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2014 IL App (3d) 130352-U

Order filed July 24, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

THE PEOPLE OF THE STATE OF	)	Appeal from the Circuit Court
ILLINOIS,	)	of the 12th Judicial Circuit,
	)	Will County, Illinois,
Plaintiff-Appellant,	)	
	)	Appeal No. 3-13-0352
v.	)	Circuit No. 12-CF-644
	)	
ANTHONY M. STAPINSKI,	)	Honorable
	)	Amy Bertani-Tomczak,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE SCHMIDT delivered the judgment of the court.  
Justice Wright specially concurred.  
Justice Carter dissented.

**ORDER**

¶ 1 *Held:* The trial court erred in granting defendant's motion to dismiss the indictment.

¶ 2 Defendant, Anthony M. Stapinski, was charged with unlawful possession of a controlled substance with intent to deliver. 720 ILCS 570/401(a)(10.5) (West 2010). Defendant filed a motion to dismiss the indictment, arguing his due process rights were violated by the State's refusal to honor a cooperation agreement with the police. The trial court granted defendant's motion. The State appeals, arguing that the trial court erred by dismissing the indictment for a

due process violation rather than suppressing defendant's incriminating statements. We reverse and remand for further proceedings.

¶ 3

### FACTS

¶ 4

On April 12, 2011, defendant was arrested at the Naperville post office for possessing a package containing ketamine. Defendant later entered into a cooperation agreement with the police to work as a confidential informant. On April 15, 2011, defendant participated in a controlled delivery of the ketamine, and as a result, the police arrested Taylor Malcolm and John Blair.

¶ 5

On March 20, 2012, Romeoville police Sergeant Christine Masterson charged defendant by criminal complaint with the April 12, 2011, offense of unlawful possession of a substance containing ketamine, a controlled substance, with intent to deliver. 720 ILCS 570/401(a)(10.5) (West 2010). The complaint was filed on April 24, 2012. On May 17, 2012, defendant was charged by indictment with unlawful possession of a controlled substance with intent to deliver.

¶ 6

On January 4, 2013, defendant filed a motion to dismiss the indictment, alleging that he was charged with unlawful possession of a controlled substance with intent to deliver in violation of his due process rights and the cooperation agreement he made with the police. The motion stated that pursuant to the cooperation agreement with the police, wherein defendant was told he would not be charged with the ketamine offense if he cooperated in the arrest of Malcolm, defendant made incriminating statements relating to the charged offense. On January 11, 2013, the State filed a response to defendant's motion to dismiss, alleging that defendant was told he had to work several cases in order for the police to consider not pursuing charges for his possession of ketamine. The State alleged that defendant did not fully comply with the cooperation agreement, and asked that the court deny defendant's motion to dismiss.

¶ 7 The trial court held a hearing on defendant's motion to dismiss on February 13 and 14, 2013. The testimony indicated that on April 12, 2011, defendant went to the Naperville post office to retrieve a package. When defendant returned to his vehicle with the package, several agents of the Naperville and Romeoville police departments and the United States Postal Service surrounded defendant. Defendant was handcuffed and detained by Masterson, who told him it was in his best interest to cooperate. Defendant agreed to cooperate and requested an attorney. Defendant's handcuffs were removed, and he was taken to the Romeoville police department, where he was questioned about the package by Masterson and Postal Inspector Jeff Gunther. Defendant was not advised of his *Miranda* rights. Defendant was allowed to call his mother, Susan Pratl, who came to the police department. After consulting with his mother and his attorney, Frank DeSalvo, defendant informed Masterson that the ketamine he picked up was supposed to be delivered to Malcolm and explained his own involvement in the transaction. Defendant also revealed the names of several other drug dealers. Defendant was later released from the police department.

¶ 8 On April 14, 2011, defendant, Pratl, and DeSalvo had a meeting with Masterson and Gunther at the Romeoville police department. Masterson informed defendant that if he cooperated he would not be charged with the ketamine offense at the post office. Defendant agreed to cooperate and participate in a controlled delivery to Malcolm and Blair. Masterson referred defendant to Mimi Bejda, a police officer of the Romeoville police department assigned to an undercover drug unit, to work as a confidential informant. Defendant met with Bejda later that night, where he arranged to sell the ketamine to Malcolm, with Blair working as a middleman. Defendant confirmed with Blair that he would deliver the ketamine the following day.

¶ 9 On April 15, 2011, defendant worked with Bejda, wore a wire, and engaged Malcolm and Blair in telephone conversations that detailed their own involvement and defendant's in the ketamine transaction. Later that day, defendant participated in a controlled delivery to Blair, which led to Blair's and Malcolm's arrest and indictment for unlawful possession of a substance containing ketamine, a controlled substance, with intent to deliver (720 ILCS 570/401(a)(10.5) (West 2010)). Following these arrests, Bejda continued to be defendant's contact in the event he was able to assist in other drug investigations. Defendant was later transferred to Mario Marzetta when Bejda left for surgery. Defendant was unable to secure any other arrests for the police.

¶ 10 Pratl testified that on April 14, 2011, Gunther and Masterson said they wanted to work with defendant to apprehend the person that the ketamine package was being delivered to. They said that as long as defendant cooperated, no charges would be filed. At no point during the meeting did Gunther or Masterson tell defendant he needed to participate in four cases to not be charged with the ketamine offense.

¶ 11 Defendant testified that when he was apprehended at his vehicle on April 12, 2011, the unopened package was taken from him and he was placed in handcuffs. Masterson told defendant it would be in his best interest to cooperate, and he told her he would like to speak to his attorney before he cooperated. Defendant's handcuffs were removed, and he was taken to the police department. Defendant insisted on calling his lawyer, but Masterson kept emphasizing it was in his best interest to cooperate. After eventually being allowed to consult with his mother and DeSalvo, defendant told the police about Malcolm and several other drug dealers. Gunther and Masterson said that if he cooperated, the ketamine charge would be dropped.

¶ 12 Defendant further testified that on April 14, 2011, Masterson again told him that if he cooperated, the ketamine charge would be dropped. Defendant was never told he had to do four

cases, but Masterson did tell defendant that his continued cooperation would eliminate his prior drug charge from college. On a later date, Bejda also told defendant that if he continued to help with other cases, his prior drug charge from college would be eliminated. Following Malcolm and Blair's arrest, defendant met with Bejda to coordinate additional drug cases. Defendant had trouble contacting Bejda, because she would not return his telephone calls. Defendant was unable to initiate any additional drug transactions for the police because, following Malcolm's arrest, the word spread that defendant was working with the police.

¶ 13 DeSalvo testified that at the meeting on April 14, 2011, Masterson said that if defendant cooperated in the arrest of Malcolm, he would not be charged with the ketamine offense. Defendant agreed to cooperate and participate in the controlled delivery to Malcolm and Blair. Masterson also questioned defendant regarding other drug-related activities and stated that if he agreed to cooperate in other cases, she would eliminate his prior drug charge from college. During the meeting, no one ever mentioned a specific number of cases defendant was required to assist with. DeSalvo spoke with Masterson a few days after April 15, 2011, to confirm the arrest of Malcolm and Blair. At that point, DeSalvo believed the ketamine charges against defendant had been dropped. DeSalvo inquired about how defendant could work off his college charges. Masterson said defendant would work with Bejda to eliminate those charges, but never specified how many cases defendant had to assist with.

¶ 14 Masterson testified that on April 12, 2011, she went to the Naperville post office after the postal inspector notified her that there was a package from Pakistan that possibly contained ketamine. The package was addressed to defendant. After Masterson detained defendant, he agreed to cooperate with the police regarding the package. Defendant was taken to the police department, where Masterson told defendant if he cooperated with the police on several cases, he

would not be charged. Masterson further testified that on April 14, 2011, she advised defendant and DeSalvo that if defendant cooperated with the police, she would not charge him with the ketamine offense. Masterson testified that defendant was supposed to assist in four drug investigations in order for her not to charge him with the ketamine offense. At the meeting, defendant wrote down the names of several drug dealers that the police would be able to pursue charges against. Defendant agreed to work these cases with the police, and Masterson referred him to Bejda. Masterson eventually charged defendant with the ketamine offense because Bejda informed her that defendant did not do the four cases they had agreed upon.

¶ 15 Bejda testified that she told defendant that if he cooperated with the police on three drug investigations, of the same class or higher than the ketamine offense he was arrested for, she would inform the State's Attorney of his cooperation. Bejda never promised defendant that charges would not be filed in exchange for defendant's cooperation. Bejda testified that after defendant assisted in the arrest of Malcolm and Blair, he stopped returning her telephone calls. Defendant was eventually transferred to Marzetta, but he was still not doing what was asked of him. Around October 2011, Bejda and Marzetta informed defendant that they were no longer willing to work with him. Bejda also informed Masterson that defendant did not fulfill his obligation to the police.

¶ 16 Marzetta testified that in July 2011, he managed defendant as a confidential informant. Defendant was supposed to advise Marzetta of any information regarding where or from whom he could purchase drugs. Marzetta was never informed of a specific number of cases defendant was required to work on. While working with Marzetta, defendant did not provide any cases that led to an arrest. Marzetta and Bejda decided to end the cooperation agreement with defendant after he was arrested in September 2011.

¶ 17 Defendant argued that Masterson told him he would not be charged with the ketamine offense if he cooperated in the arrest of Malcolm and Blair. Pursuant to that agreement, defendant waived his fifth amendment right against self-incrimination. Defendant argued the case fell within the parameters of *People v. Schmitt*, 173 Ill. App. 3d 66 (1988), *rev'd on other grounds*, 131 Ill. 2d 128 (1989), and requested that the indictment be dismissed based on the violation of defendant's due process rights. The State did not dispute that defendant entered into a cooperation agreement, but argued that the agreement was between defendant and Bejda for defendant to cooperate in three or four cases. The State claimed that defendant did not live up to his end of the bargain. The court took the matter under advisement.

¶ 18 On February 27, 2013, the trial court granted defendant's motion to dismiss the indictment. The court found that defendant's due process rights had been violated because he incriminated himself based upon promises made for his cooperation. The court found that there was an oral agreement between Masterson and defendant, noting that of the five people present at the meeting, three defense witnesses contradicted Masterson and the postal inspector did not testify. The court determined that the agreement with defendant was that if he cooperated in the arrests of Malcolm and Blair, he would not be charged with the ketamine offense. The court found that defendant did cooperate in the arrests, wore a wire, and despite not being advised of his *Miranda* rights, incriminated himself in the instant offense.

¶ 19 On March 18, 2013, the State filed a motion to reconsider. The motion stated that since no one from the State's Attorney's office was present during the plea discussions with defendant, the State's Attorney was not bound by any agreement entered into by the police and defendant. The motion further stated that the trial court's reason for dismissing the indictment was because defendant incriminated himself in the instant offense. The State pointed out that any statements

made by defendant during the plea discussions were inadmissible under Illinois Supreme Court Rule 402(f) (eff. July 1, 2012), and therefore did not affect defendant's right against self-incrimination.

¶ 20 On April 4, 2013, defendant filed an answer and memorandum in opposition to the State's motion to reconsider. Defendant distinguished the cases cited by the State to claim that the State's Attorney was not bound by the agreement. Defendant cited to *Schmitt*, 173 Ill. App. 3d 66, for support. Defendant also stated that at the hearing, the witnesses testified regarding a verbal cooperation agreement between defendant and a police officer, but alleged that no plea discussions took place. Thus, defendant stated that Rule 402(f) was inapplicable.

¶ 21 Following a hearing, the trial court denied the State's motion to reconsider on May 1, 2013. The State subsequently filed a certificate of substantial impairment and brought this appeal to challenge the trial court's ruling.

¶ 22 ANALYSIS

¶ 23 The State argues that the trial court erred by dismissing the indictment. Specifically, the State argues that instead of dismissing the indictment to protect defendant's due process rights, the court should have suppressed defendant's incriminating statements.

¶ 24 A trial court may dismiss an indictment on any ground set forth in section 114-1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/114-1 (West 2012)), or when there has been an "unequivocally clear denial of due process." *People v. Lawson*, 67 Ill. 2d 449, 456 (1977). To support a claim that an indictment should be dismissed because of a due process violation, a defendant must show both actual and substantial prejudice. *People v. Burrows*, 148 Ill. 2d 196 (1992).



¶ 25 In this case, the trial court found that the government violated defendant's due process rights when it acquired incriminating statements from defendant based on promises not to prosecute the instant offense. On appeal, the State does not contest that finding. Instead, the State argues that the trial court could have protected defendant's due process rights by suppressing defendant's incriminating statements, not dismissing the indictment. Defendant, however, argues that due process requires enforcement of the agreement by dismissing the charge. Since the essential facts concerning defendant's cooperation with the police are undisputed, we review *de novo* whether defendant suffered a prejudicial denial of due process that could warrant dismissal of the indictment. See *People v. Mattis*, 367 Ill. App. 3d 432 (2006).

¶ 26 The trial court's ability to dismiss a criminal charge for a due process violation is recognized as part of the court's inherent authority to guarantee defendant a fair trial. *Lawson*, 67 Ill. 2d 449. Here, despite defendant's incriminating statements in relation to the instant offense, we find he cannot show that the surrender of his right against self-incrimination foreclosed the possibility of a fair trial, nor does the record provide such a conclusion. Defendant argues that the surrender of his right against self-incrimination in reliance on a cooperation agreement requires enforcement of that agreement. Defendant, however, relies on cases which enforce agreements made by the prosecution, not the police. See *People v. Starks*, 106 Ill. 2d 441 (1985) (holding that an assistant State's Attorney must honor a cooperation agreement made with defendant); *People v. Weilmuenster*, 283 Ill. App. 3d 613 (1996) (upholding dismissal of indictment because assistant Attorney General was bound by immunity agreement made with defendant). The only case cited by the parties that is factually similar to the instant circumstances is *Schmitt*, 173 Ill. App. 3d 66, which was brought up in the trial court.

¶ 27 In *Schmitt*, a defendant was arrested for selling drugs to an undercover agent. *Id.* The arresting agent allegedly promised defendant that he would not be prosecuted if he confessed to his involvement and cooperated in apprehending his drug source. *Id.* Defendant cooperated, but was later indicted and convicted at trial, where his incriminating statements were used against him. *Id.* The appellate court remanded the cause for an evidentiary hearing to determine the terms of the agreement and to dismiss the indictment if the agents violated that agreement. *Id.*

¶ 28 Here, the parties dispute whether Masterson had the authority to bind the State's Attorney to the cooperation agreement. However, even assuming, *arguendo*, there was such authority, *Schmitt* is distinguishable; defendant's incriminating statements have not yet been used against him at trial. Consequently, defendant cannot show that the surrender of his right against self-incrimination foreclosed the possibility of a fair trial. See *id.* (noting that because defendant's incriminating statements were used against him, his right to a fair trial was impaired and he was denied due process). Where there are alternative solutions to protect defendant's rights so that he does not suffer prejudice, the trial court should employ those solutions rather than dismiss the indictment. *People v. Polonowski*, 258 Ill. App. 3d 497 (1994).

¶ 29 Defendant argues that the prejudice he suffered was the fact that he made incriminating statements and performed incriminatory actions in reliance on the agreement not to prosecute. The State argued that defendant did not perform his part of the agreement. The trial court found that he did. Furthermore, it is undisputed that the police did not provide defendant with *Miranda* warnings. Therefore, the trial court, on remand, should hold a hearing to determine what evidence should be excluded as the result of police conduct in this case. After the exclusion of the evidence, the parties and the court can decide whether enough evidence remains to allow this case to go to trial. Contrary to the dissent's argument, suppressing all evidence obtained by

virtue of defendant's cooperation will put the defendant exactly where he would have been had he not cooperated.

¶ 30 Under these circumstances, we hold that the trial court improperly granted defendant's motion to dismiss the indictment. Therefore, we reverse the trial court's dismissal of the indictment and remand to the court for further proceedings.

¶ 31 CONCLUSION

¶ 32 The judgment of the circuit court of Will County is reversed, and the cause is remanded for further proceedings.

¶ 33 Reversed and remanded.

¶ 34 JUSTICE WRIGHT, specially concurring.

¶ 35 I agree this court should reverse the trial court's decision dismissing the charge in the case at bar. However, I conclude it is premature for this court to imply defendant's incriminating statements are not admissible.

¶ 36 The case law provides that a State's Attorney is not bound by promises made to a defendant by law enforcement officials pursuant to a cooperation agreement. See *People v. Dandridge*, 152 Ill. App. 3d 941, 943 (1987). It appears the State's Attorney was not present and did not participate in the oral cooperation agreement reached between the police, defendant, and defense counsel. Based on this record, it is impossible to determine whether Sergeant Masterson consulted the State's Attorney at any point prior to the agreement defendant now seeks to enforce. Therefore, absent a motion to suppress or motion *in limine* filed by the parties, I respectfully observe there is no pending evidentiary motion for the trial court to consider on remand.

¶ 37 JUSTICE CARTER, dissenting.

¶ 38 I respectfully dissent from the majority's order in the present case. I would find that the trial court did not err in granting defendant's motion to dismiss the indictment. I would, therefore, affirm the trial court's judgment.

¶ 39 In the instant case, as the lead decision notes, the trial court found after a full evidentiary hearing on the motion to dismiss that: (1) the investigating police officer in this case entered into an oral cooperation agreement with defendant; (2) the terms of that agreement were that defendant's ketamine offense would not be charged if defendant cooperated in the arrest of Taylor Malcolm and John Blair, the persons to whom the ketamine was supposed to be delivered; and (3) defendant fully performed his obligations under the agreement—defendant cooperated in the arrests of Malcolm and Blair, wore a wire, and made statements that incriminated himself further in the ketamine offense (despite not being advised of his *Miranda* rights). Based upon those findings, the trial court concluded that defendant's due process rights had been violated because defendant incriminated himself in reliance upon the promise that was made to secure his cooperation. The trial court's findings and conclusion in that regard have not been challenged in this appeal.

¶ 40 Where I disagree with the lead decision in this case is as to the appropriate remedy for the due process violation. I also disagree with the special concurrence because the case relied upon in the special concurrence, *People v. Dandridge*, does not directly address due process. See *Dandridge*, 152 Ill. App. 3d at 943-44. My concern in this case is as to the due process ramifications of what occurred, a more fundamental concern than whether the investigating officer had authority, from a contractual standpoint, to bind the State to an agreement with defendant. In my opinion, as the trial court found, the only appropriate remedy in this case is for

the indictment against defendant to be dismissed. See *Schmitt*, 173 Ill. App. 3d at 106 (1988) (in a case in which the defendant filed a motion to dismiss the charge based upon the law enforcement agents' failure to honor their cooperation agreement with the defendant, the appellate court remanded the case for an evidentiary hearing to determine the terms of the agreement and to dismiss the charge if the agents did, in fact, violate those terms). Only that remedy will give defendant the benefit of his bargain and will require the State to live up to its end of the agreement. Merely suppressing defendant's incriminating statements would not remove the prejudice that defendant has already suffered. See *id.* at 95-106.

¶ 41 For the reasons stated, I respectfully dissent from the majority's order in the present case. I would affirm the trial court's order granting defendant's motion to dismiss the indictment.