STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2002
v	No. 224965 Ingham Circuit Court
LONNIE MCKISSIC, JR., Defendant-Appellant.	LC No. 98-073428-FC

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

PER CURIAM.

Defendant appeals as of right from his convictions, following a bench trial, of delivery of more than 650 grams of cocaine, MCL 333.7401(2)(a)(1), conspiracy to deliver more than 650 grams of cocaine MCL 750.157(1), and possession with intent to deliver more than 650 grams of cocaine, MCL 333.7401(2)(a)(1). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to consecutive terms of thirty to fifty years' imprisonment for the delivery conviction, twenty to thirty years' imprisonment for the conspiracy conviction, and twenty to thirty years' imprisonment for the possession conviction. We affirm.

In 1994, defendant was indicted in federal court for conspiracy to deliver cocaine and other related charges. He signed a plea agreement with the federal government, pleading guilty to one count of money laundering in exchange for his cooperation with federal and state law enforcement. In accordance with the plea agreement, defendant testified before a grand jury, implicating several other people involved in the distribution of cocaine. Thereafter, defendant recanted his grand jury testimony and testified differently at an organization member's preliminary examination than he had testified before the grand jury. In response, the federal government rescinded defendant's plea agreement, stating that he had violated its terms. In 1998, defendant was charged with the crimes at issue here, arising out of the same incidents forming the basis of defendant's 1994 federal charges.

Defendant first argues that the former version of MCL 750.157 entitled him to transactional immunity from prosecution for these crimes because he was required to testify about these crimes before a grand jury pursuant to the terms of a federal plea agreement. We disagree.

This Court reviews questions of statutory interpretation de novo. *People v Stevens*, 460 Mich 626, 631; 597 NW2d 53 (1999), cert den 528 US 1164; 120 S Ct 1181; 145 L Ed 2d 1088 (2000). At the time defendant testified before the grand jury, MCL 750.157 stated, in part:

> No person shall be excused from . . . testifying . . . before any court . . . for a violation of any of the provisions of this chapter [conspiracy], . . . for the reason that the testimony . . . *required* of him may tend to . . . incriminate him; but *no person shall be prosecuted . . . on account of any transaction, matter or thing concerning which he may so testify . . . and no testimony so given . . . shall be received against him upon any criminal investigation, proceeding or trial*: Provided, That no person so testifying shall be exempt from prosecution and punishment for perjury committed in so testifying. [MCL 750.157, amended by 1999 PA No. 251, effective December 28, 1999 (emphasis added).]

Because defendant testified before the grand jury pursuant to a plea agreement, his testimony was not "required" as required by MCL 750.157. To be valid, a plea agreement must be voluntary. MCR 6.302(A). Voluntary cooperation in accordance with the terms of a plea agreement is not required testimony. See *United States v Camp*, 72 F3d 759, 761 (CA 9, 1995), cert den 517 US 1162; 116 S Ct 1557; 134 L Ed 2d 658 (1996).

Moreover, persons are not entitled to statutory transactional immunity unless they raise their constitutional privilege against self-incrimination or object to answering questions having the tendency to incriminate. *People v Parsons*, 142 Mich App 751, 762; 371 NW2d 440 (1985), citing *People v Robinson*, 306 Mich 167, 173-174; 10 NW2d 817 (1943), cert den 320 US 799; 64 S Ct 369; 88 L Ed 482 (1943); *Roach v Carter*, 297 Mich 577, 579; 298 NW2d 288 (1941). Immunity statutes are not self-executing. *Parsons, supra* at 761. Defendant failed to invoke his right against self-incrimination before the grand jury; therefore, defendant was not entitled to transactional immunity pursuant to MCL 750.157.

Defendant next argues that the prosecutor improperly vouched for the credibility of three prosecution witnesses by entering their entire plea agreements into evidence. Because we find this issue waived, appellate review is precluded.

Defense counsel affirmatively stated that he had no objection to the introduction of each witness' plea agreement. The affirmative agreement constituted a waiver of this issue. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). "'One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.'" *Id.*, citing *United States v Griffin*, 84 F3d 912, 924, cert den sub nom *Rux v United States*, 519 US 999; 117 S Ct 536; 136 L Ed 2d 421 (CA 7, 1996).

Defendant next argues that the trial court erred by permitting expert testimony introducing "drug profile evidence" as substantive evidence of defendant's guilt. We agree that the evidence was erroneously admitted, but find the error not outcome determinative. Therefore, reversal is not warranted.

This Court reviews the admissibility of expert testimony for an abuse of discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit,

inherently prejudicial to a defendant because the profile may suggest that innocuous events indicate criminal activity. *Id*. at 52-53. However, expert testimony from police officers may be permissible if offered as background or modus operandi evidence, and not as substantive evidence of guilt. *People v Williams*, 240 Mich App 316, 320-321; 614 NW2d 647 (2000), citing *Murray, supra* at 56-57.

We recognize there is a fine line between the probative use of profile evidence as modus operandi evidence and the prejudicial use of the evidence as substantive evidence of guilt. *Murray, supra* at 54-55. In this case, however, we find that the expert testimony crossed that line. The officers listed general characteristics of cocaine organizations and then compared defendant's situation – even using an organizational chart to demonstrate the similarities. Therefore, we find that the testimony was offered as substantive evidence of defendant's guilt, failing the first requirement for admissibility. *Williams, supra* at 320.

However, this Court applies a harmless error analysis when considering the effect of improperly admitted drug profile evidence. *Williams, supra* at 321. To warrant reversal, it must be more probable than not that the error was outcome determinative. *Id*., citing *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). Here, the prosecution presented overwhelming evidence of defendant's guilt. Therefore, the error was not outcome determinative and reversal is not warranted. *Lukity, supra* at 496.

Defendant next argues that a pre-arrest delay violated his right to due process, requiring dismissal. We disagree.

A challenge to a pre-arrest delay implicates constitutional due process rights, reviewed de novo by this Court. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 28 (1999); *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). To establish a due process violation in the context of pre-arrest delay, the defendant bears the initial burden of establishing prejudice to the defendant's right to a fair trial. *People v Herndon*, 246 Mich App 371, 390; 633 NW2d 376 (2001). The prejudice must be actual and substantial, meaningfully impairing the defendant's ability to defend against the charges in a manner likely to affect the outcome of the proceedings. *Crear, supra* at 166. Alleged imperfections of a witness' memory are generally insufficient to establish actual and substantial prejudice. *Id.*

Defendant fails to demonstrate any prejudice affecting the outcome of the proceeding. Instead, he relies on general allegations of dimming memories and loss of exculpatory evidence. These general allegations are insufficient to warrant reversal. *Id*.

Defendant next argues that his prosecution violated the prohibition against double jeopardy because he was previously convicted in federal court for conduct also forming the basis for the convictions in this case. We disagree.

A double jeopardy challenge constitutes a question of law that this Court reviews de novo on appeal. *People v Kulpinski*, 243 Mich App 8, 12; 620 NW2d 537 (2000), citing *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999). Pursuant to his plea agreement, defendant pleaded guilty to one count of money laundering. The other federal charges were dismissed. "Jeopardy does not attach to charges dismissed as part of a plea agreement." *People v Mezy*, 453 Mich 269, 276; 551 NW2d 389 (1996). Therefore, a prosecution on charges

dismissed pursuant to a plea agreement does not violate the Double Jeopardy Clause where the newly charged offense is different than the crime to which the defendant pleaded guilty. *Mezy, supra*, 453 Mich at 275, citing *United States v Garner*, 32 F3d 1305, 1311 n 6 (CA 8, 1994), cert den 514 US 1020; 115 S Ct 1366; 131 L Ed 2d 222 (1995). Defendant's federal conviction for money laundering raises no double jeopardy issues with respect to defendant's state court indictment for delivery, possession, and conspiracy to deliver cocaine. *Id*.

Finally, defendant argues that he is entitled to have his presentence investigation report (PSIR) amended because certain disputed information remained legible after the sentencing court ruled it would be eliminated. We agree.

This Court reviews questions of statutory interpretation de novo. *Stevens, supra,* at 631. Statutory construction begins by examining the plain language of the statute to discern and give effect to the Legislature's intent. *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). MCL 771.14(6) requires that information in the PSIR found to be irrelevant or inaccurate by the sentencing court "shall be stricken" before the report is transmitted to the department of corrections (DOC). The statute contains no definition of the term "stricken." However, "'[t]he meaning of statutory language, plain or not, depends on context.'" *People v Vasquez*, 465 Mich 83, 89; 631 NW2d 711 (2001), quoting *King v St Vincent's Hosp*, 502 US 215, 221; 112 S Ct 570; 116 L Ed 2d 578 (1991).

The PSIR follows defendant through the DOC and is used to make critical decisions regarding defendant's status. *People v Norman*, 148 Mich App 273, 275-276; 384 NW2d 147 (1986). Information determined to be inaccurate or irrelevant by the sentencing court should not be provided to the DOC. *Norman, supra*, 148 Mich App at 274-275. In this context, we conclude that information "stricken" from the PSIR must be completely obstructed so it is no longer legible. Therefore, we remand for a complete obliteration of the inaccurate or irrelevant material with directions to send a corrected copy to the DOC. Defendant's request to add information is denied because it appears the requested information was already added.

Affirmed and remanded to the sentencing court for complete obliteration of eliminated sections of the PSIR and transmittal of a corrected copy to the DOC. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Joel P. Hoekstra