

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

Supreme Court No.: 157200
Court of Appeals No.: 338552
Circuit Court No.: 17-243452-FC

vs.

ROMON McBURROWS,

Defendant-Appellant.

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PLAINTIFF-APPELLANT'S SUPPLEMENTAL BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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**STATEMENT OF JURISDICTION, JUDGMENT BEING APPEALED,
AND RELIEF SOUGHT**

The People seek leave to appeal from the Michigan Court of Appeals' opinion issued on December 19, 2017, which reversed the 38th Circuit Court's order denying the Appellee's Motion to Dismiss for Lack of Jurisdiction. *People v McBurrows*, published opinion of Court of Appeals, issued on 12/19/17 (Docket Number No. 338552). The jurisdiction of the Michigan Supreme Court is pursuant to MCR 7.303(B)(1). The Court has directed the Clerk to schedule oral argument on whether to grant the People's Application for Leave to Appeal and has ordered the parties to file supplemental briefs and appendices.

The People ask this Court to reverse the decision of the Court of Appeals and affirm the 38th Circuit Court's order denying the Motion to Dismiss for Lack of Jurisdiction. The People ask the Court to hold that MCL 762.5 and/or MCL 762.8 establishes venue and allows prosecution of a Delivery of a Controlled Substance Causing Death case in the county where the victim consumed the controlled substance or died from the controlled substance.

STATEMENT OF ISSUES PRESENTED

I. IS MONROE COUNTY A PROPER VENUE FOR THIS CASE INVOLVING THE CHARGE OF DELIVERY OF A CONTROLLED SUBSTANCE CAUSING DEATH WHERE THE DELIVERY OCCURRED IN WAYNE COUNTY BUT THE CONSUMPTION AND DEATH OCCURRED IN MONROE COUNTY?

Plaintiff-Appellant answers this question		“Yes”
Defendant-Appellee answers this question	“No”	
Michigan Court of Appeals answers this question	“No”	
38 th Circuit Court answers this question		“Yes”

STATEMENT OF FACTS

Below is the People's statement of facts. It borrows from the Appellee's statement of facts contained in his Brief on Appeal in the Michigan Court of Appeals.

First District Court Proceedings

The Appellee was charged by the Monroe County Prosecuting Attorney with Delivery of a Controlled Substance Causing Death, contrary to MCL 750.317a (130a). He was charged in the First District Court and a Preliminary Examination was held on March 7, 2017. The testimony adduced shows the following facts:

On the evening of December 12, 2016, Nicholas Abraham, the victim, traveled from his home in Monroe County to Detroit in Wayne County with the intent to purchase heroin (32a-35a). He was accompanied by his friend William Ingalls, a known drug runner (13a, 32a-35a). Once in Detroit, Mr. Ingalls called the Appellee to arrange a purchase of heroin (33a). The victim provided money to Mr. Ingalls to purchase the heroin (33a-35a). Mr. Ingalls then exited the vehicle, leaving the victim alone in the vehicle, and then purchased heroin from the Appellee (33a-35a, 39a-40a).

The victim and Mr. Ingalls proceeded to a laundromat in Detroit, where they consumed some of the heroin (35a). They then returned to Monroe County, where the victim gave some of the remaining drug to Mr. Ingalls, dropped Mr. Ingalls off, and returned to his own residence (35a-36a). Around 10:00 p.m. that evening, the victim and his wife, Michelle, consumed more of the heroin (56a-57a). Michelle passed out a few minutes later, and when she regained consciousness about four hours later, she found Nicholas passed out on the floor (57a). At approximately 2:40 a.m., she called 911, and the victim was pronounced dead at 3:25 a.m. on the morning of December 13, 2016 (8a).

An autopsy was conducted by Dr. Leigh Hlavaty of the Office of the Wayne County Medical

Examiner, who opined that the victim's death was caused by fentanyl toxicity (90a-91a). At the preliminary examination, Detective Michael McClain testified that heroin is often cut with fentanyl in order to increase the potency of the dose (83a-84a). The Appellee was bound over to the 38th Circuit Court to stand trial.

38th Circuit Court Proceedings

The Appellee was arraigned in the 38th Circuit Court on March 17, 2017 (132a). The Appellee filed a Motion to Dismiss for Lack of Jurisdiction. The Honorable Daniel S. White denied the motion and held that the 38th Circuit Court had jurisdiction and Monroe County was a proper venue (111a). Specifically he held that MCL 768.8 and MCL 762.5 gave venue to Monroe County (113a-115a).

Michigan Court of Appeals Proceedings

The Appellee filed an Application for Leave to Appeal with the Michigan Court of Appeals on May 26, 2017. The Court of Appeals granted leave on July 13, 2017. On December 19, 2017, the Court of Appeals issued a published decision reversing the Circuit Court and holding that Monroe County was not a proper venue and that Wayne County was the sole proper venue for this case.

Michigan Supreme Court Proceedings

The Appellant filed an Application of Leave to Appeal on February 13, 2018, with this Court. The Court issued an order on May 16, 2018, directing the Clerk to schedule oral argument on whether to grant the People's Application for Leave to Appeal, and has ordered the parties to file supplemental briefs and appendices. The People now file our Supplement Brief on Appeal.

ARGUMENT

I. **MONROE COUNTY IS A PROPER VENUE FOR THIS CASE INVOLVING THE CHARGE OF DELIVERY OF A CONTROLLED SUBSTANCE CAUSING DEATH.**

Standard of Review

A court's determination regarding the existence of venue in a criminal prosecution is reviewed *de novo*. *People v Houthoofd*, 487 Mich 568, 579 (2010). Questions of law pertaining to statutory construction and interpretation are reviewed *de novo*. *People v Schultz*, 435 Mich 517 (1990).

The People charged the Appellee with one count of Delivery of a Controlled Substance Causing Death, contrary to MCL 750.317a. The Appellee filed a Motion to Dismiss for Lack of Jurisdiction. The Circuit Court denied the motion. The Court of Appeals reversed the Circuit Court and held that Monroe County was not a proper venue and that Wayne County was the sole proper venue for this case. The People disagree.

Grounds for Appeal

This appeal involves an issue of legal principles of major significance to the State of Michigan's jurisprudence. MCR 7.305(B)(3). There are numerous cases across Michigan where a victim buys a controlled substance in one county and consumes the controlled substance in another county that results in death. The question of whether MCL 762.5 and/or MCL 762.8 allows prosecution of a Delivery of a Controlled Substance Causing Death case in the county where the victim either consumed the controlled substance or died from the controlled substance is a question of major significance to Michigan jurisprudence.

Argument

The Circuit Court held that Monroe County is a proper venue. Specially, the court found

pursuant to MCL 762.5 and MCL 762.8, Monroe County was a proper venue. The Court of Appeals held that Wayne County was the only proper venue. The People will address each section of the Code of Criminal Procedure.

MCL 762.8; Felony Consisting of more than 1 Act

The trial court found that the 38th Circuit Court has jurisdiction and Monroe County was the proper venue pursuant to MCL 762.8. The statute states:

“Whenever a felony consists or is the culmination of 2 or more acts done in the perpetration of that felony, the felony may be prosecuted in any county where any of those acts were committed or in any county that the defendant intended the felony or acts done in perpetration of the felony to have an effect.” MCL 762.8.

It is the People’s position that the crime in this case consisted of numerous acts and that at least two of the acts occurred in Monroe County. The Appellant is arguing that no acts occurred in Monroe County.

Acts in Monroe County prior to Delivery

It is the position of the People that the Delivery of a Controlled Substance constitutes a conspiracy and acts in furtherance of the conspiracy occurred in Monroe County. The victim, the Appellee, and Mr. Ingalls conspired to deliver a controlled substance to the victim. Acts were done in furtherance of the conspiracy in Monroe County prior to the delivery in Wayne County.

The victim while in Monroe County contacted Mr. Ingalls by telephone for the purpose of jointly obtaining heroin from the Appellee (13a, 32a, 63a-65a). The victim left from his home in Monroe County to pick up Mr. Ingalls to get the heroin from Detroit (32a, 63a-65a). This conspiracy to obtain the Controlled Substance from the Appellee began in Monroe County. Therefore, acts done in furtherance of the Delivery of a Controlled Substance Causing Death were committed in Monroe

County prior to the actual delivery of the Heroin/Fentanyl.

Acts in Monroe County after Delivery

The record from the Preliminary Examination establishes that the heroin/fentanyl was delivered by the Appellee to the victim in Wayne County. The record provides direct evidence the victim consumed the heroin/fentanyl in Monroe County (56a-59a). The death of the victim occurred in Monroe County. *Id.*

The act of delivery occurred in Wayne County by the Appellee. However, both the acts of consumption by the victim and his death occurred in Monroe County. *Id.* Consumption of the controlled substance and death of a person are elements of the crime. CJI 12.2a; MCL 750.317a. Therefore, the MCL 762.8 establishes both Monroe County and Wayne County as proper venues for this charge.

It is the People's position that two acts of the criminal offense occurred within Monroe County. These acts were committed by the victim (consumption and death), but are still acts that are necessary elements of the crime. It is important to note that MCL 762.8 does not require the acts to be committed by the defendant. It is the People's position that the acts under MCL 762.8 may be committed by anyone involved in the crime: the defendant, co-defendants, accessories, co-conspirators, and victims. The 3rd Circuit United States Court of Appeals addressed this issue and stated:

A crime, however, may be performed through an innocent dupe. *United States v. Kelley*, 395 F.2d 727 (2d Cir. 1968), cert. denied, 393 U. S. 963, 89 S.Ct. 391, 21 L.Ed.2d 376 (1968); *Boushea v. United States*, 173 F.2d 131 (8th Cir. 1949); *Beausoliel v. United States*, 71 U.S.App.D.C. 111, 107 F.2d 292, 297 (1939). The court aptly stated the basis for this well accepted principle in *United States v. Lester*, 363 F.2d 68, 73 (6th Cir. 1966):

It is but to quote the hornbook to say that in every crime there must exist a union or joint operation of act, or failure to act, and intent. However, this is far from suggesting that the essential element of criminal intent must always reside in the person who does the forbidden act. Indeed, the latter may act without any criminal intent whatever, while the *mens rea*—“willfulness”—may reside in a person wholly incapable of committing the forbidden act. . . . And in such a case, of course, only the person who willfully causes the forbidden act to be done is guilty of the crime.

There are numerous examples of convictions of defendants who used innocent dupes to commit crimes, for example, *Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 98 L.Ed. 435 (1954); *United States v. Selph*, 82 F.Supp. 56 (S.D.Calif.1949); *United States v. Inciso*, 292 F.2d 374 (7th Cir. 1961); *United States v. One 6.5 mm. Mannlicher-Carcano Military Rifle*, 250 F.Supp. 410 (N.D.Tex.1966). *United States v Bryan*, 483 F.2d 88, 92 (CA 3 1973).

The victim clearly committed the acts required to complete the crime. Specifically, the victim committed the act of consuming the controlled substance and committed the involuntary act of dying.

People v Plunkett

The Court of Appeals held in our case that the crime of Delivery of a Controlled Substance Causing Death is complete when the drugs are delivered (125a). The court also held that the statute is a “penalty enhancement.” *Id.* The Court of Appeals relied on this Court’s decision in *People v Plunkett* to support this conclusion. *Plunkett*, 485 Mich 50 (2010). The People disagree with the Court of Appeals analysis and holding as it applies to this case. This argument is akin to stating that Murder is a penalty enhancement to Assault. This Court held in the *Plunkett* case that MCL 750.317a is a general intent crime and the defendant did not need the specific intent to cause the death of the victim. *Id.* at 60. The Court never held that MCL 750.317a is a “penalty enhancement.”

The People are required to prove the following elements for the charge of Delivery of a Controlled Substance Causing Death: 1) the defendant delivered a controlled substance to another

person, 2) the substance delivered was a controlled substance, 3) the defendant knew he was delivering a controlled substance, 4) the controlled substance was consumed by the victim, and 5) that consuming the controlled substance caused the death of the victim. CJI 12.2a; MCL 750.317a. If the Court of Appeals were correct in their analysis, the prosecution would not have to prove the fourth and fifth elements of this crime at trial.

Delivery of a Controlled Substance Causing Death is not a “penalty enhancement” to a simple delivery charge. It is a separate crime that requires the People to prove the victim consumed the controlled substance and died as a result of the controlled substance. These constitute separate acts that must occur for the crime to be complete. It is our argument that the Court of Appeals misinterpreted *People v Plunkett* in finding that Delivery of a Controlled Substance Causing Death is a “penalty enhancement” and that the crime is complete when the delivery occurs.

MCL 762.5; Fatal Force and Death in Different Counties

The trial court found that the 38th Circuit Court has jurisdiction and Monroe County is the proper venue pursuant to MCL 762.5. The statute states:

“If any mortal wound shall be given or other violence or injury shall be inflicted, or any poison shall be administered in 1 county by means whereof death shall ensue in another county, the offense may be prosecuted and punished in either county.” MCL 762.5.

It is the People position that the delivery of Heroin/Fentanyl was a mortal wound, an injury, and is a poison.

Mortal Wound

In this case, the mortal wound, violence, or injury was the providing the Victim with Heroin/Fentanyl, which caused his death. The victim did in fact consume the drugs and die within

Monroe County, thereby establishing venue in Monroe County. The delivery of the Heroin/Fentanyl is similar to giving a person a ticking time bomb. The Appellee delivered the Heroin/Fentanyl knowing that it would be shortly consumed and due to its inherent dangerousness, knew it could possibly cause the death of anyone consuming the drugs.

This Court held that when a defendant performed an illegal abortion in Jackson County and the victim died in Oakland County, Oakland County was the proper venue under MCL 762.5. *People v Southwick*, 272 Mich 258, 262 (1935). It is our argument that this case is analogous to *Southwick*. At the time of the *Southwick* case, abortion was an illegal medical procedure in the State of Michigan. MCL 750.14. In this case, the Appellee illegally distributed Heroin and Fentanyl to the Victim. Heroin is a Schedule I Controlled Substance and is illegal for anyone to distribute. 21 CFR 1308.11. Fentanyl is a Schedule II Controlled Substance that only a Medical Doctor with a DEA Controlled Substance License may prescribe. 21 CFR 1308.12. The Appellee has no such license.

The illegal delivery of the controlled substances of Heroin and Fentanyl to the victim by the Appellee was a mortal wound or injury. The drugs distributed in this case are inherently dangerous. Heroin is a drug that has no accepted medical use in treatment in the United States and there is a lack of accepted safety for its use. 21 USC § 812(b)(1). Fentanyl is a drug that has a high potential for abuse, and is currently accepted for medical use with severe restrictions. 21 USC § 812(b)(2). Just as the illegal abortion in *Southwick* was a mortal wound, the delivery of these dangerous controlled substances was a mortal wound or injury.

Poison

It is the People's argument that heroin and fentanyl are poisons for the purposes of this statute. There is no definition within the statute for "poison". Further, we were unable to find any

definition for poison within the Michigan Compiled Laws or within Michigan appellate case law.

According to *The Black's Law Dictionary, 4th Edition*, the word is defined, in pertinent part, as follows:

Poison- “A substance having inherent deleterious property which renders it, when taken unto the system, capable of destroying life. A substance which, on being applied to the human body, internally or externally, is capable of destroying the action of the vital functions, or of placing the solids and fluids in such a state as to prevent the continuance of life.”

Clearly these substances have deleterious properties which renders them capable of destroying life. It is our position that both of these drugs meet the definition of poison for the purposes of MCL 762.5.

Conclusion

The People argue that MCL 762.8 confers jurisdiction to the 38th Circuit Court and establishes venue in Monroe County because two separate acts in furtherance of the crime of Delivery of a Controlled Substance Causing Death occurred in Monroe County. It is also our position that MCL 762.5 establishes venue in Monroe County because the delivery of Heroin/Fentanyl caused a mortal wound/injury to the victim and due to Heroin and Fentanyl being poisons.

STATEMENT OF RELIEF REQUESTED

FOR ALL THE REASONS STATED ABOVE, the People of the State of Michigan respectfully request that this Honorable Court grant leave to appeal.

Dated: June 27, 2018

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