# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESUS GALLEGO,

Defendant-Appellant.

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UNPUBLISHED
December 9, 1997

No. 196252
Oakland Circuit Court
LC No. 92-117911-FC

Before: Jansen, P.J., and Doctoroff and Gage, JJ.

PER CURIAM.

Following a four-day jury trial, defendant was convicted of conspiracy to deliver more than 650 grams of cocaine, MCL 750.157a; MSA 28.354(1), and delivery of more than 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). Defendant was sentenced to two consecutive terms of life without parole. By statute, the terms run consecutive to two previous terms of life without parole imposed for prior convictions of delivery and conspiracy to deliver. MCL 333.7401(3); MSA 14.15(7401)(3). Defendant appeals as of right. We affirm.

Defendant's convictions stem from events which occurred between October 1991 and April 1992 during a drug investigation. Following a purchase of cocaine by an informant on April 6, 1992, police arrested Nader Fakhouri. Fakhouri agreed to cooperate with police in exchange for federal prosecution, and on April 16, 1992, police arrested Fakhouri's supplier, Aref Nagi. Nagi also agreed to cooperate with police in exchange for federal prosecution, and on May 12, 1992, police arrested defendant, who was Nagi's supplier, after he retrieved five kilograms of cocaine from the trunk of a car. Defendant was convicted in a prior proceeding of delivery and conspiracy to deliver resulting from the May 12, 1992, incident.[1]

At issue in the present case is a series of events which transpired between October 1991 and April 1992. Fakhouri testified that Nagi began supplying him with cocaine in October 1991, when he provided one kilogram. Nagi testified that defendant began supplying him with cocaine at the same time. Fakhouri kept the cocaine in his basement safe, and both he and Nagi sold portions of it. On April 4, 1992, Nagi and defendant delivered two kilograms of cocaine to Fakhouri's home. Although

defendant and Fakhouri were never formally introduced, Fakhouri testified that he knew Nagi was living with his supplier, he told police that he believed the supplier was Colombian, and he stated that defendant waited in a car at the end of his driveway while Nagi delivered the two kilograms of cocaine. Fakhouri also testified that at times, he drove defendant's vehicle while defendant drove Fakhouri's rental car.

On appeal, defendant first argues that double jeopardy bars his subsequent convictions because all of the charges stemmed from a continuous criminal transaction, and, therefore, the prosecution was required to join all charges in one trial. We disagree.

Double jeopardy is a question of law which this Court reviews de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). The double jeopardy clause of the United States Constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb . . . ." US Const, Am V. Michigan's double jeopardy clause is substantially similar to the federal provision and states that "[n]o person shall be subject for the same offense to be twice put in jeopardy." Const 1963, art 1, § 15. The purpose of the double jeopardy clause is to protect against both multiple prosecutions for the same offense and multiple punishments for the same offense. *People v Wilson*, 454 Mich 421, 427; 563 NW2d 44 (1997).

Federal double jeopardy analysis applies the "same-elements" test. *United States v Dixon*, 509 US 688, 696-697; 113 S Ct 2849; 125 L Ed 2d 556 (1993). Under the same-elements test, each offense must contain an element not contained in the other or they are considered the same offense, and double jeopardy prohibits successive prosecution or additional punishment. *Id.*

Our Supreme Court has adopted the "same transaction" test to determine whether a successive prosecution violates the double jeopardy provision. *People v White*, 390 Mich 245, 257-258; 212 NW2d 222 (1973). This test differs from the "same-elements" test employed by the federal courts.

> . . . [T]he Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction. This 'same transaction' test of 'same offence' not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience. [*Id.* at 254 (quoting *Ashe v Swenson*, 397 US 436; 90 S Ct 1189; 25 L Ed 2d 469 (1970) (Brennan, J., concurring).]

Offenses committed by a defendant were part of a single criminal transaction if the crimes "were committed in a continuous time sequence and display a single intent and goal." *White*, *supra* at 259.

In the conspiracy context, courts have employed a slightly different analysis. Analyzing the crime of conspiracy in the double jeopardy context is particularly problematic because it can be difficult to discern whether there is one conspiracy to commit several crimes or multiple conspiracies, each with a different object. In addressing the issue, our Supreme Court has employed the same "totality of the

circumstances" approach used in federal double jeopardy analysis. *Wilson, supra* at 429-430; *People v Mezy,* 453 Mich 269, 285; 551 NW2d 389 (1996). The test employs the following factors:

> 1) time, 2) persons acting as coconspirators, 3) the statutory offenses charged in the indictments, 4) the overt acts charged by the government or any other description of the offenses charged that indicate the nature and scope of the activity that the government sought to punish in each case, and 5) places where the events alleged as part of the conspiracy took place. [*Id.*]

These factors are intended to serve only as guidelines. "The essence of the determination is whether there is one agreement to commit two crimes, or more than one agreement, each with a separate object." *United States v Thomas,* 759 F2d 659, 662 (CA 8, 1985).

Applying the factors to the present case, we conclude that two agreements existed, each involving a separate quantity of cocaine. First, analyzing the time factor, we find that the present case involves charges resulting from events which occurred between October 1991 and April 1992, when both Fakhouri and Nagi were arrested. The prior case, on the other hand, concerned charges resulting from the May 12, 1992, transaction. While there may be some overlap in time, the two periods are not identical. Second, the coconspirators involved in the transactions are different. Defendant was charged in the present case with conspiring with Fakhouri and Nagi, while in the prior case, defendant was charged with conspiring with his Colombian sources of supply, including Juan Salamanca, Juan Perez, and others unknown. The May transaction involved meetings with people at a shopping mall and a Sears store prior to the transaction, while the facts presented concerning the April transaction do not relate any such meetings. Further, we note that once Nagi agreed to cooperate with police, he could no longer be considered a coconspirator. See *People v Atley,* 392 Mich 298, 311-312; 220 NW2d 465 (1974). Thus, for purposes of the May transaction, Nagi was not a member of the conspiracy. Third, the statutory offenses charged in the indictment are identical. However, as noted under the time factor, the charges stem from different dates and involve different cocaine. Further, "[t]he fact that both indictments charge some of the same statutory violations is not particularly important. It is possible to have two different conspiracies to commit exactly the same type of crime." *Thomas, supra* at 666.

The fourth factor addresses the nature and scope of the activity. The objective in both instances was the delivery of cocaine. However, the transactions involved separate trips to Chicago to procure the cocaine, and separate means of delivery. In the April transaction, Nagi picked up defendant at the airport and retrieved defendant's vehicle, which someone else had driven back from Chicago, and delivered the cocaine. In the May transaction, the cocaine was delivered to a parking lot in a different car after a series of meetings and phone calls with various people. Additionally, because both Fakhouri and Nagi were fronted cocaine, neither could obtain more cocaine until they paid for the previous purchase. Fakhouri testified that when he paid Nagi after his arrest, he and Nagi discussed a future transaction involving five kilograms of cocaine, two of which Fakhouri would receive. This fact suggests that the parties were discussing a subsequent agreement and is further supported by evidence from one of the recorded conversations between Nagi and defendant, in which both parties decided to store the cocaine at Fakhouri's home, as they had following the April transaction. The fifth factor, location,

favors defendant because the charges in both cases stem from events which transpired in Chicago and Detroit. We conclude that the evidence demonstrates the existence of two conspiracies. Therefore, defendant's subsequent convictions do not violate double jeopardy's prohibition against multiple prosecutions for the same offense.

We also conclude that defendant's subsequent delivery conviction was not barred by double jeopardy because it was not part of the same transaction. The facts of the present case do not evidence the continuous time sequence contemplated by the same-transaction test, nor do they demonstrate a single intent or goal. Rather, the facts demonstrate two separate deliveries of two separate quantities of cocaine. See *People v Jackson*, 153 Mich App 38, 50; 394 NW2d 480 (1986).

Defendant next argues that there was insufficient evidence to sustain his conspiracy conviction. However, after reviewing the evidence in the light most favorable to the prosecution, we conclude that the evidence was sufficient to prove the elements beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

To establish conspiracy, the prosecution must show a combination or agreement, express or implied, between two or more persons, to commit an illegal act or to commit a legal act in an illegal manner. *People v Meredith (On Remand)*, 209 Mich App 403, 407-408; 531 NW2d 749 (1995); MCL 750.157a; MSA 28.354(1). The essence of the crime of conspiracy is the unlawful agreement between the parties. *People v Blume*, 443 Mich 476, 481; 505 NW2d 843 (1993). Conspiracy involves a two-part specific intent: the intent to combine with others and the intent to accomplish the illegal act. *Id.* The evidence must establish "that the parties specifically intended to further, promote, advance, or pursue an unlawful objective." *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). Direct evidence of the conspiracy is not required. *Id.* Rather, the proof may be derived from circumstantial evidence such as the acts and conduct of the parties and may be based on reasonable inference. *Id.* at 347-348; *Atley, supra* at 311.

Defendant argues that the evidence is insufficient to establish conspiracy because defendant and Fakhouri were never introduced to each other and there was no evidence that they intended to participate cooperatively to further a known objective. However, it is not necessary for all coconspirators to have knowledge of the extent of the conspiracy, nor must each defendant know each of the other coconspirators. *Meredith, supra* at 412. This Court has held that a drug conspiracy may exist where all the individuals did not know each other, but shared the knowledge that the large quantities of drugs involved would ultimately be delivered for consumption by street users. *People v Missouri*, 100 Mich App 310, 343-344; 299 NW2d 346 (1980). Although defendant and Fakhouri were not formally introduced, they shared the knowledge that the drugs would be distributed. Moreover, defendant and Nagi agreed to store the drugs in Fakhouri's safe. Therefore, we conclude the evidence was sufficient to establish conspiracy.

Defendant also argues that the subsequent prosecution denied him due process because it was vindictive. Defendant notes that he had already been sentenced to two terms of life without parole and that the prosecutor agreed to prosecute the case in federal court in exchange for defendant's cooperation. We disagree.

Prosecutors are afforded broad discretion when determining with what offenses to charge defendant. *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996). A prosecutor abuses that discretion only if the charging decision is made for reasons which are unconstitutional, illegal, or ultra vires. *Id.* Therefore, this Court reviews a charging decision under an 'abuse of power" standard, questioning whether a prosecutor has acted in contravention of the constitution or the law. *Id.*

Punishing a person for asserting a protected statutory or constitutional right violates due process. *People v Ryan*, 451 Mich 30, 35; 545 NW2d 612 (1996). Such punishment constitutes prosecutorial vindictiveness. *Id.* at 36. Prosecutorial vindictiveness may be presumed, or it may be actual. *Id.* Courts may presume vindictiveness "only in cases in which a reasonable likelihood of vindictiveness exists" and should be especially cautious before adopting such a presumption in the pretrial setting. See *United States v Goodwin*, 457 US 368, 373, 380-382; 102 S Ct 2485; 73 L Ed 2d 74 (1982). The fact that a defendant forces the government to prove its case by refusing to plead guilty is not sufficient to warrant a presumption that subsequent changes in the charging decision are vindictive. *People v Goeddeke*, 174 Mich App 534, 536; 436 NW2d 407 (1988). Likewise, the dismissal of a lesser charge and rearrest on a newly filed greater charge following a defendant's refusal to plead guilty to the lesser charge is not sufficient to establish a presumption of vindictiveness. *Id.* at 537.

Where vindictiveness cannot be presumed, the defendant bears the burden of establishing actual vindictiveness. *Ryan, supra* at 36. "Actual vindictiveness will be found only where objective evidence of an 'expressed hostility or threat' suggests that the defendant was deliberately penalized for his exercise of a procedural, statutory, or constitutional right." *Id.* If the prosecution has discretion to bring additional charges, the mere threat of additional charges during plea negotiations does not constitute actual vindictiveness. *Id.*

We conclude that vindictiveness cannot be presumed on these facts, nor has defendant demonstrated actual vindictiveness. The prosecution did not abuse its power in subsequently prosecuting defendant for the events which occurred between October 1991 and April 1992. The charges were filed within three days of defendant's arrest, there was sufficient evidence to support the charges, defendant admits he withdrew his cooperation, and his application for leave to appeal from the Supreme Court was still pending.

Defendant also argues that the trial court erred in admitting the evidence surrounding the May 12, 1992, transaction because it was unfairly prejudicial. We disagree.

A decision to admit evidence is within the sound discretion of the trial court. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995); *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). "An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias." *Id.* Determinations under the balancing test of MRE 403 are best left to the trial court, who is able to assess the presentation, credibility, and effect of the testimony. *Id.* at 675.

We conclude that the evidence was not unfairly prejudicial. First, we note that the trial court gave a limiting instruction both when the five kilograms of cocaine was admitted and in the closing jury instructions. Second, after reviewing the record, we disagree that the prosecution made excessive references to the evidence or a show of displaying the evidence. Some reference was necessary for the jury to understand the circumstances surrounding the conspiracies and to understand how police apprehended defendant. This probative value was not substantially outweighed by the danger of unfair prejudice.

Finally, defendant argues that he was denied due process because he was sentenced consecutively without credit for time previously served. However, the Supreme Court recently held that because MCL 333.7401(3); MSA 14.15(7401)(3) constitutes a "penalty" within the meaning of the conspiracy statute, MCL 750.157a; MSA 28.354(1), the trial court properly imposed the defendant's cocaine conspiracy sentence to run consecutive to his marijuana conspiracy sentence. *People v Denio*, 454 Mich 691, 704-705; 564 NW2d 13 (1997). Therefore, the sentencing court properly imposed consecutive sentences.

Defendant also argues that he was entitled to credit for time previously served. However, MCL 333.7401(3); MSA 14.15(7401)(3) specifically precludes any type of disciplinary credit or sentence credit reduction. See *Dean v Dep't of Corrections*, 453 Mich 448, 450; 556 NW2d 458 (1996). Further, the cases cited by defendant involve situations in which defendant was either sentenced after he violated probation or was resentenced and are not applicable to the present case. Therefore, we conclude that the trial court properly sentenced defendant to consecutive terms without credit for time served.

Affirmed.

/s/ Kathleen Jansen
/s/ Martin M. Doctoroff
/s/ Hilda R. Gage

[1] This Court affirmed defendant's convictions. *People v Gallego*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 1995 (Docket No. 169393). The Supreme Court denied defendant's application for leave to appeal. *People v Gallego*, 452 Mich 863; 550 NW2d 792 (1996).