

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD WILSON,

Defendant-Appellant.

UNPUBLISHED

November 28, 2006

No. 262725

Wayne Circuit Court

LC No. 04-004332

Before: Wilder, P.J. and Kelly and Borrello, JJ.

PER CURIAM.

Defendant was charged with perjury under MCL 750.423 and two counts of misconduct in office under MCL 750.505. Following a bench trial before visiting Judge John O’Hair, defendant was convicted of perjury, but acquitted of the misconduct in office charges. Defendant filed a motion for a new trial, which was heard by Judge Leonard Townsend who denied the motion. Defendant was thereafter sentenced to one year’s probation for the perjury conviction. Defendant appeals his conviction as of right. We affirm.

Defendant argues that Judge Townsend abused his discretion in denying defendant’s motion for a new trial because the verdict was against the great weight of the evidence. We disagree. We review a trial court’s ruling on a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

In reviewing a motion for a new trial, the test is whether the evidence “preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). Absent exceptional circumstances, issues of witness credibility are left with trier of fact whether that is a jury or judge. *Id.* at 642-646; MCR 2.613(C).

According to MCL 750.423,

Any person authorized by any statute of this state to take an oath, or any person of whom an oath shall be required by law, who shall wilfully swear falsely, in regard to any matter or thing, respecting which such oath is authorized or required, shall be guilty of perjury [*People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005), quoting MCL 750.423.]

Defendant, a lieutenant in the Detroit Police Department, contends that the record is devoid of evidence that he swore falsely to facts that he knew, at the time of the swearing, were false. Specifically, he asserts that the evidence shows that he had no way of knowing that no undercover officer had gone into the raid site, Club Fabulous, and he relied on statements made by his subordinates when he signed and swore to the contents of the search warrant affidavit.

The evidence demonstrates that after reviewing the warrant defendant sent him, assistant prosecutor, Robert Spada, told defendant to send in undercover officers. Defendant replied that he was sending someone in "right now." Defendant called Spada back thirty minutes later stating that he sent someone in, and the club was up and running. Defendant faxed Spada an addendum to the warrant indicating that undercover Officer Anthony Jones went into Club Fabulous, paid a cover charge, saw alcohol being consumed, and smelled the strong odor of marijuana. Spada testified that he would not have authorized the warrant to go to the magistrate without the addendum stating that an undercover officer went in and observed the activity.

The magistrate judge testified that he declined the warrant when it was first faxed to him because it relied on stale information. The judge only authorized the warrant after receiving the addendum. He swore defendant in over the phone regarding the truth of the contents of the affidavit.

Sergeant Raymond Williams testified that when defendant began writing the addendum, he wanted to list Williams as the undercover officer. But Williams told defendant that the only officers unknown to the club operator were Anthony Jones and Marie Foster. Defendant chuckled and wrote that Jones was undercover officer.

Jones testified that he was not asked to go into any establishment as an undercover officer the night in question, but he did participate in the raid of Club Fabulous. Defendant later instructed Jones to fill out a preliminary complaint report (PCR) indicating that he conducted an undercover operation, but Jones refused to write the false PCR.

Sergeant Esther Lightfoot verified that no undercover operation was mentioned at the briefing before the raid, she would have known if an undercover operation had occurred, nobody talked about preparing for an undercover operation, she did not see any officers in undercover clothing, and the undercover car was in her sight the entire time she was at the staging area.

Officer Carnelle Humphries testified that he was never instructed to conduct an undercover operation, but he did participate in the raid. Humphries did not believe that any undercover operation took place at Club Fabulous before the raid. After the raid, defendant called Humphries into his office, handed him the search warrant with Jones's name on it, and told him to have Jones fill out a PCR indicating that Jones conducted an undercover operation. Humphries did as he was told. Jones went to defendant's office, and returned to Humphries telling him to go see defendant. Defendant told Humphries to fill out a PCR indicating that he was the undercover officer. When Humphries objected, defendant told him that he had to work as a team player or defendant would have to do what was necessary to get everybody working as a team. Humphries completed the PCR, using the information in the search warrant. Humphries later told Lightfoot about the PCR because he knew what he had done was wrong and wanted to get the paperwork corrected.

Despite the inconsistent evidence cited by defendant, viewing the evidence as a whole, it does not weigh so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. The evidence demonstrates that defendant swore to the magistrate over the phone regarding the truth of the contents of the affidavit. The evidence also demonstrates that defendant knew the contents of the affidavit were false at the time he swore to them. Because exceptional circumstances do not warrant otherwise, we leave witness credibility to the trier of fact, Judge O'Hair. To the extent that Judge Townsend made credibility determinations in deciding the motion for new trial despite not having viewed the witnesses, this had no prejudicial effect when his credibility assessment agreed with Judge O'Hair's. Judge Townsend did not abuse his discretion in denying defendant's motion for a new trial.

Defendant also contends that, pursuant to MCR 6.440, Judge O'Hair should have heard his motion for a new trial because Judge O'Hair was not disabled or otherwise unable to hear the motion. We disagree. Failure to comply with MCR 6.440 does not entitle a defendant to reversal unless he can establish prejudice. *People v Bell*, 209 Mich App 273, 275; 530 NW2d 167 (1995). Because there was no error in the denial of defendant's motion for new trial, defendant cannot establish that he was prejudiced by Judge Townsend hearing the motion.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello