

No. 1-08-2465

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(3)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	06 CR 16029
	)	
DARVEN MARION,	)	Honorable
	)	Charles P. Burns,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE NEVILLE delivered the judgment of the court.  
Justices Murphy and Salone concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* When the trial court decides a motion based on a transcript of testimony, without hearing any witnesses in court, we review its findings of fact *de novo*. If a defendant moves to dismiss an indictment because of an alleged cooperation - immunity agreement, and no inherent incredibility undercuts a defendant's testimony that he reached such a cooperation - immunity agreement with police, the court should not deny the motion to dismiss without hearing evidence or argument from the State.
- ¶ 2 A grand jury charged defendant, Darven Marion, with possession of cocaine and cannabis. Marion moved to dismiss the indictments based on allegations that a police officer promised

that the State would not pursue charges for the narcotics offenses if Marion helped police with an investigation. The trial court denied Marion's motion to dismiss the indictments and, in a bench trial, found Marion guilty of possessing cocaine and cannabis. On appeal, Marion argued that the court erred when it denied his motion to dismiss the indictments. We vacated the convictions and remanded for completion of the hearing on Marion's motion to dismiss.

¶ 3 At the hearing on remand, the judge, who had not presided at the initial hearing on the motion to dismiss, read the transcripts from that hearing and found both that Marion did not testify credibly, and that Marion never testified that police promised not to pursue the charges against him if he gave them certain information they sought. Because the trial court heard no live testimony and based its findings of fact and credibility assessments on a document, the transcript of the hearing on the motion, we review the court's findings *de novo*. *Townsend v. Sears, Roebuck & Co.*, 227 Ill. 2d 147, 154 (2007).

¶ 4 We find that Marion testified that a police officer promised not to pursue charges against Marion in exchange for his cooperation. We also find nothing inherently incredible about Marion's testimony. Again, we remand for completion of the hearing on Marion's motion to dismiss the indictments.

¶ 5 **BACKGROUND**

¶ 6 Police arrested Marion on June 21, 2006, charging him with possession of more than 15 grams of cocaine and more than 30 grams of cannabis. A grand jury later indicted Marion for possession of cocaine and cannabis with intent to deliver. Marion moved to dismiss the indictments based on an agreement he allegedly reached with some of the officers involved

in his arrest.

¶ 7 The Evidentiary Hearing

¶ 8 The trial court held an evidentiary hearing on the motion to dismiss the indictments. Marion testified that shortly after midnight on June 21, 2006, seven or eight police officers approached him as he stood outside his car, near the intersection of Harrison and Kolmar, talking to John Herndon and another friend. According to Marion, some officers took the keys from his car and left the scene. A half hour later, a call came in to one of the officers who stayed with Marion. The officers at the scene handcuffed Marion and Herndon and drove them in a police car to an address a few blocks away, where Marion used an apartment to store his furniture and occasionally stay overnight. Officers came out of that building with some bags, which they claimed held drugs they found in the apartment Marion used. The officers then removed from Marion's back pocket about \$7,000 in cash. Marion testified that he had just finished gambling.

¶ 9 According to Marion's testimony, some of the officers then drove him back to his car. One of the officers asked Marion, "[Y]ou want to help yourself in this case?" Marion said yes. The officer said, "[Y]ou got some guns?" Marion said he had none, but he knew how to get some. Marion testified that the officer said, "[Y]ou give me some guns, you can leave with your money and we won't even pursue this case."

¶ 10 Marion testified that he then placed a few calls on his cell phone. The persons he called delivered guns to nearby locations, as Marion requested. Marion directed officers to an address near Van Buren and Kolmar, where they recovered two guns, and to Harrison and

Kilbourn, where they recovered a third gun. Marion admitted that he did not remember the name of the officer who made the promise.

¶ 11 Marion called as a witness Officer Joe Ferenzi, who wrote a report concerning Marion's arrest. Ferenzi confirmed that other officers recovered three guns, within an hour of Marion's arrest, based on information the officers learned from Marion. Marion then rested on his motion to dismiss the indictments.

¶ 12 Before the State began to present evidence on the motion, the trial court denied the motion to dismiss the indictments because the State had not yet filed charges against Marion at the time the officer offered not to pursue charges in exchange for the information Marion provided. In the course of making the ruling, the court noted, "I certainly believe from Officer Ferenzi's testimony and combined with your client's testimony that he did give information."

¶ 13 A different judge presided at the bench trial. Based on the testimony of two police officers, the trial court found Marion guilty of possessing more than 30 grams of cannabis and more than 15 grams of cocaine. The trial court sentenced Marion to five years for possession of cocaine and three years for possession of cannabis, with the sentences to run concurrently.

¶ 14 Appeal

¶ 15 On appeal, this court held that a suspect and the State could enter into an enforceable cooperation - immunity agreement before the filing of formal charges. *People v. Marion*, 2012 IL App (1st) 082465-U. We remanded for completion of the hearing on Marion's motion to dismiss the indictments.

¶ 16

Remand

¶ 17 On remand, Marion presented a transcript of the testimony he gave at the hearing on his motion to dismiss the indictments. The judge on remand, who had not presided at the original hearing on the motion to dismiss, read the transcript and said:

"The salient testimony with regard to the motion to dismiss came from Mr. Marion. Mr. Marion, basically, state[s] that the police made a statement to him [which] I'm quoting from page 23 of the transcript [of the pretrial hearing].

Question: What exactly was that offer?

Answer: They asked me did I want to help myself in this case, and I told them, yes.

Question: All right. And what did the police officer say?

Answer: They said if you give us some guns, we will let you and your money leave.

There's nothing more definitive than that. There is no indication of which officer might have said something to Mr. Marion.

It is just a blank, and I think a vague statement that if to be believed is the subject matter on the motion to dismiss the indictment.

After looking at the testimony here, looking at the totality of the testimony here, first off, I do not feel that testimony is credible.

It is very vague. It is not definitive in any way, shape, or

form, but this definitely does not say that he would not be charged, if in fact, he presented some guns.

All it says is that we'll let you, if you give us some guns we'll let you and your money leave. There's no indication that the charges would be filed or subsequently dismissed in any way, shape, or form.

I do not feel that the defendant, Marion, has presented the prima faci[e] case for the dismissal [of] the indictment."

¶ 18 The trial court again denied the motion to dismiss the indictments, and Marion again appeals.

¶ 19 ANALYSIS

¶ 20 The trial judge suggested two bases for his ruling on the motion to dismiss the indictments. First, the judge said, "I do not feel that testimony is credible." Second, the judge said the testimony "definitely does not say that he would not be charged, if in fact, he presented some guns." The judge relied on the insufficiency of Marion's testimony to support the conclusion that police offered him immunity from prosecution for narcotics charges in exchange for cooperation with police looking for guns, but the court also mentioned that on the basis of the transcript alone of Marion's testimony, the court found the testimony incredible.

¶ 21 Usually, we defer to the trial court's findings of fact, and we reverse those findings only if the findings are against the manifest weight of the evidence. *People v. Sorenson*, 196 Ill. 2d 425, 431 (2001). But when the trial judge bases his findings solely on documentary evidence, like affidavits, depositions and transcripts of trial testimony, we need not defer to the trial court's findings of fact. *Townsend*, 227 Ill. 2d at 154; *People v. Coleman*, 183 Ill. 2d

366, 388 (1998). We review the trial court's findings of fact here *de novo*. See *Addison Insurance Co. v. Fay*, 232 Ill. 2d 446, 453 (2009).

¶ 22 The judge found Marion's testimony insufficient to state a *prima facie* case for dismissal of the charges because the judge found that Marion never testified that a police officer promised not to charge him with narcotics offenses if he gave them information that led them to some guns. As we quoted from the transcript above, Marion testified that the officer he spoke with said, "[Y]ou give me some guns, you can leave with your money and we won't even pursue this case." We find that Marion actually testified, in essence, that a police officer promised not to pursue narcotics charges against Marion if he gave police information that helped them find some guns. Reviewing the evidence *de novo*, we find that the judge on remand erred when he found that Marion never testified that a police officer promised not to charge him with narcotics offenses if he gave them information that led them to some guns.

¶ 23 The judge on remand, however, also found Marion's testimony not credible. Because the judge heard no live testimony, and based his findings solely on the transcript of that testimony, we need not defer to the trial court's credibility assessment. *Addison Insurance*, 232 Ill. 2d at 453; *People v. Vasquez*, 393 Ill. App. 3d 185, 189 (2009). We see nothing inherently incredible about Marion's testimony. Police probably should consider gun violence a greater threat to the community than possession of moderate amounts of narcotics. See *People v. Jones*, 357 Ill. App. 3d 684, 690 (2005). A conscientious police officer could choose not to pursue narcotics charges against a suspect in exchange for information that helps police get several illegally held guns off the streets. We find Marion's testimony

sufficiently credible to support a finding that a police officer said police would not pursue charges against Marion if Marion gave them information that led them to some guns and helped get the guns off the street.

¶ 24 Although Marion's testimony needed no further support to warrant a finding that an officer promised not to pursue charges in exchange for information that led to guns, we note that in this case, Officer Ferenzi's testimony substantially bolstered Marion's testimony. The trial judge who heard the testimony in court found Officer Ferenzi's testimony credible, and explicitly found that Marion gave the police information that led them to find three guns and to remove those guns from circulation.

¶ 25 Thus, we reject both reasons the trial court gave for denying Marion's motion to dismiss the indictments. The proceedings in the trial court indicate that we need to further clarify our instructions for completion of the hearing on the motion to dismiss the indictments. We have not found Illinois cases that establish the elements required to prove that the court should enforce an alleged cooperation-immunity agreement under circumstances like those presented by the facts of this case. We suggest that the parties and the court may find some guidance in cases from other jurisdictions, including *United States v. Flemmi*, 225 F.3d 78, 84 (1st Cir. 2000); *United States v. Williams*, 780 F.2d 802, 803 (9th Cir. 1986); *United States v. Carrillo*, 709 F.2d 35 (9th Cir. 1983); *State v. Wacker*, 268 Neb. 787, 688 N.W.2d 357 (2004); *People v. C.S.A.*, 181 Cal. App. 4th 773, 104 Cal. Rptr. 3d 832 (2010); and *Johnson v. Lumpkin*, 769 F.2d 630, 634 (9th Cir.1985); see also *People v. Schmitt*, 173 Ill. App. 3d 66 (1988), *rev'd on other grounds* 131 Ill. 2d 128 (1989).

¶ 26 The *Flemmi* court held that an FBI agent lacked authority to promise not to prosecute charges against a defendant, and that the court should enforce the unauthorized promise only if the defendant's due process rights required such enforcement. *Flemmi*, 225 F.3d at 84, 88. The fact that Marion spoke to the officer before the filing of formal charges might distinguish this case from *Flemmi*, because police lack authority to dismiss charges after the prosecutor has decided to file the charges, (see *State v. Smith*, 809 A.2d 1174, 1176–1177 (Del. Super. Ct. 2002)), but they may have some authority to decide whether to enforce a penal statute against a suspect (see *People v. Clemons*, 46 Ill. App. 3d 159, 161 (1977)). The State should decide whether it wants to argue that police lack authority to promise that the State will not pursue charges against a suspect.

¶ 27 On the other hand, the State could choose not to question the sufficiency of Marion's testimony to state a *prima facie* case for dismissal of the indictments, and instead present testimony to contradict Marion's testimony about his discussions with police. The State will then need to present testimony that explains Marion's decision to give the police information leading to the discovery of three guns without hearing from the police anything that led him to expect favorable treatment in exchange for the information.

¶ 28 Here, we note only that Marion testified a police officer told him, "[Y]ou give me some guns, you can leave with your money and we won't even pursue this case," and nothing in the record makes this testimony incredible. Accordingly, we reverse the trial court's decision and remand for the completion of the hearing on Marion's motion to dismiss the indictments.

¶ 29 Reversed and remanded.