STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2004
v	No. 247312 Oakland Circuit Court
ERNESTO GONZALEZ, Defendant-Appellant.	LC No. 2002-185414 FC

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction and the resulting sentence for participating in a conspiracy to illegally manufacture or possess with intent to deliver 650 grams or more of a mixture containing cocaine, MCL 750.157a, MCL 333.7401(2)(a)(i). For that participation, the trial court sentenced defendant to a twenty to forty year prison sentence. We affirm.

I. FACTS

This case arises from the June 6, 2002 arrest of defendant, Ernesto Gonzalez, and several others in connection with a cocaine processing and distribution operation in Oakland County. After conducting a controlled buy, police arrested a cocaine seller, who shared the location of his source, a residence at 514 Highland, in Pontiac. Using this information, police surveilled the residence and sought a search warrant. Upon execution of the warrant, two men fled through the back door, later to be apprehended, while defendant was found hiding under a pile of clothes in the back bedroom. No cocaine was found on defendant's person or in the room in which he was hiding, but the police did find $100 in cash on defendant. All three were arrested. Within the residence, police found a full-scale processing and packaging operation[1] in the small[2] house's kitchen and dining room.

[1] Officers testified that the house contained mixing bowls with white residue, food processors containing cocaine, cutting agents, packages of various sizes of cocaine, plastic baggies, a digital scale, and a cocaine press operated by hydraulic jacks. At the time of the raid, the house contained more than two kilograms of cocaine, with empty packaging that suggested two additional kilograms had been processed there.

The night of the arrest, defendant was taken to the Oakland County Jail. Two days later, police read an advice of rights form to defendant and defendant signed the form. Officers then interrogated defendant and he gave oral and written inculpatory statements. Defendant explained that he was hired by one of the other men arrested in the raid to act as lookout during the cocaine processing and that he helped package a bag or two for sale. For these services, defendant explained, he was paid $100—the $100 police found on his person during the raid.

Based on these statements and evidence found in the raid, defendant was charged with illegally manufacturing or possessing 650 grams or more of a mixture containing cocaine with intent to deliver, MCL 333.7401(2)(a)(i), and conspiracy to illegally manufacture or possess with intent to deliver 650 grams or more of a mixture containing cocaine, MCL 750.157a.

Prior to trial, defendant moved to suppress his inculpatory statements. Accordingly, the trial judge held an evidentiary hearing, pursuant to *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965), to determine whether the statements were in fact voluntary and made after a knowing and intelligent waiver of defendant's Fifth and Sixth Amendment rights.

At the hearing, officers testified that they interrogated defendant for the first time at 1:10 p.m. on June 8th, two days after his arrest. They testified that they had no knowledge of any other officer questioning defendant at an earlier time. Prior to that interrogation, officers testified they confirmed that defendant could read, write, and understand the English language and that defendant had no difficulty understanding them during the questioning. The officers noted that defendant did not complain of lack of sleep or appear to be under the influence of drugs or alcohol. The officers testified that they read and briefly explained the advice of rights form to defendant; defendant acknowledged that he understood it, signed the form, and, without promise or threat, waived his Fifth and Sixth Amendment rights and gave his statements.

Defendant testified contrarily. According to defendant, on the night of his arrest, he was placed in a small room where an unspecified officer tried to interrogate him. Defendant testified that he refused to answer the officer's questions and invoked his Sixth Amendment right to have counsel present during questioning and that no counsel was provided. After this attempted questioning, defendant testified that he was moved to a single-person cell, did not sleep much, and was held without food or drink until the June 8th interrogation. Further, during this time, defendant alleged that the police repeatedly refused to let defendant use the telephone. At the June 8th interrogation, defendant testified that he again invoked his Sixth Amendment right to counsel, which was ignored by the officers, and that he did not fully understand the advice of rights form even after an officer "somewhat" explained the form. Ultimately, defendant testified that he did not want to write out the inculpatory statement, but he felt pressured into doing so.

Defendant's testimony also revealed that defendant had a ninth-grade formal education and an adult criminal record with one felony possession of cocaine charge.

(…continued)

[2] Reportedly, 800-900 square feet.

Based on this testimony and evidence offered by the witnesses, the trial judge found the inculpatory statements to have been voluntarily given after a knowing and intelligent waiver of rights. Considering defendant's age, experience, education, background, and intelligence, the trial court held defendant had the capacity to understand the warning given to him, the nature of his rights, and the consequences of waiving those rights. The trial judge noted that defendant did not lack the intellect to understand the warnings and his prior experiences with the criminal justice system suggested that he understood the implications of waiving his rights. Ultimately, the trial judge found defendant's testimony to be "simply not credible."

II. SUPPRESSION OF DEFENDANT'S INCULPATORY STATEMENT

A. Standard of Review

This Court reviews a waiver of constitutional rights de novo by considering the totality of the circumstances. *Walker*, *supra* at 338. However, this Court does not disturb a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights unless that ruling is found to be clearly erroneous. *People v Dauod*, 462 Mich 621, 633; 614 NW2d 152 (2000). In determining a defendant's level of comprehension, credibility is crucial and the trial judge is in the best position to make that assessment. *Id.*

B.Analysis

The Fifth and Sixth Amendments protect the right to remain silent and the right to counsel. When in custody, once the right to remain silent is invoked, police must cease questioning, suspend questioning for a significant time, and later re-Mirandize an individual before resuming questioning. *Michigan v Mosley*, 423 US 96, 104-05; 96 S Ct 321; 46 L Ed 2d 313 (1975). However, once the right to counsel is invoked by a suspect in custody, police must cease questioning and cannot resume questioning in the absence of counsel unless the suspect initiates further communication with police. *Edward v Arizona*, 451 US 477, 481-82; 101 S Ct 1880; 68 L Ed 2d 378 (1981). Therefore, if defendant did invoke his right to counsel on June 6th and 8th, did not initiate communication with the police, and was not afforded counsel, as he contends, then his Sixth Amendment right has been violated. However, if defendant waived his rights to silence and counsel, his incriminating statements were properly admitted into evidence.

Whether counsel was ever invoked is a question of fact and ultimately turns on the credibility of testimony offered. "Credibility is a matter for the trier of fact to ascertain. We will not resolve it anew." *People v Vaughn*, 186 Mich App 376; 465 NW2d 365(1990). As stated in *Dauod*, *supra* at 633, the trial judge is in the best position to determine the credibility of proffered testimony. In this case, the judge found defendant's testimony to lack sufficient credibility. This Court finds nothing in the record to leave it with a firm conviction that that was a mistaken conclusion; in other words, the judge's holding is not clearly erroneous.

Whether defendant knowingly, intelligently, and voluntarily waived his Fifth and Sixth Amendment rights must be shown by the prosecution, which bears the burden of establishing a valid waiver by a preponderance of the evidence. *Colorado v Connelly*, 479 US 157, 168; 107 S Ct 515; 93 L Ed 2d 473 (1986). To determine whether defendant waived his Fifth and Sixth Amendment rights, this Court employs a two-pronged inquiry:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. *Moran v Burbine*, 475 US 412, 421; 106 S Ct 1135; 89 L Ed 2d 410 (1986); see also *People v Cheatham*, 453 Mich 1, 14; 551 NW2d 355(1996).

As the trial judge did, this Court examines the "totality of the circumstances surrounding the interrogation" to make these determinations. *Cheatham*, *supra* at 27. This examination includes an evaluation of defendant's "age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his rights, and the consequences of waiving those rights." *Fare v Michael C*, 442 US 707, 725; 99 S Ct 2560; 61 L Ed 2d 197 (1979); see also *Cheatham*, *supra* at 27.

1. Voluntariness Prong

The Voluntariness prong focuses on police conduct to determine whether, considering the totality of all the surrounding circumstances, "the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self determination critically impaired." *People v Cipriano*, 431 Mich 315, 333-34; 429 NW2d 798 (1988).

Ultimately, this issue depends on the credibility of defendant's testimony. The trial judge remains in the better position to determine credibility. Here, the trial judge did not find the defendant's testimony credible. This Court finds nothing in the record to show that holding to be clearly erroneous. Rather, that defendant's codefendant testified during the *Walker* hearing that he was given food and drink on June 6th or 7th justifies the trial judge's conclusion.

2. Knowing and Intelligent Waiver Prong

"[D]etermining whether a suspect's waiver was knowing and intelligent requires an inquiry into the suspect's level of understanding, irrespective of police behavior." *Dauod*, *supra* at 634. The prosecution must show, by a preponderance of the evidence, that defendant understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him. *Id.* at 634, 637. "To waive rights intelligently and knowingly, one must at least understand basically what those rights encompass and minimally what their waiver will entail. The [necessary] mental state . . . involves being cognizant at all times of the State's intention to use one's statements to secure a conviction and of the fact that one can stand mute and request a lawyer." *Id.* at 640-41.

The prosecution showed that defendant was provided an advise of rights form, which disclosed defendant's rights to silence and counsel and explained inculpatory statements could be used against defendant. The prosecution showed that defendant signed the form, waiving his rights. Defendant's own testimony provided that he could read, write, and understand the English language, including every word on the form; that officers "somewhat" broke down the rights contained in the form, namely the right to remain silent and the right to counsel; that he

had a ninth grade formal education; that he had had previous police contacts, evidenced by his adult criminal record; and showed that he was able to competently testifying on his own behalf.

Considering the totality of these circumstances, as the trial judge did, this Court is not left with a firm conviction that a mistake was made; thus, the trial judge's conclusion was not clearly erroneous. Here, we have a defendant that was not a stranger to the criminal justice process who showed competence in his testimony and intelligence. That defendant did not fully comprehend the ramifications of his admission to police does not make his waiver unknowing or unintelligent. "[T]o knowingly waive [Fifth and Sixth Amendment] rights, a suspect need not understand the ramifications and consequences of choosing to waive or exercise the rights that the police have properly explained to him." *Cheatham*, *supra* at 28. "Lack of foresight is insufficient to render an otherwise proper waiver invalid." *Id.* at 29. As the Supreme Court has held, "we have never 'embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness.'" *Connecticut v Barrett*, 479 US 523, 525-526; 107 S Ct 828; 93 L Ed 2d 920 (1987) (citations omitted). Thus, that defendant's choice was unwise or, at least, unlawyerly does not evince that it was not made knowingly and intelligently.

Therefore, this Court holds that the record does not show that the trial judge made a clear error when he determined defendant knowingly, intelligently, and voluntarily waived his Fifth and Sixth Amendment rights. Thus, the admission of defendant's statements into evidence was warranted.

III. SUFFICIENCY OF EVIDENCE

A. Standard of Review

This Court reviews the sufficiency of evidence in a light most favorable to the prosecution to determine whether a rational finder of fact could find that the essential elements of the crime had been proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 225; 380 NW2d 11 (1985).

B. Analysis

Defendant was convicted of participating in a conspiracy to illegally manufacture or possess with intent to deliver 650 grams or more of a mixture containing cocaine, MCL 750.157a, MCL 333.7401(2)(a)(i). A conspiracy is a unlawful agreement between two or more persons to participate in a criminal purposes. *People v Turner*, 213 Mich App 558, 569-570; 540 NW2d 728 (1995), overruled in part on other grounds by *People v Mass*, 464 Mich 615, 627-28; 628 NW2d 540 (2001). To prove a conspiracy, the prosecution must show that defendant had specific intent to combine with others to accomplish an illegal goal. *Id.*

> To prove the intent to combine with others for an unlawful purpose, it must be shown that the intent, including knowledge, was possessed by more than one person. A defendant may become a member of an existing conspiracy if he cooperates knowingly to further the object of the conspiracy, although mere knowledge that someone proposes unlawful action is alone not enough. For intent to exist, the defendant must know of the conspiracy, know of the objective of the

> conspiracy, and intend to participate cooperatively to further that objective. *Id.* (citations omitted).

Construing the record in a light most favorable to the prosecution, this Court finds that a rational fact finder could have found every element of the conspiracy charge met beyond a reasonable doubt. According to defendant's admission, he was hired to act as lookout during cocaine processing on the night of June 6th. Further, defendant admitted that he packaged a bag or two of cocaine for sale. Defendant's admissions suggest that he cooperated with others to further an unlawful goal, namely, protecting a cocaine processing and distribution operation. Defendant then knew of the conspiracy after being recruited, knew the nature of the operation, and cooperated by bagging the cocaine and protecting the operation by acting as lookout. Any reasonable trier of fact could find that this record sufficed to show that the essential elements of the crime of conspiracy were met beyond a reasonable doubt.

This conclusion remains unchanged even though the jury refused to return a guilty verdict for defendant's second charge, illegally manufacturing or possessing 650 grams or more of a mixture containing cocaine with intent to deliver, MCL 333.7401(2)(a)(i). Defendant contends that because the jury found that defendant had not manufactured or possessed 650 plus grams of cocaine, he could not be found guilty of conspiring to do the same. Implicit in this argument is a challenge to the jury's rationality. However, this Court reviews sufficiency of evidence challenges by examining the record to determine whether *any* rational trier of fact could have concluded that defendant conspired beyond a reasonable doubt irrespective of those charges for which defendant was acquitted. This record evinces sufficient evidence for a rational trier of fact to conclude that defendant conspired beyond a reasonable doubt. Therefore, defendants' conviction is based on sufficient evidence.

IV. CRUEL AND UNUSUAL PUNISHMENT

A. Standard of Review

Constitutional questions are reviewed de novo. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996).

B. Analysis

Defendant contends that his sentence of twenty to forty years is cruel and unusual punishment because it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-36; 461 NW2d 1 (1990). The principle of proportionality requires that sentences must be proportionate to the seriousness of the crime committed. *Id.* The sentence imposed on defendant was the statutory minimum. Statutory sentencing guides are presumptively proportional. *People v Williams*, 189 Mich App 400, 404; 437 NW2d 727 (1991).

> MCL 769.34(2)(a) provided, in pertinent part:
> If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute.

The conspiracy statute upon which defendant was convicted, MCL 750.157a, provides, in pertinent part, "the person convicted under this section shall be punished by a penalty equal to that which could be imposed if he had been convicted of committing the crime he conspired to commit." MCL 750.157a(a). Therefore, defendant was punished under MCL 333.7401 that, at the time of defendant's acts (the basis for his conviction),[3] provided that one, like defendant, found guilty under MCL 333.7401(2)(a) was punishable by life imprisonment or any term of years *not less than* twenty. Thus, defendant was given the statutory minimum for his involvement in the cocaine processing and distribution conspiracy.

The trial judge did not abuse his discretion when imposing this sentence, despite the fact that the Michigan Department of Corrections Bureau of Probation's pre-sentence investigation report suggested that defendant only receive forty to seventy months for his involvement. Rather, the trial judge was following a legislative mandate.

MCL 769.34(2)(a) provides that if a statute requires a minimum sentence, that the court will impose that minimum sentence. Further, MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

Defendant has not claimed nor has this Court found any error in scoring the sentencing guidelines or that the trial court relied on inaccurate information to determine defendant's sentence. Therefore, this Court is under a legislative mandate to uphold defendant's sentence.[4]

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper

---

[3] Pub Acts 2002, No 665, effective December 25, 2002, amended the statute and removed the statutory minimum. According to MCL 769.34(2), the sentence is measured by the date of the crime's commission; therefore, Pub Acts 2002, No 665 does not apply to this case.

[4] Our Supreme Court has recently upheld this mandate as a constitutional delegation of power. *People v Gazar*, 469 Mich 431, 670 NW2d 662 (2003).