an appreciable amount of time because he was wary of investigators and was known to carry a portable police scanner to detect police movement. Moreover, in an earlier affidavit, Reigel documented an incident during which defendant was successful in evading an attempt to monitor his physical movements. Hence, defendant's claim that Reigel's affidavit contained a false or conclusory statement is not supported by the evidence.

Lastly, defendant suggests that there was some error in Reigel's failure to establish himself as an expert in the area of narcotics trafficking investigation. We disagree. 18 USC 2518 does not require that an affiant must be qualified as an expert before wiretapping authorization may be properly issued. Moreover, it is evident from Reigel's eleven years as an FBI agent and the factual statements contained in his affidavits that he was at least minimally qualified to supply a statement of "necessity" as mandated by 18 USC 2518(1)(c). In light of these considerations, we hold that the trial court did not clearly err in admitting evidence of conversations recorded pursuant to federal wiretapping warrants.

IV

Next, defendant argues that he is entitled to have his judgment of sentence amended to reflect his eligibility for parole in accordance with *People v Bullock*, 440 Mich 15; 485 NW2d 866 (1992).[3] This issue is unpreserved for our review, because defendant failed to file a motion for resentencing pursuant to MCR 7.208(B)(1) or to file with this Court a motion to remand pursuant to MCR 7.211(C)(1). MCR 6.429(B)(2). Moreover, even if, as defendant claims, "the parole board has as a matter of course[] required that a change be made on the defendants [sic] judgment and conviction record in the court below" stating that "the defendant shall be sentenced to a term of life imprisonment and that upon completion of service of ten years [sic] imprisonment, he be [sic] subject to the jurisdiction of the parole board for their consideration for release on parole," we do not agree that this Court should remand this matter for correction of defendant's judgment of sentence simply because the parole board refuses to follow the law as set forth in *Bullock*, *supra*, and MCL 791.234(6)(a)-(d); MSA 28.2304(6)(a)-(d). If indeed the parole board requires such a change of defendant's judgment of sentence when he comes under the parole board's jurisdiction after serving ten calendar years of his sentence, that is a matter between defendant and the parole board. At that time, defendant may opt to challenge this requirement in the appropriate venue.

V

Lastly, defendant argues that the trial court abused its discretion in denying his motion for a new trial, because, as defendant argues, the prosecutor failed to disclose to the jury the terms of the plea agreement Maurice Farrell Wilson, a cooperating defendant, entered into with the federal government. We disagree.

The decision whether to grant a defendant's motion for a new trial is within the discretion of the trial court, and will not be reversed on appeal absent an abuse of discretion. *People v Legrone*, 205 Mich App 77, 83; 517 NW2d 270 (1994). This Court will find an abuse of discretion only if an unprejudiced person, considering the facts upon which the trial court made its decision, would conclude that there was no justification for the ruling made. *People v Miller*, 198 Mich App 494, 495; 499 NW2d 373 (1993).

When an accomplice or coconspirator has obtained immunity or other leniency from prosecution to secure his testimony, the prosecutor and the trial court must disclose the immunity agreement to the jury upon the defendant's request. *People v Atkins*, 397 Mich 163, 173-174; 243 NW2d 292 (1976), ; *People v Dowdy*, 211 Mich App 562, 570-571; 536 NW2d 794 (1995). This duty of disclosure also obligates the prosecutor to reveal the existence of reasonable expectations, as opposed to promises, of leniency or other rewards for testifying resulting from contact with the prosecutor. *Atkins, supra* at 173.

The prosecutor fulfilled her duty of disclosure by apprising the jury of the substance of Wilson's federal plea agreement. The jury was told that Wilson had entered into a federal plea agreement that obligated him to fully cooperate with the government in exchange for an approximately ten- to fifteen-year term of incarceration for possession of two kilograms of cocaine. Evidence presented at the evidentiary hearing was consistent with Wilson's trial testimony that he had not actually been offered anything above his federal plea agreement in exchange for his testimony. Any further subjective expectation of receiving a reduced sentence in exchange for his cooperation with defendant's trial was not reasonably based on the prosecutor's representations, and therefore not subject to the disclosure requirement. Moreover, the supreme court in *Atkins*, *supra*, recognized that it would be "atypical" if an informer "did not have an expectation of consideration for his cooperation in a given case. The well of informer cooperation would soon run dry if law enforcement consistently adhered to a policy of no consideration. Furthermore, we would not be so paternalistic as to believe that jurors are not well aware of these facts of life." *Id.* at 173. Hence, it is clear that, consonant with *Atkins*, *supra*, the prosecutor fulfilled her duty to fully apprise the jury of the substance of Wilson's plea agreement.

No further evidence adduced at the evidentiary hearing supports the theory that Wilson was actually offered additional benefits in exchange for his testimony. First, although defendant argues that the fact that Wilson was not subjected to state prosecution evidences the existence of a further deal, there is no evidence that the state prosecutor agreed not to charge Wilson in exchange for his testimony. Second, defendant argues that the prosecutor's subsequent letter to Wilson's attorney detailing Wilson's cooperation shows that the prosecutor actually offered Wilson more leniency than was disclosed at trial. However, the fact that the letter was written does not establish that the prosecutor promised Wilson she would advocate for leniency in his federal sentencing if he cooperated in

defendant's trial. Furthermore, even if the prosecutor had entertained the notion of writing such a letter at the time Wilson testified in defendant's trial, she was under no duty to disclose her mere intention to recommend some form of consideration for Wilson's testimony. *Id.* at 174. Lastly, the fact that Wilson's federal sentence was ultimately reduced is of little significance. There is simply no evidence that the federal prosecutor agreed with Wilson that he would seek leniency in exchange for his testimony against defendant. Again, even if the federal prosecutor harbored an intention to seek consideration for Wilson's cooperation, the prosecutor was under no duty to disclose this fact to the jury. *Id.*

Defendant advances a further argument that deserves cursory attention. Defendant contends that his conviction should be reversed because Wilson lied to the jury about whether he was seeking a further reduction in his sentence on the basis of his cooperation. When defense counsel asked at trial whether he was seeking more consideration in exchange for his substantial cooperation, Wilson stated that he was not. However, defense counsel proved that Wilson was lying by confronting him with a document that Wilson's attorney had filed on his behalf in federal court. The document requested further reduction of Wilson's sentence on the basis of his substantial cooperation with the government.

While it is true that a prosecutor's knowing presentation of false testimony may constitute grounds for reversal, *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992), reversal is not warranted in this case. Through defendant's skillful cross-examination of Wilson, the jury was fully apprised of the fact that Wilson was indeed seeking further consideration in exchange for his cooperation with the government, notwithstanding the prosecutor's failure to correct his testimony. It is clear from the record that defendant was not prejudiced by Wilson's lack of candor as to this issue. Indeed, Wilson's initial denial could have only benefited defendant, because it enabled him to raise serious doubts in the jurors' minds concerning Wilson's overall credibility. In light of these considerations, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros

[1] This Court reviews a trial court's ruling on a motion to suppress evidence on legal grounds for clear error. *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996).

[2] The trial court declined to suppress the cocaine on the basis that the car was seized pursuant to federal and state drug forfeiture statutes and searched as part of a routine inventory search. In order to justify a search as a valid inventory search, the government must establish that such a search is a routine procedure, i.e., one "conducted according to standardized criteria." *Colorado v Bertine*, 479 US 367, 374 n 6; 107 S Ct 738, 742 n 6; 93 L Ed 2d 739, 747 n 6. Since the trial court failed to hold an

evidentiary hearing on this issue, we decline to adopt its reasoning. However, reversal is not warranted, as we conclude that the trial court reached the correct result, albeit for the wrong reason. *People v Lucas*, 188 Mich App 554, 577; 470 NW2d 460 (1991).

[3] In 1991, defendant was sentenced under MCL 333.7403(2)(a)(i); MSA 14.15(7403)(2)(a)(i) to mandatory life imprisonment for possession of more than 650 grams of cocaine. At that time, MCL 791.234(4); MSA 28.2304(4) denied the possibility of parole for defendant's offense. *Bullock*, *supra*, at 22. In *Bullock*, *supra*, the supreme court held that life sentences without possibility of parole for mere possession of more than 650 grams of cocaine constituted "cruel or unusual" punishment under Const 1963, art 1, § 16. *Id.* at 42. To remedy this, the supreme court struck down the offending portion of MCL 791.234(4); MSA 28.2304(4) as to people convicted of possession of more than 650 grams of cocaine and provided that all who had been convicted of this offense under the law forbidding parole would be subject to the jurisdiction of the parole board after serving ten calendar years of their sentence and eligible for parole consideration in accordance with what is now MCL 791.234(6)(a)-(d); MSA 28.2304(6)(a)-(d). *Id.* at 42-43.