STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2004
v	No. 244208 Ottawa Circuit Court
ARLO JAMES KELLY, Defendant-Appellant.	LC No. 02-025673-FH

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

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of more than fifty but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii). He was sentenced to 120 months to 240 months' imprisonment. Defendant appeals as of right. We affirm.

Defendant's conviction arose out of a series of four separate cocaine sales of increasing quantities that he made to an undercover officer. Defendant met the officer through a confidential informant with whom defendant previously worked and used cocaine. The informant contacted defendant and told him that he had a "friend" who had inherited $150,000 who wanted to buy some drugs. Defendant agreed to locate the cocaine for the informant because defendant was unemployed and needed the money and as a means to obtain cocaine for his own use. The first sale involved a "small amount" of cocaine, the second sale involved either a quarter or half ounce of cocaine, the third sale involved an ounce of cocaine and some marijuana, and the fourth sale, which culminated in defendant's arrest, involved over two ounces of cocaine. During the sales, defendant set the price for the drugs. According to defendant, the officer repeatedly asked and pressured him to get larger quantities of cocaine.

Defendant first argues that the trial court erred in determining that he was not entrapped. We disagree. We review a trial court's findings regarding entrapment for clear error. *People v Johnson*, 466 Mich 491, 497; 647 NW2d 480 (2002). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.* at 497-498. Further, "[a] defendant has the burden of establishing by a preponderance of the evidence that he was entrapped." *Id.* at 498, citing *People v D'Angelo*, 401 Mich 167, 182; 257 NW2d 655 (1977).

"Under the current entrapment test in Michigan, a defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible

that it cannot be tolerated." *Johnson, supra* at 498, citing *People v Juillet,* 439 Mich 34, 56-57; 475 NW2d 786 (1991) (Brickley, J). The first type of entrapment exists if the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances. *Johnson, supra* at 498.

> When examining whether governmental activity would impermissibly induce criminal conduct, several factors are considered; (1) whether there existed appeals to the defendant's sympathy as a friend, (2) whether the defendant had been known to commit the crime with which he was charged, (3) whether there were any long time lapses between the investigation and the arrest, (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen, (5) whether there were offers of excessive consideration or other enticement, (6) whether there was a guarantee that the acts alleged as crimes were not illegal, (7) whether, and to what extent, any government pressure existed, (8) whether there existed sexual favors, (9) whether there were any threats of arrest, (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant, (11) whether there was police control over the informant, and (12) whether the investigation was targeted. [*Johnson, supra* at 498-499, citing *Juillet, supra* at 56-57.]

The second type of entrapment exists if the police engaged in impermissible conduct that was so reprehensible that it cannot be tolerated. *Johnson, supra* at 498; *People v Connolly,* 232 Mich App 425, 429; 591 NW2d 340 (1998). Under either type, "where law enforcement officials present nothing more than an opportunity to commit the crime, entrapment does not exist." *Johnson, supra*.

Careful review of the evidence establishes that none of the relevant factors weigh in favor of a finding that the police entrapped defendant under the first type of entrapment.

First, there was no evidence that the police unduly exploited defendant's friendship with the informant. The informant and defendant met each other at work and knew each other for only about one month before the initial contact was made, and the extent of their friendship consisted of using drugs together. A "mere acquaintance" relationship is not sufficient to support a defendant's claim of entrapment. *Juillet, supra* at 66-67. In addition, defendant's testimony that he agreed to find the drugs because he needed the money "very badly" and to obtain cocaine for his own use suggests that he was not motivated to sell drugs to the officer because of his friendship to the informant, but was motivated by profit.

Second, at the time of defendant's arrest, the police had reason to believe that defendant was engaged in the delivery of drugs because defendant willingly and readily sold drugs to the undercover officer several times over a short period of time. There was also testimony that defendant initiated contact with the officer when he had drugs to sell, offered him the drugs, set the price for the drugs and profited from the sales.

Third, there was not a long lapse between the investigation and the arrest. The investigation began sometime in late January 2002, when the informant contacted defendant and defendant was arrested on February 2, 2002.

Fourth, the police did not offer defendant inducements that would make the crime unusually attractive to a hypothetical law-abiding citizen. Defendant contends that he was induced into selling drugs to the undercover officer by the large inheritance and the officer's promise to lend him money in exchange for selling him drugs. According to defendant, after he heard about the officer's inheritance he kept trying to convince the officer to lend him money, but the officer refused and told defendant that he did not know defendant well enough, and if they dealt "with each other a couple more times to earn trust," the officer might lend him money. According to the officer, after defendant requested a loan to fix his car, he only told defendant that he was not going to lend defendant any money to fix it. Where evidence is conflicting, we must give deference to the special opportunity of the trial court to assess the credibility of the witnesses before it. MCR 2.613(C); *People v Marshall*, 204 Mich App 584, 587; 517 NW2d 554 (1994). Given the conflicting testimony concerning the promise of a loan and the absence of any other offers or enticements, we do not find that the existence of an inheritance would make the commission of the crime unusually attractive to a hypothetical law-abiding citizen. Rather, it merely presented defendant an opportunity to commit the crime.

Fifth, there were no offers of excessive consideration. Although the informant told defendant that that the officer had a large inheritance, the informant merely told defendant that he could "*probably* make some money" if defendant could find drugs. Further, defendant set the price for the drugs, not the officer. Sixth, the police did not assure defendant that his actions were legal.

Seventh, defendant did not establish that the police placed undue pressure on him to sell the drugs. Although the officer told defendant that he desired to purchase more drugs, there is no evidence that the officer or the informant repeatedly contacted defendant between the transactions. Moreover, there is evidence that defendant initiated contact with the officer and offered to sell him more drugs. Defendant also testified that he voluntarily met with the officer, nobody forced him to sell cocaine, he acted of his own free will and the officer never threatened him.

There is no evidence that sexual favors were involved or that the officer threatened defendant with arrest during the investigation.

Tenth, the police did not engage in activities designed to escalate defendant's criminal culpability. Defendant contends that his culpability was escalated from a drug user to a drug seller and then to a drug seller of greater quantities. Although "sentencing entrapment occurs 'when a defendant, although predisposed to commit minor or lesser offense, is entrapped in committing a greater offense subject to greater punishment,"' *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997), quoting *United States v Staufer*, 38 F3d 1103, 1106 (CA 9, 1994), quoting *United States v Stuart*, 923 F2d 607, 614 (CA 8, 1991), "entrapment does not exist if the conduct would induce only those persons who are ready and willing to commit the offense to do so." *People v Fabiano*, 192 Mich App 523, 531; 482 NW2d 467 (1992). Although defendant admitted that he was a former and current user of drugs, there was no evidence that defendant ever delivered drugs before he sold drugs to the undercover officer. However, defendant willingly and readily sold drugs to the officer as evidenced by his agreement to participate and his eventual participation in further transactions with the officer after the initial transaction, the short period of time between the transactions (all four transactions occurred in a few days) and his ability to obtain drugs in larger quantities from several sources (defendant obtained drugs

from Holland and Chicago).[1] In addition, although the officer sought greater amounts of cocaine from defendant, there is no evidence that the officer continued to purchase drugs from defendant merely to enhance defendant's eventual sentence. Although sentencing entrapment "may occur where outrageous government conduct overcomes the will of a defendant predisposed to deal only in small quantities of drugs, for the purpose of increasing the amount of drugs and resulting sentencing," *Ealy, supra* at 510-511, quoting *United States v Stavig*, 80 F3d 1241, 1245 (CA 8, 1996), there was no evidence in this case that defendant's will was overcome by outrageous police conduct. Defendant did not hesitate to supply the officer with more than two ounces of cocaine and was ready and willing to sell him greater quantities of cocaine. Although defendant could have been arrested after the first three transactions, the delay in his arrest can be justified "on the ground that an earlier arrest would have impaired the ability of the police to conduct an ongoing undercover narcotics investigation." *Ealy, supra* at 511.

Finally, there is no evidence that the informant was not under the control of the police and, although the police were not initially investigating defendant, it can be inferred from defendant's repeated transactions with the undercover officer that the police were focusing on defendant as a specific target. However, by this time the police had reason to believe that defendant was actually selling drugs. This final factor is, therefore, neutral.

In sum, we find that defendant failed to prove by a preponderance of the evidence that the police conduct would induce an otherwise law-abiding citizen to commit the offense of delivery of cocaine. *Johnson, supra* at 498. Therefore, defendant was not entrapped under the first prong of Michigan's entrapment test. The court's finding that there was no reprehensible police conduct under the second prong of Michigan's entrapment test was also supported by the record. The evidence indicates that defendant readily and willingly sold drugs to the police, the police did not engage in criminal behavior, and the police did nothing more than provide defendant with an opportunity to commit the crime, which is not reprehensible and does not constitute entrapment. *Id.* at 508.

Defendant next argues that the trial court abused its discretion in admitting the cocaine into evidence because the chain of custody was not sufficient for its admission. We disagree. A trial court has discretion to determine whether evidence is admissible, and its decision should be reversed only when the trial court clearly abused its discretion. *People v Bahoda*, 448 Mich 261, 263, 289-290; 531 NW2d 659 (1995). A perfect chain of custody is not required for the admission of real evidence. *People v White*, 208 Mich App 126, 133; 527 NW2d 34 (1994). "Once a proper foundation has been established, any deficiencies in the chain of custody go to the weight afforded to the evidence, rather that its admissibility." *Id.*

Defendant contends that the chain of custody was broken when the officer left the cocaine in his car overnight without sealing or marking it. Although a break in the chain of

[1] Even assuming the police entrapped defendant during the initial transaction by escalating defendant's criminal culpability from a drug user to a seller, any initial entrapment does not immunize defendant from criminal liability for the subsequent sales to the officer that defendant readily and willingly undertook. See *Johnson, supra* at 505.

custody is relevant to the determination of admissibility, it does not require automatic exclusion. *White, supra* at 133. Rather, the evidence is admissible where the absence of a mistaken exchange, contamination or tampering has been established to a reasonable degree of probability or certainty. *Id.* Here, while there was the possibility of a break in the chain because the officer left the package in his unattended car overnight, there was no evidence of mistaken exchange, contamination or tampering. To the contrary, the officer testified that the package remained inside the locked glove box in his locked car until the following morning when he sealed it and put it in the evidence locker. Accordingly, we find that an adequate foundation was established for its admission and the deficiency in the chain of custody goes to the weight of the evidence rather than its admissibility. *Id*. Under these facts, the trial court did not abuse its discretion in admitting the cocaine at trial.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot