STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

VINCE JEROME SHIVERS,

Defendant-Appellee.

UNPUBLISHED
November 12, 1999

No. 208925
Recorder's Court
LC No. 97-002663

Before: Cavanagh, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

The prosecutor appeals as of right from an order dismissing a charge of possession of 225 grams or more, but less than 650 grams, of cocaine, MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii). We affirm.

In 1997, defendant and a codefendant, John Lawrence, were bound over for trial on a cocaine possession charge stemming from an incident that occurred on October 13, 1994. While the case was pending, defendant pleaded guilty to a federal conspiracy count involving conduct from "late 1994 and continuing up to and including March, 1997, these dates being approximate," which involved named and unnamed conspirators. Defendant then moved for dismissal of the pending state claim on the basis that it was barred by MCL 333.7409; MSA 14.15(7409). Following an evidentiary hearing, the trial court granted defendant's motion and dismissed the case.

On appeal, the prosecutor contends that the trial court committed clear error by dismissing the case, contrary to the law set forth in *People v Mezy*, 453 Mich 269; 551 NW2d 389 (1996). We disagree.

The specific totality of the circumstances test set out in *Mezy*, *supra* at 285, is not applicable to this case because the "same acts" question here does not involve state and federal conspiracy charges, but rather, state possession and federal conspiracy charges. In this context, this Court's holding in *People v Avila (On Remand)*, 229 Mich App 247; 582 NW2d 838 (1998), is controlling:

> In this case, there is no question that the state charge arose out of the same acts as those that formed the basis of the federal conviction, defendant's acts of possessing the ten kilograms of cocaine at his residence and breaking it up for eventual sale. Although the prosecution correctly states that a conspiracy charge does not constitute the same offense as a possession charge, [*Mezy*, *supra*] at 276, this is not relevant to whether § 7409 is implicated. As we have already discussed, § 7409 bars all successive prosecutions based on the same criminal act. Accordingly, § 7409 precludes prosecution in this case, and dismissal of the charges was proper. [*Avila*, *supra* at 251.]

Although the trial court here did not have the benefit of *Avila* when rendering its findings, we are satisfied that its decision, considered in the light of the arguments, stipulations, and evidence presented by the parties, comports with *Avila*. The prosecutor has not demonstrated that the trial court's findings of fact were clearly erroneous or that the trial court applied an incorrect burden of proof. See *Mezy*, *supra* at 282-283; *People v Hermiz*, 235 Mich App 248, 255; 597 NW2d 218 (1999). Although the federal conspiracy charge was obviously larger in scope than the October 13, 1994, incident upon which the state charge was based, the trial court's finding that the claim was barred under MCL 333.7409; MSA 14.15(7409) is supported by the assistant prosecuting attorney's own stipulation at the evidentiary hearing that "during the plea, . . . the factual basis was part of the October 13, 1994 proceedings," along with the evidence that the October 13, 1994, incident came within the language of the federal indictment charging defendant with conspiracy, the oral modification of the written plea agreement, and other proofs.[1]

Finally, while the prosecutor questions the propriety of the federal proceedings that resulted in the October 13, 1994, incident being used for the conspiracy plea and asserts that improper interference with a state prosecutor can be implied, the prosecutor has failed to brief this claim or otherwise show that this precludes application of MCL 333.7409; MSA 14.15(7409). As the appellant, the prosecutor was required to do more than announce his position and leave it to this Court to discover and rationalize the basis for its claim. See *Hermiz*, *supra* at 258. Hence, we decline to consider this claim.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

[1] Pursuant to the general rule that enlargement of the record on appeal is not permitted, we have not considered the federal plea transcript submitted by the parties. *People v Canter*, 197 Mich App 550, 557; 496 NW2d 336 (1992); *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990).