STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/
Cross-Appellant,

v

STEVEN D. DENT,

Defendant-Appellant/
Cross-Appellee.

UNPUBLISHED
October 7, 1997

No. 195958
Oakland Circuit Court
LC No. 92-119725-FH

Before: Sawyer, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), three counts of felonious assault, MCL 750.82; MSA 28.277, fleeing and eluding a police officer, second offense, MCL 750.479a(4); MSA 28.747(1), resisting and obstructing a police officer, MCL 750.479; MSA 28.747, reckless driving, MCL 257.626; MSA 9.2326 and being an habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced as an habitual offender to terms of five to forty years' imprisonment, two to four years' imprisonment, two to four years' imprisonment, two to four years' imprisonment, one to four years' imprisonment and two years' imprisonment, respectively. Defendant was also sentenced to three months' imprisonment for reckless driving. These sentences were to run concurrently to each other and consecutively to a prior conviction. Defendant appeals as of right. The prosecution cross-appeals defendant's sentences. We affirm defendant's convictions, but vacate his sentences and remand for resentencing.

This case arose from the Pontiac Police Department setting up a controlled buy of cocaine from defendant through Christopher Lee, a police informant. On the day of the incident, Lee called defendant's pager. In response to the page, defendant called the police telephone line, which the police had wiretapped. When Lee answered the call, defendant said, "this is Dent." Lee negotiated for the sale of approximately three ounces of crack cocaine to take place at a market in Pontiac. Defendant

told Lee to page him with the digits 406 when he was ready to meet at the market and said that he would be driving a late model Oldsmobile Cutlass.

Officers set up surveillance across the street from the market in the parking lot of a Dairy Queen. After defendant was paged with the digits 406, he arrived at the market in a beige Oldsmobile Cutlass, circled the parking lot two or three times and left. Defendant then pulled into the Dairy Queen parking lot and exited his car. When defendant noticed an officer in full police raid gear approaching him, he ran to his car, which was still running, and attempted to flee. The officer reached into the car and attempted to turn off the engine. Defendant put the car in reverse and accelerated, crashing into an unmarked police car directly behind him. He then sped away, knocking an officer off the car and almost striking two officers who were on foot and standing directly in front of the car.

The police chased defendant in a marked police car with its lights and sirens activated. Defendant drove in excess of 60 mph on residential streets and ignored several traffic signals and stop signs. He eventually drove down a dirt road, slowed the car and jumped out. Defendant was apprehended. A subsequent search of defendant, his automobile and the getaway route revealed several plastic baggies, a false driver's license, and approximately 45.3 grams of crack cocaine.

I

Defendant raises several claims essentially arguing that because the police officers' conduct amounted to an impermissible investigative stop and an unlawful arrest, all the evidence discovered consequent to his seizure and arrest should have been suppressed as "fruit from the poisonous tree." We find that none of defendant's arguments have merit.

The Fourth Amendment of the United States Constitution and its Michigan counterpart guarantee the right of people to be secure against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11; *People v LoCicero*, 453 Mich 496, 501; 556 NW2d 498 (1996). However, an officer is permitted to stop a party and make reasonable inquiries regarding his suspicion when the officer observes behavior which leads him to conclude that a party has engaged, or is about to engage, in criminal activity. *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968). This Court has held that in order to justify a seizure or an investigative pursuit and stop, the police must have had a particularized suspicion, based on objective observations, that the person seized or stopped has been, is, or is about to be engaged in some type of criminal wrongdoing. *People v Daniels*, 186 Mich App 77, 80; 463 NW2d 131 (1990) (citations omitted).

In this case, two officers testified at both the preliminary examination hearing and *Walker*[1] hearing that they recognized the voice in the taped conversation as defendant's. Evidence was also presented that a person identifying himself as "Dent" called the police telephone line and agreed to sell three ounces of crack cocaine at a particular place. Defendant circled the location designated for the drug transaction twice in a car that had been identified as the one which would be bringing the cocaine. Based on the above testimony, we find that the officers had a sufficiently particularized suspicion, based

on objective observations, that defendant was about to engage in some type of criminal wrongdoing. Accordingly, the attempted seizure of defendant was justified.

Further, MCL 764.15(1); MSA 28.874(1), provides that a police officer may arrest without first procuring a warrant under in the following situations:

> (a) When a felony, misdemeanor, or ordinance violation is committed in the peace officer's presence.
>
> (b) When the person has committed a felony although not in the presence of the peace officer.
>
> (c) When a felony in fact has been committed and the peace officer has reasonable cause to believe that the person has committed it.
>
> (d) When the peace officer has reasonable cause to believe that a felony has been committed and reasonable cause to believe that the person has committed it.

Here, the evidence presented clearly demonstrated that the officers observed defendant commit a number of illegal activities while trying to flee from the police officers, including felonious assault, reckless driving, and fleeing and eluding a police officer. MCL 764.15(1)(c); MSA 28.874(1)(3). Accordingly, regardless of the attempted seizure of defendant in the Dairy Queen parking lot, the officers had probable cause to arrest defendant. As a result, the officers also could search defendant's person and car incident to his arrest for the criminal acts committed during his flight. *People v Catanzarite*, 211 Mich App 573, 581; 536 NW2d 570 (1995). Therefore, the discovery and admission of the evidence of the narcotics and other incriminating evidence did not violate defendant's Fourth Amendment rights. [2]

II

Defendant also argues that the trial court erred in admitting evidence of his prior conviction for fleeing and eluding and the pending 1991 case in which defendant was charged with possession with intent to deliver cocaine. The decision whether to admit evidence rests within the sound discretion of the trial court and will not be set aside on appeal absent an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. MRE 103(a).

Pursuant to MRE 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). Evidence of another crime may be admitted if (1) it is relevant to an issue other than character or propensity, (2) it is relevant to an issue or fact of consequence at trial, and (3) its probative value is not substantially outweighed by the danger of unfair prejudice. *Catanzarite*, *supra* at 578-579. Prior acts evidence

may be relevant to demonstrate non-character issues, such as motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when material. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996).

We initially note that, contrary to defendant's claim, he was not unduly surprised or prejudiced by the prosecution's timing of the notice of intent to use the prior acts evidence. In any event, while the court properly admitted the evidence of defendant's pending drug case, we agree with defendant that the admission of defendant's fleeing and eluding conviction served no purpose other than to display defendant's propensity to commit the crime charged. However, because defendant fails to cite any instance where the evidence was presented before the jury, we find no error requiring reversal. *People v Griffis*, 218 Mich App 95, 99; 553 NW2d 642 (1996).

III

Defendant also argues that the trial court erred in admitting the recorded conversation between himself and the police informant into evidence because the prosecution could not adequately prove that either party to the conversation had given consent. The intercepted use of wire, oral or electronic communications is generally prohibited. 18 USC 2511. However, 18 USC 2511(c), provides that the warrantless recording of a telephone conversation with the consent of only one of the parties is proper under federal law and the transcript of such a conversation may be admitted into evidence. *US v Armocida*, 515 F2d 49, 52 (CA 3, 1975).

In this case, the trial court concluded after holding a *Walker* hearing that the tape recorded conversation was admissible. MRE 104(a) provides:

> Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the Rules of Evidence except those with respect to privileges.

We find that the issue of consent constituted a preliminary question concerning the admissibility of the wiretap evidence and therefore, the rules concerning hearsay testimony do not apply. MRE 104(a). Additionally, the rules of evidence do not apply to *Walker* hearings. MRE 104(a); *People v Richardson*, 204 Mich App 71, 80; 514 NW2d 503 (1994). Since the determination of admissibility occurred at the *Walker* hearing, the trial court did not abuse its discretion in admitting the recorded conversation between the informant and defendant into evidence.

IV

On cross-appeal, plaintiff asserts that the trial court erred in imposing concurrent sentences. A consecutive sentence may not be imposed unless specifically authorized by statute. *People v Hunter*, 202 Mich App 23, 25; 507 NW2d 768 (1993). MCL 333.7401(3); MSA 14.15(3), in relevant part:

> A term of imprisonment imposed pursuant to subsection (2)(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony.

Accordingly, defendant's possession with intent to deliver less than 50 grams of cocaine, MCL 333.7403(2)(a)(iv); MSA 14.15(7403)(2)(a)(iv), was clearly subject to consecutive sentencing. We therefore vacate the judgment of sentence and remand for resentencing. *People v Thomas*, 223 Mich App 9; 566 NW2d 13 (1997).

We affirm defendant's convictions, but vacate his sentences and remand for resentencing. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Harold Hood
/s/ Joel P. Hoekstra

[1] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

[2] Although Michigan law provides that a person has the right to reasonably resist an unlawful arrest, *People v Reinhardt*, 141 Mich App 173, 174 n 1; 366 NW2d 245 (1985), we note that defendant's attempt to resist an arrest by crashing into an undercover police car, and nearly running over two officers standing in front of his car is not conduct that is considered a reasonable means of resisting arrest. See *People v Daniels*, 186 Mich App 77; 463 NW2d 131 (1990).