STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

HANI S. AWAZEM,

Defendant-Appellee.

UNPUBLISHED
January 22, 2002

No. 232343
Wayne Circuit Court
LC No. 00-011824

Before: Hood, P.J., and Murphy and Markey, JJ.

PER CURIAM.

The prosecutor appeals as of right from the trial court's order of dismissal. We reverse.

In the evening of February 3, 2000, defendant was suspected of being under the influence of intoxicants or narcotics.[1] A traffic stop occurred, and defendant and his passenger were ordered out of the vehicle. Defendant's vehicle was searched, and several plastic bottles were recovered. Police suspected that the liquid contained within the bottles was "GHB" or gamma hydroxybutyric. White capsules suspected to be "GBL," a precursor to GHB, a pink tablet suspected to be "ecstasy," and a blue steel pressurized cylinder labeled nitrous oxide were also recovered from the vehicle. At the police station, defendant told police that he purchased the liquid called "Furanone" under the product name "Verve," which was marketed as an organic cleaning solvent. Police recognized the name "Furanone" as another name for GBL. Defendant reported that there were additional bottles of liquid in the home that he shared with his parents.

Detective Rob Toth took possession of the bottles that were found in defendant's car. He stored the bottles in a temporary locker at the offices of the Down River Area Narcotics Organization (DRANO). Only the lieutenant retained a key to the temporary locker. When an officer needed to access a locker, he had to find the lieutenant to access it. Toth temporarily stored the bottles obtained from defendant's vehicle in the locker while he obtained a search warrant for defendant's home. At the home, additional bottles of liquid were recovered. At approximately 4:00 a.m., Toth sealed eighteen items of evidence, eleven from defendant's car,

[1] The statement of facts is compiled from the police report and preliminary examination transcript that were submitted as exhibits and the evidentiary hearing held regarding defendant's motion to suppress. For purposes of the motion to suppress, defendant did not challenge the validity of the stop or the qualifications of scientist Susan Isley.

into plastic envelops and labeled the items. Toth labeled item number three as a bottle with a white cap containing bluish liquid. Toth relied on his report to testify regarding the color of the liquid. The evidence was then stored in a locked evidence room. Five people had access to this evidence room. Forty-three days later, Toth delivered the evidence to the state crime lab for testing. Toth attributed any delay in testing the evidence to the number of cases he had pending and the distance to the state lab. When he arrived at the lab, a scientist was unable to test the evidence immediately. It was left in a locked location at the lab. While it was questionable whether Toth had an independent recollection of delivering the evidence to the lab, he acknowledged that his name appeared on the receipt.

Susan Isley, forensic scientist employed by the Michigan State Police Crime Lab, tested the evidence submitted by Toth. Isley testified that the evidence was presented in sealed, labeled bags. She tested item number three and concluded that it contained GHB. Isley recorded that the liquid she tested was not blue in color, but was clear. However, Isley testified that color tests of substances were not definitive, and the color of the liquid had nothing to do with whether a substance tested positive for GHB.

Following the preliminary examination and bindover, defendant moved to suppress the evidence based on the discrepancy between the label by Toth on bottle three that listed the color of the liquid as "bluish" and Isley's testimony that the liquid was clear. At the hearing, Toth testified that he first learned of any discrepancy in color at the time of the preliminary examination. Toth concluded that any discrepancy was merely a mistake. He explained that he had eighteen items to log and it was 4:00 a.m. at the time he performed that task. The trial court granted defendant's motion to suppress and subsequent oral motion to dismiss. The trial court stated that there were "some questions" about the chain of custody because the evidence remained in the police locker for approximately forty-five to forty-seven days. The trial court also cited to Toth's reliance on the receipt from the lab, not his firsthand knowledge, and the fact that several officers had keys to the evidence locker. Finally, the court stated that there was a "substantial change" between the bottles at the time of the seizure and the time of testing that could not be explained. Based on its evidentiary ruling, the trial court dismissed the charge of possession of a controlled substance (GHB), MCL 333.7403(2)(b)(ii).

The prosecutor argues that the trial court erred by granting defendant's motion to suppress. We agree. We review the trial court's ultimate decision on a motion to suppress de novo, but review the trial court's underlying factual findings for clear error. *People v Beuschlein*, 245 Mich App 744, 748; 630 NW2d 921 (2001). A finding is clearly erroneous if the appellate court is left with a definite and firm conviction that a mistake has been made. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001).

In *People v White*, 208 Mich App 126, 132-133; 527 NW2d 34 (1994), this Court held that a perfect chain of custody was not required for narcotics and other relatively indistinguishable items of real evidence. Such evidence was admissible where there was an absence of a mistaken exchange, contamination or tampering as established to a reasonable degree of certainty. *Id*. Even if a break in the chain of custody occurred, evidence was not automatically excluded. Rather, courts must consider, on a case by case basis, whether an adequate foundation for the admission of the evidence had been laid under all the facts and circumstances. *Id*. If a proper foundation was established, any deficiencies in the chain of custody went to the weight afforded the evidence, not its admissibility. *Id*.

Review of the all of the facts and circumstances of this case reveals that there was an adequate foundation for admission of the evidence. Toth testified that he placed the evidence in a locker. When he returned to the station, he catalogued the evidence by placing it in sealed plastic envelopes and then placing labels on the envelopes. The evidence was sealed and placed in a locked area. Although five people had access to this locked area, there was no evidence of tampering. There was no indication that mere placement in the locked area could account for any color change. Rather, Toth explained that his testimony was based solely on the recorded documentation that may have been mistaken due to the number of items and the time the evidence was logged. Indeed, when Isley received the evidence, it was sealed. She further testified that color had no bearing on the presence of GHB. Accordingly, there was an adequate foundation for the admission of the evidence. While there was the *possibility* of breaks in the chain due to the access of other officers to the locked area during the forty-three day period, there was no evidence of mistaken *exchange*,[2] contamination, or tampering. Once the evidence was sealed, there was no indication that the seals were broken prior to Isley's testing. Irrespective of who delivered the evidence to the lab, there was no indication of evidence tampering. Accordingly, there was an adequate foundation for admission of the evidence and the trial court erred in granting defendant's motion to suppress. *White, supra*.

Defendant argues that *People v Kemp*, 99 Mich App 485; 298 NW2d 1 (1980), and *People v Beamon*, 50 Mich App 395; 213 NW2d 314 (1973) support suppression of the evidence. However, as previously noted, each case must be examined individually in light of all the facts and circumstances. *White, supra*. Furthermore, we note that both cases are distinguishable. In *Kemp*, several officers gave substantially inconsistent testimony at trial and at the preliminary examination. Additionally, in *Beamon*, multiple shirts had been taken into evidence, but one shirt had disappeared. *No* chain of custody could be established for the remaining shirt that was clearly not in the same condition at the time of its removal. The change in condition could not be attributed to a mere mistake. In the present case, Toth's preliminary examination testimony was premised solely on the documentation that Toth deemed to be a mistake. Accordingly, defendant's reliance on those cases is misplaced.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Harold Hood
/s/ William B. Murphy
/s/ Jane E. Markey

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[2] There was no testimony to indicate that Toth was examining evidence involving different defendants.