STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0552

State of Minnesota,
Respondent,

vs.

Travis Richard Hopp,
Appellant.

Filed February 10, 2014
Affirmed in part, reversed in part, and remanded;
motion granted.
Peterson, Judge

Renville County District Court
File No. 65-CR-11-250

Lori Swanson, Attorney General, St. Paul, Minnesota; and

David Torgelson, Renville County Attorney, Glen M. Jacobsen, Assistant County Attorney, Olivia, Minnesota (for respondent)

John E. Mack, Mack & Daby P.A., New London, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Peterson, Judge; and Ross, Judge.

U N P U B L I S H E D O P I N I O N

PETERSON, Judge

In this appeal from his convictions of possession and sale of a controlled substance, appellant argues that the district court erred by refusing to suppress evidence

or dismiss the charges against him. Appellant also contends that the prosecutor engaged in vindictive prosecution and challenges the sufficiency of the evidence to sustain his conviction for sale of a controlled substance. We affirm appellant's conviction for possession of a controlled substance, reverse his conviction for sale of a controlled substance, and remand this matter to the district court for sentencing.

FACTS

In February 2011, appellant Travis Richard Hopp was stopped for driving after cancellation. Appellant told police that he had information about drug sales that he would be willing to share with law-enforcement officials if that would result in a reduction or dismissal of the driving-after-cancellation charge. Officer Andrew Erlandson of the Hutchinson Police Department, who was assigned to the Southwest Metro Drug Task Force (SMDTF), spoke to appellant about assisting SMDTF as a cooperating individual (CI). Appellant agreed to participate in three controlled drug purchases in return for Erlandson's recommendation that the traffic charge be dismissed. Appellant and Erlandson signed a document titled, "Cooperating Individual Agreement," which set forth the terms of their agreement. The terms of the agreement included that appellant would have "no police power under the State of Minnesota or any local government subdivision" and that his "association with the Task Force [would] not afford [him] any special privileges."

Erlandson testified that CIs are instructed that they may not use narcotics, even to aid an investigation, and that they are coached about ways to avoid using drugs without raising suspicions. Appellant confirmed this in his testimony.

Erlandson described the procedure that SMDTF follows for every controlled purchase involving a CI. A CI either volunteers a target name or Erlandson asks a CI to approach a named individual. After contact is made, Erlandson meets with and searches the CI and the CI's vehicle for contraband. The CI is given a recording device and purchase money that has been identified for tracking purposes. While under surveillance by Erlandson and a team of at least three officers, the CI approaches the targeted individual and makes a purchase. Next, the CI meets with the team, delivers the drugs and any leftover purchase money, is searched for contraband, and provides a tape-recorded debriefing.

Appellant participated in two controlled purchases in February 2011 and one in August 2011, which satisfied his agreement with Erlandson. After the August 2011 purchase, Erlandson did not arrange another controlled purchase for appellant, although appellant could have been asked to do more controlled purchases in exchange for payment. Erlandson spoke by telephone with appellant in September 2011, but during those calls he did not arrange for appellant to make a controlled purchase.

On September 16, 2011, Renville County patrol sergeant Douglas Best went to a house in the city of Hector, seeking information about a fugitive. The fugitive's ex-wife, K.M., lived at the house. Best was able to see into the interior of the house and saw appellant, "smoking out of a glass smoking pipe." Based on his training and experience, Best assumed that appellant was smoking some kind of narcotic, either methamphetamine or crack cocaine. As Best watched, appellant inhaled and blew out a "large puff of white

smoke." When Best knocked on the door, he saw appellant drop his hand "down quickly to the right."

K.M. answered the door and denied having any knowledge about her ex-husband. Best told her that he saw someone in her house smoking meth and that he wanted to speak to that person. After he followed K.M. into the house, Best told appellant that he saw him smoking meth and, as he spoke to appellant, Best noticed the end of a glass pipe sticking out from underneath a coat. Best arrested appellant because he saw him smoking a controlled substance. Best searched appellant and found a pill bottle that contained a baggie with methamphetamine, an orange cylinder with several baggies that contained methamphetamine, a black pouch that contained five baggies with methamphetamine and some drug paraphernalia, and $403 in cash. The total weight of the methamphetamine found was 7.2 grams. Appellant denied that the drugs were his and asserted that he was trying to set up a controlled purchase.

The state subpoenaed as witnesses some people whose names were on a handwritten list of possible investigative targets that appellant had provided to Erlandson. The state explained that it intended to use these people as rebuttal witnesses. In letters to the potential witnesses, the state wrote, "If you wish to defend yourself against [appellant's] allegation that you are a seller of meth and that he was trying to assist law enforcement in making a case against you, you are invited to attend court and testify." The state included a subpoena with this letter. At trial, the state sought to introduce the handwritten list of names; the district court sustained appellant's objection on relevance grounds.

The jury convicted appellant of one count of second-degree sale of a controlled substance, in violation of Minn. Stat. § 152.022, subd. 1(1) (2010), and one count of second-degree possession of a controlled substance, in violation of Minn. Stat. § 152.022, subd. 2(a) (1) (Supp. 2011). This appeal followed.

D E C I S I O N

I.

Appellant argues that his conviction must be reversed because (1) the state should be estopped from charging him with a crime that it encouraged him to commit; (2) he is a victim of judicial entrapment for the same reason; and (3) the government's conduct was so outrageous that due process principles bar the government from seeking a conviction. Appellant contends that he was misled into believing that he was acting appropriately by continuing his investigation into drug dealing in the area and that his use of drugs was intended to lull the suspicions of those whom he targeted.

Government estoppel

Equitable estoppel may be used as a defense against the government "if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by the imposition of estoppel." *Ridgewood Dev. Co. v. State*, 294 N.W.2d 288, 293 (Minn. 1980) (quotation omitted). We review the application of equitable estoppel as a question of law. *State v. Ramirez*, 597 N.W.2d 575, 577 (Minn. App. 1999). "[E]quitable estoppel should not be freely applied, but instead should be used only sparingly against the government." *Id.* at 577-78. Generally, equitable estoppel may be applied against the government "only if it committed

affirmative misconduct." *City of Minneapolis v. Minneapolis Police Relief Ass'n*, 800 N.W.2d 165, 176 (Minn. App. 2011) (quotation omitted), *review denied* (Minn. Aug. 24, 2011).

In its second omnibus order, the district court concluded that appellant could not use government estoppel as a defense. The district court noted that government estoppel may be invoked "[w]hen a law enforcement or similar agency advises a person that conduct is legal or permitted" and a person acts in reliance on that advice. 9 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 47:29 (4th ed. 2012). According to this treatise, the defense requires an official statement or act by a government agent that a person relies on in good faith. *Id.* The district court concluded that because appellant was not operating under the usual SMDTF procedures and guidelines when he went to K.M.'s house, there was not an "official, 'authoritative' statement or act" on which appellant relied. The district court's conclusion that appellant was not relying on an authoritative statement that would provide a government estoppel defense to his convictions is not erroneous.

Entrapment

In an argument related to his government estoppel claim, appellant asserts that he was entrapped by the government because he was encouraged to possess drugs and then prosecuted for possessing drugs. Entrapment occurs when "the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation, or inducement lured into the commission of a criminal act." *State v. Grilli*, 304 Minn. 80, 88, 230 N.W.2d 445, 451

(1975) (quotation omitted). To evaluate whether a person has been entrapped, we examine whether the government initiated the criminal conduct and whether the defendant was predisposed to commit the crime. *Id.* at 96, 230 N.W. 2d at 456. The defendant has the burden of raising the issue of entrapment by a preponderance of the evidence; the state must prove beyond a reasonable doubt that the defendant was predisposed to commit the crime. *Id.*

The district court concluded that appellant failed to raise the issue of entrapment by a preponderance of the evidence. The court stated, "The incident in question was . . . created and conducted solely at the initiation and discretion of [appellant]. To the extent that the defense may apply, the [c]ourt concludes the [s]tate [has] proven beyond a reasonable doubt that [appellant] was predisposed to commit the crime charged."

The district court's conclusion is not erroneous. On the date of the offense, appellant was acting on his own initiative, and he acknowledged that he was not acting under the procedures that applied to his earlier controlled buys. Thus, the state did not initiate the conduct.

Due process

Appellant argues that the government's conduct was "so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." *See* 9 *Minnesota Practice* § 47:25(C) (quoting *United States v. Russell*, 411 U.S. 423, 431-32, 93 S. Ct. 1637, 1643 (1973)). Appellant contends that the following conduct was outrageous: (1) unlike the U.S. Attorney General's Office, which has a detailed protocol for using confidential informants, the SMDTF relies on a two-

page contract that fails to describe all contingencies; (2) nothing in Minnesota law permits a CI to make a purchase of a controlled substance, so each CI is forced to act illegally; (3) paying a CI to perform an illegal act contravenes state statutes against bribery and taints convictions obtained in this manner; (4) appellant was contractually obligated to testify against K.M., but the county instead charged him with a crime; and (5) appellant was unable to discern the limits of permissible conduct.

We recognize that the SMDTF contract does not cover every contingency and that Minnesota statutes or rules do not expressly permit or prohibit controlled drug purchases made by a CI.[1] Had appellant been operating within the parameters of his contract with SMDTF, a due process question might have arisen. But because appellant was not acting in accordance with the SMDTF contract, due process concerns are not implicated.

Citing *Williamson v. United States*, 311 F.2d 441, 444 (5th Cir. 1962), appellant argues that convictions based on testimony for which a contingent fee is paid must be vacated. But *Williamson* was rejected by *United States v. Cervantes-Pacheco*, 826 F.2d 310, 315 (5th Cir. 1987), which stated that contingent-fee arrangements affect the weight of the testimony, but are not subject to a per se exclusionary rule.

Finally, appellant relies on *State v. Glosson*, 441 So. 2d 1178, 1178-79 (Fla. Dist. Ct. App. 1983), in which the court affirmed the district court's dismissal of a two-count information based on testimony from a witness who was to receive a contingent fee based

[1] The practice is recognized in and approved of by case law. *See State v. Ward*, 580 N.W.2d 67, 71 (Minn. App. 1998) (setting forth definition and parameters of term "controlled purchase" and describing it as a "term of art"); *see also State v. Ross*, 676 N.W.2d 301, 304 (Minn. App. 2004) (stating that a "controlled purchase" in a narcotics case was an indication of a CI's reliability).

on the value of civil forfeitures that resulted from convictions. But in *Williams v. State*, 304 Ark 279, 281-82, 801 S.W.2d 296, 297 (1990), the Arkansas Supreme Court noted that *Glosson* differed from most cases in which an informant's fee is paid because the fee was based on forfeitures resulting from criminal convictions and Florida was the only state that held that use of contingent-fee informants violates due process. No evidence in the record suggests that appellant was to be paid a contingent fee.

Appellant has not set forth outrageous conduct by the state that offends due process principles, and the district court did not err by refusing to suppress evidence.

II.

Appellant argues that the prosecutor engaged in vindictive prosecution by subpoenaing witnesses from a list of possible drug dealers that he provided to Erlandson. The prosecutor explained that he intended to call these people as rebuttal witnesses to refute appellant's claim that he was working for the SMDTF when he went to K.M.'s house.

Prosecutorial vindictiveness occurs when a person is punished "because he has done what the law plainly allows him to do." *United States v. Goodwin*, 457 U.S. 368, 373, 102 S. Ct. 2485, 2488 (1982). A presumption of vindictiveness arises when, after trial, a defendant successfully challenges his conviction, and the prosecution brings new, more-serious charges. *Id.* at 375-76, 102 S. Ct. at 2490; *see also Bordenkircher v. Hayes*,

434 U.S. 357, 362-63, 98 S. Ct. 663, 667-68 (1978).[2] The Supreme Court has concluded that "[t]here is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting." *Goodwin*, 457 U.S. at 381, 102 S. Ct. at 2492. The Minnesota Supreme Court agreed with this conclusion. *Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006) (stating that there is no presumption of prosecutorial vindictiveness in pretrial prosecutorial decisions).

Generally, a claim of prosecutorial vindictiveness focuses on the prosecutorial charging function. *See Goodwin*, 457 U.S. at 375-76, 102 S. Ct. at 2490; *Bordenkircher*, 434 U.S. at 362-63, 98 S. Ct. at 667-68; *Cuypers*, 711 N.W.2d at 104; *State v. Pettee*, 538 N.W.2d 126, 132-33 (Minn. 1995); 9 *Minnesota Practice* § 47:54. When there is no presumption of prosecutorial vindictiveness, the defendant bears the burden of proof. *Pettee*, 538 N.W.2d at 133. If a defendant raises such a claim, the prosecutor may offer a reasonable explanation for his charging decision that negates the appearance of vindictiveness. *See Hardwick v. Doolittle*, 558 F.2d 292, 301-02 (5th Cir. 1977) (balancing due process rights of defendant against prosecutor's discretion). Nothing in this record suggests that the state engaged in vindictive charging.[3]

[2]But in *Bordenkircher*, the Supreme Court held that a prosecutor could, without being vindictive, threaten to impose additional charges during the course of plea negotiations. *Id.*

[3]Appellant did not raise the issue of prosecutorial misconduct, as opposed to prosecutorial vindictiveness; when a party makes no argument and cites no legal authority in support of an issue, we deem it waived. *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002).

III.

Appellant argues that the evidence was insufficient to prove that he intended to sell a controlled substance. Appellant was convicted of unlawfully selling "one or more mixtures of a total weight of three grams or more containing . . . methamphetamine." Minn. Stat. § 152.022, subd. 1(1). "Sell" is defined as "(1) to sell, give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture; or (2) to offer or agree to perform an act listed in clause (1); or (3) to possess with intent to perform an act listed in clause (1)." Minn. Stat. § 152.01, subd. 15a (2010). Appellant asserts that the circumstantial evidence suggests that he possessed methamphetamine for personal use and is insufficient to sustain his conviction for sale of methamphetamine.

Intent to sell a controlled substance "typically is proved with circumstantial evidence." *State v. Porte*, 832 N.W.2d 303, 309 (Minn. App. 2013). Circumstantial evidence receives stricter scrutiny. *State v. Hanson*, 800 N.W.2d 618, 622 (Minn. 2011). When an appellate court reviews a conviction based on circumstantial evidence, it first identifies the circumstances proved and defers to the jury's acceptance or rejection of evidence in support of the circumstances proved. *Id.* An appellate court defers to the jury's assessment of credibility and how much weight to give to witness testimony. *Id.*

Having determined which circumstances were proved, an appellate court independently reviews "the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with a hypothesis other than guilt," without deference to the fact finder. *Id*. (quotation omitted). "Circumstantial evidence

must form a complete chain that, as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt." *Id.*

The jury found that appellant possessed the drugs and money discovered by Best, and the jury rejected appellant's explanation that an unnamed individual in K.M.'s house slid the black bag that contained the drugs across the floor. This court must examine the inferences that can be drawn from these circumstances.

There is no evidence in the record before us that leads so directly to the conclusion that appellant intended to sell the 7.2 grams of methamphetamine that he possessed as to exclude beyond a reasonable doubt any reasonable inference other than that appellant intended to sell. No witness testified about the amount of methamphetamine that is commonly associated with personal use or that 7.2 grams is wholly inconsistent with personal use.

We are aware that possession of a large quantity of individually packaged narcotics raises a suspicion of intent to sell. *See Hanson*, 800 N.W.2d at 623 (defendant convicted of intent to sell based on possession of 100 empty plastic bags, 12 grams of methamphetamine, and tools for cutting, mixing, and manufacturing meth); *Porte*, 832 N.W.2d at 310 (defendant convicted of intent to sell based on possession of 50 individually wrapped packages of crack cocaine). But the evidence here is not as compelling as the evidence in *Hanson* and *Porte*, and, in the absence of evidence to the contrary, it is not unreasonable to infer that appellant possessed the 7.2 grams of methamphetamine for personal use. We therefore reverse appellant's conviction of second-degree sale of a controlled substance. Because appellant was also convicted of

second-degree possession of a controlled substance, we remand this matter to the district court for sentencing purposes.

IV.

Respondent moved to strike appellant's confidential appendix and any reference to the confidential appendix in appellant's brief. The "confidential appendix" is in an envelope that was included with each copy of appellant's appellate brief, and consists of a letter written by one of the jurors to the district court a week after the verdict was entered. The letter is not included in the district court file. "The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01; *see also* Minn. R. Crim. P. 28.02, subd. 8. The document contained in appellant's "confidential appendix" is not a part of the record, as defined by the rules.

"[I]f an allegation is outside of the record, it must be disregarded." *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). We, therefore, grant respondent's motion and order appellant's "confidential appendix" and any references to it in appellant's brief stricken from the appellate record.

Affirmed in part, reversed in part, and remanded; motion to strike granted.