IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT KNOXVILLE

JULY SESSION, 1997

STATE OF TENNESSEE,)
) No. 03C01-9701-CC-00031
Appellee,)
) Blount County
vs.)
) Hon. D. Kelly Thomas, Jr., Judge
)
) Possession of Marijuana with
DAVID SPRADLIN,) Intent to Sell and Delivery; Simple
) Possession of Marijuana
Appellant.)

For the Appellant:

David M. Shepherd
404 Ellis Avenue
Maryville, TN 37804
(at trial and on appeal)

For the Appellee:

Charles M. Burson
Attorney General and Reporter
and
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Philip H. Morton
Asst. District Attorney General
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OPINION FILED: _____

AFFIRMED

L. T. Lafferty
Special Judge

O P I N I O N

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Danny Spradlin appeals his conviction for two charges of Possession With Intent To Sell Marijuana, Tenn. Code Ann. §39-17-417 and his conviction for Possession of Marijuana less than one half ounce, Tenn. Code. Ann. §39-17-418.

The factual basis of these charges and convictions is extensively contested. The appellant raises four grounds for appellate consideration. First, the appellant contends that these charges are barred by the double jeopardy clause of the United States and Tennessee constitutions because the State engaged in prosecutorial misconduct by prosecuting the appellant in violation of a plea bargain agreement to which the appellant provided information and services. Second, the appellant contends that the trial court erred in failing to allow testimony at the trial regarding the plea bargain negotiations and agreement by a police officer, thereby depriving the appellant of vital evidence in support of his defense of entrapment. Third, the appellant contends that the trial court's action in prohibiting proof of the plea agreement violated his right to obtain compulsory process for witnesses in his favor. Finally, the appellant contends that the trial court erred in failing to grant him an alternative probation.

After carefully reviewing the record we find that the trial court properly applied the applicable law and that the judgments of conviction in each of the charges should be affirmed, as well as the imposed sentences.

Mr. Spradlin is a person of some notoriety in Bledsoe County. He is a former football player at the University of Tennessee and continued his sports exploits as a professional football player for several years. In October, 1991 Mr. Spradlin was in a local bluegrass band and was introduced to Mr. Cravens by a mutual friend, Shannon Criscillis. During the evening Cravens obtained marijuana from Spradlin through Criscillis. Cravens was employed in another job by law enforcement officials in Bledsoe and Sevier counties and was working on this occasion as an undercover agent for the police. After this initial encounter Mr. Cravens began to contact Spradlin directly seeking to buy marijuana. She later was successful in buying marijuana on three separate occasions, November 11, 1991, November 14, 1991 and December 2, 1991. On December 11, 1991 the appellant was arrested on charges of Distribution of Marijuana of less than one half ounce, Tenn. Code Ann. §39-17-418 with respect to the November sale. The appellant hired an attorney and on January 9, 1992 he pled guilty to this charge and was fined $150 and given a suspended jail sentence of 11 days with unsupervised probation. At the time of this plea the appellant's attorney was informed by police officers that they could charge the appellant with three additional drug related charges. These police officials advised the appellant that if he would set up and undercover illegal steroid purchases that they would not bring these charges against him. This information was not presented as a part of the plea in the General Sessions Court nor was the District Attorney contacted concerning such an agreement. The appellant thereafter acted as an undercover agent and made three steroid purchases for the authorities before his identity was compromised and he ceased his undercover activities. Apparently other initially arrested in December 1991, but the appellant's motor vehicle and his girlfriend's motor vehicle were seized. In February both vehicles were returned after one of the steroid purchases were made. These

not to be returned in consideration for the appellant's actions in cooperating with and proceeding to the police. On August 4, 1993 the appellant was indicted on three counts of various transactions leading ultimately to the convictions for our consideration.

The first issue is the appellant's claim of prosecutorial misconduct in prosecuting the appellant in connection with an agreement with the police not to prosecute him if he acted as an undercover informant.

Tennessee has only recently accepted the view that immunity agreements are enforceable when entered by the prosecutor under principles of contract law and fundamental fairness. State v. Partington, ___ S.W.2d ___ (Tenn. 1995). Previously, Lance v. State, 181 S.W.2d 511, 511 (Tenn.1951) stood for the proposition that since there was no statutory authorization for immunity agreements, they were unenforceable in Tennessee law. The Lance case dealt with an alleged agreement between a police officer and the defendant. Partington overrules Lance insofar as it concerns agreements between the prosecutor and the defendant but does not alter previous Tennessee law in respect to agreements with the police by the accused.

The Partington court points out that plea agreements have traditionally been treated as contracts and are enforceable once the condition precedent is met; that is, once the trial judge accepts the agreement. See also State v. Sweet, 781 S.W.2d 293, 295 (Tenn.Crim.App.1989); Lindsey v. State, 888 S.W.2d 793, 795 (Tenn.Crim.App.1994). The Court concluded that there is no substantial difference between a plea agreement and an immunity agreement between one accused and the prosecutor.

A criminal accused, such as Mr. Spradlin, who cooperates as an informer and reports to the police is entitled to enforce an agreement that will improve a long pending criminal charge under the agreement is accepted as a part of a plea agreement or is an agreement with the prosecution. As in this case, such an accused person acts at his or her own peril without such an agreement. The record does not support a claim of prosecutorial misconduct in pursuing the prosecution of the appellant.

The appellant next contends that this prosecution is barred by the double jeopardy provisions of the U.S. Constitution[1] and the Tennessee Constitution.[2] Double jeopardy provisions of the federal and state constitutions protect defendants against prosecution for the same offense after acquittal or conviction and against multiple punishments for the same offense. Brown v. Ohio, 432 U.S. 161, 165 (1977). In order to raise a double jeopardy objection it is further required that the defendant must have been previously placed in jeopardy on the charge. State v. Todd, 654 S.W.2d 399, 401 (Tenn. 1983); Lindsey v. State, 888 S.W.2d 793, 795 (Tenn.Crim.App.1994); Serfass v. United States, 420 U.S. 377, 388, (1975). The entry of a plea

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[1] U.S. Const. amend. V; the double jeopardy clause contained in the fifth amendment is enforced against the states through the fourteenth amendment. Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969).

[2] Tenn. Const. art. I, § 10.

of guilty in and of itself is not a bar to a subsequent prosecution for the same or higher offense without some judicial action upon the plea. State v. Sluder, 493 S.W.2d 467, 470 (Tenn. 1973), cert. denied, 414 U.S. 876, (1973). If the rule were otherwise, jeopardy would attach at every plea inquiry and the court would be bound to accept every plea agreement submitted to it. Todd, 654 S.W.2d at 381; State v. Mackey, 553 S.W.2d 337 (Tenn. 1977). Since this agreement was never presented to a court of competent jurisdiction and acted upon, jeopardy never attached and no double jeopardy bar exists. This assignment is overruled.

We will consider the appellant's second and third assignments of error together as they relate to the same factual issues. The appellant contends that the trial court erred by failing to allow testimony concerning the plea bargain negotiations and agreement, thereby depriving the appellant of evidence in support of the defense of entrapment. He further contends that his right of compulsory process for a witness in his favor was denied by the court's failure to allow Blount Metro Narcotics Unit officer Tom Hatcher to testify as to these plea negotiations and agreement.

Entrapment provides one who commits a criminal act a defense when his illegal conduct is the result of undue inducement or persuasion by law enforcement officials.[3] The focus of the inquiry is as to the conduct of the government's agents at or near the time of the criminal act which persuades an otherwise unwilling person to commit an unlawful act. Assuming that a plea agreement was discussed for the disposition of these cases, that discussion did not occur until January, 1993 when the appellant entered his plea to misdemeanor distribution of marijuana. These police inducements would be relevant to the issue of entrapment if the appellant was being prosecuted for illegal trafficking in steroids as a result of his conduct in February and March of 1993, but would be completely irrelevant to his criminal conduct in November and December of 1992.

The trial court's denial of the appellant's request to present officer Tom Hatcher as a witness before the jury concerning the plea bargain agreement was not a violation of the appellant's right to obtain
compulsory process for a witness in his favor.[4] This right is guaranteed under both the U.S. Constitution and Article 1 Section 9 of the Tennessee Constitution. The right to compulsory process extends only to competent, material, and resident witnesses whose expected testimony would be admissible. Bacon v. State, 385 S.W.2d 107, 109 (Tenn. 1964).

Officer Hatcher's testimony concerning a plea bargain agreement in January, 1993 would not be relevant to the issue of entrapment for criminal conduct which occurred in the previous year.

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"It is a general rule of criminal practice and procedure, entrapment occurs when law enforcement officials, acting either directly or through an agent, induce or persuade an otherwise unwilling person to commit and unlawful act; however, where a person is predisposed to commit an offense, the fact that the law enforcement officials or their agents merely afford an opportunity does not constitute entrapment." State v. Jones, 598 S.W.2d 209, 221 (Tenn. 1980)

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U.S. Const. Amend. VI; the Compulsory Process Clause contained in the Sixth Amendment is enforceable against the states through the Fourteenth Amendment. Washington v. Texas, 388 U.S. 14 (1967).

Tennessee Rule of Evidence 401 defines relevant evidence as evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Chandler's understanding of any such agreement or the agreement's provides no basis for finding that an entrapment defense exists for the appellant. Assignments of error two and three are therefore overruled.

Finally the appellant complains that the trial court erred in failing to sentence him to an alternative probation. The appellant was convicted and sentenced as a Standard Offender, Range I, for two Class E felonies and one misdemeanor. He received a one (1) year sentence on each of the felony convictions for possession of marijuana with the intent to sell or deliver pursuant to Tenn. Code Ann. §39-17-417 and another one-half year sentence for his conviction of possession of less than one-half ounce of marijuana pursuant to Tenn. Code Ann. §39-17-418. These sentences were to run concurrently and were to be suspended with the exception of the first sixty (60) days which were to be served. The appellant was then to be placed on supervised probation for eleven (11) months and twenty-nine (29) days.

Whenever an appeal raises issues concerning the appropriateness of the trial court's sentencing practices, it is the duty of this court to conduct a de novo review on the record with a presumption that the determinations made by the trial court is correct, Tenn. Code Ann. § 40-35-401(d). When one is convicted of a Class C, D, or E felony and is sentenced as either an especially mitigated offender or standard offender, there is a rebuttable presumption that the accused is a favorable candidate for alternative sentencing unless disqualified by one of the provisions of the law. Tenn. Code Ann. §§ 40-35-102 (5)-(6). However, the appellant has the burden of establishing his suitability for probation in the trial court. Tenn. Code Ann §40-35-303(b).

The record reveals that the trial court considered the presentence report and testimony that was presented. Thereafter, the court found that Mr. Spradlin should only be granted split confinement because of his continued violation of the law by the use of illegal drugs, marijuana, following his guilty plea in January of 1991. Further the court found that Mr. Spradlin demonstrated a lack of acceptance of responsibility for the criminality of his actions. The trial court described this attitude as distain and unamenability for the laws of the United States and those of Tennessee. This last finding is separate in depreciating the seriousness of the offense, Tenn. Code Ann. §40-35-102 (1)(B). Both findings are supported by the record. We conclude that the trial court properly applied the law in sentencing Mr. Spradlin to split confinement.

Therefore, we affirm the conviction and sentence and this matter to the trial court to enforce its judgment and sentence. Costs will be taxed to the Appellant.

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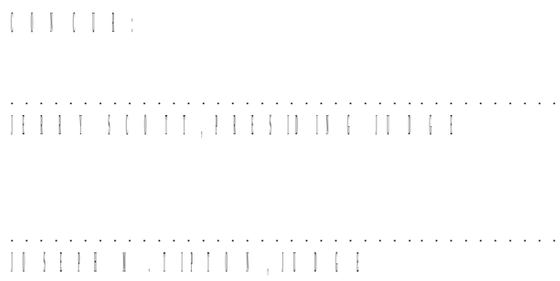
L. T. LAFFERTY,
SPECIAL JUDGE



STATE OF TENNESSEE,

Appellee,

v.

DAVID SPRADLIN,

Appellant.

No. 03C01-9511-CC-00344

Blount County

Honorable D. Kelly Thomas, Jr., Judge

(Possession of marijuana with intent to sell or deliver; Simple possession of marijuana)

CONCURRING OPINION

Although I concur with my colleagues' opinion, I respectfully disagree with its basic conclusion that the agreement in question was unenforceable because it was not approved by the District Attorney's office or the court. I would reverse and remand the case to the trial court for appropriate findings of fact in order to determine if the conditions of the agreement were sufficiently complied by the defendant, if the agreement was materially breached, or if the agreement was otherwise materially altered by subsequent events.

The defendant was charged in the Blount County General Sessions Court with one count of simple marijuana possession and represented by counsel. Blount County Drug Narcotics Unit agents advised the defendant's attorney that they had evidence that the defendant was involved in other marijuana sales to an undercover agent. At that time, there were no charges pending for those sales.

The attorney testified that the agents agreed that if the defendant would assist in developing cases, illegal narcotics being discussed in particular, charges would not be placed against the defendant. The attorney

also testified that an agreement was reached and that the defendant pled guilty to the misdemeanor charge. Neither the agents nor the attorney advised the District Attorney's office about the agreement. At this point, the attorney ceased to represent the defendant.

Four days later, the defendant and his parents met with the agents and signed a "Statement of Confidential Source" that stated that in exchange for "no arrest charges," the defendant would work with the agents and act as a confidential informant for the federal Drug Enforcement Administration in making three controlled buys before the defendant's misdemeanor matter was apparently to be presented in another case in Dane County. The record does not reflect how the case proceeded.

In the motion to dismiss hearing, there was conflicting testimony as to the particular details about the agreement, whether the agreement was fulfilled, and whether the agreement was altered in order that the defendant's only benefit was the return of his car that had been seized at his initial arrest. However, a great deal of time was helped that he did not tell the District Attorney about the cooperation until the time of the defendant's initial arrest in the present case. Although the trial court accredited the defendant's testimony that he believed he was doing the work for the charges not to be brought, its findings of fact are otherwise limited because specific findings were unnecessary once the trial court concluded that the District Attorney had no power to enter into a promise before it was enforceable.

In Eaton v. Lovington, 117 S.W.2d 401, 401 n.1 (Tenn.1938), an unpaid counsel encountered the same case the issue of "whether agreements entered into by a police officer and a defendant are enforceable." This appears to be the latter case, except we deal with a police officer and a person not yet charged as a defendant who made an agreement for the person to work undercover in order that charges not be brought. Given the extensive use of cooperating informants by law enforcement and the interests favoring informing our courts, through undercover operations and other means, I do not believe that the intervention of the District Attorney is necessary in every case to render a working agreement enforceable to the benefit of the

cooperating individual.

In the present case, the best evidence of an agreement existing between a police officer and the defendant is the "Statement of Confidential Source" that was signed by the defendant and Agent Allen. This form outlines certain prerequisites regarding the limited immunity's existence and if Agent Allen confers with the Limited Immunity's office before he signed it. Agent Allen even acknowledged that the form reflected an agreement.

However, as previously noted, there are questions left unanswered regarding the extent of the agreement, the extent of the defendant's compliance with the material conditions of the agreement, and the extent, if any, to which the agreement was materially modified. Therefore, I would not conclude that the ongoing verbal exchange between the Limited Immunity DA and agent in the charges not being brought. I believe that resolution of the issue should be on its specific findings of fact by the trial court upon remand.

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Joseph F. Tipton, Judge