STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant

v.

ROMON MCBURROWS,
Defendant-Appellee **No. 157200**

Court of Appeals No. 338552
Circuit Court No. 17-243452-FC

BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN IN SUPPORT OF THE PEOPLE OF THE STATE OF MICHIGAN

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Table of Contents

Index of Authorities

Case **Page**

Statutes and Court Rules

Other Authority

Statement of the Question

I.

Under MCL 762.8, whenever a felony consists of or is the culmination of 2 or more acts done in its perpetration, venue is proper in any county where any of those acts were committed. MCL 750.317a prohibits 1) delivery of a schedule 1 or 2 controlled substance, other than marijuana, that is 2) consumed by the person to whom delivered or any other person, and that 3) causes that person's death. Where delivery of the substance occurs in one county, and its consumption and the death in another, is venue proper under MCL 762.8 in the county where consumption and death occurred?

Amicus answers YES

The Court of Appeals answered NO

Statement of Facts

Amicus concurs in the facts as stated by the People of the State of Michigan.

Argument

I.

Under MCL 762.8, whenever a felony consists of or is the culmination of 2 or more acts done in its perpetration, venue is proper in any county where any of those acts were committed. MCL 750.317a prohibits 1) delivery of a schedule 1 or 2 controlled substance, other than marijuana, that is 2) consumed by the person to whom delivered or any other person, and that 3) causes that person's death. Where delivery of the substance occurs in one county, and its consumption and the death in another, venue is proper under MCL 762.8 in the county where consumption and death occurred.

Standard of Review

The question here is one of law—the proper construction of a statute—and so review is de novo.[1]

Discussion

A. The factual background

Nicholas Abraham wanted some heroin, and so he and William Ingall traveled to defendant's home in Detroit to purchase it. Abraham gave Ingall the money, Ingall went in and made the purchase from defendant, and they consumed some at a nearby laundromat, Ingall noticing that the heroin was very strong. When Ingall dropped Abraham off at home in Monroe County, he cautioned him with regard to the heroin because of its apparent strength. Abraham and his wife used the heroin; Abraham's wife passed out after so doing, and when she came to found Abraham not breathing. The medical examiner determined that Abraham's death was caused by fentanyl toxicity, fentanyl being a drug often used by dealers to "cut" heroin.

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[1] *People v. Gardner*, 482 Mich. 41, 46 (2008).

Defendant McBurrows was charged by the Monroe County Prosecutor with a violation of MCL 750.317a:

> A person who delivers a schedule 1 or 2 controlled substance, other than marihuana, to another person in violation of section 7401 of the public health code, 1978 PA 368, MCL 333.7401, that is consumed by that person or any other person and that causes the death of that person or other person is guilty of a felony punishable by imprisonment for life or any term of years.

Defendant was bound over for trial, and moved for dismissal in circuit court on the ground of improper venue, the delivery having occurred in Wayne County. The trial court held venue proper both because elements of the offense had occurred in each county, MCL 762.8, and because a "mortal wound" was inflicted by means of the drug transaction in Monroe County. MCL 762.5. The Court of Appeals reversed, and ordered dismissal of the charges in Monroe County.

B. The Court of Appeals erred in finding MCL 762.8 inapplicable by construing MCL 750.317a to be a "penalty-enhancement" statute, and that defendant's offense was essentially complete upon delivery of the controlled substance

1. The Court of Appeals misread this Court's decision in *People v. Plunkett*; MCL 750.317a is not a "penalty-enhancement" statute

MCL 762.8 provides that

> [w]henever 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.

The Court of Appeals rejected application of the statute to the facts here, construing MCL 750.317a to be a "penalty-enhancement" statute based on this Court's decision in *People v. Plunkett*.[2] But in so doing the Court of Appeals overread that decision.[3]

In *Plunkett* the issue was aiding and abetting. Much like the situation with Ingall in the instant case, Plunkett had driven to Detroit from Ann Arbor to buy drugs for himself and his paramour, one Tracy Ann Corson. Plunkett drove, provided Corson with the money for the transaction, and Corson left the car and purchased the drugs. While the two were using the drugs in Plunkett's apartment, Corson invited a friend over, and after the friend used some of the heroin, she became unresponsive, and died. Plunkett was charged with delivery of a controlled substance causing death. In the present case, the situation would have been the same had Abraham and Ingalls invited a third party to use the drugs they had obtained, that person had died, rather than Abraham, and Abraham had been charged rather than the initial seller. Or to look at it the other way, the situation in Plunkett would have been the same as the present case if Plunkett had died after using the drugs in Ann Arbor, and the Detroit dealer had been charged in Washtenaw County.

The Court of Appeals in *Plunkett* found that Plunkett only, at most, aided Corson in receiving the heroin, but not in delivering it to their guest, who used it and died. This Court disagreed. In its analysis of aiding and abetting, this Court said that it was clear—uncontested—that the seller of the drugs in Detroit, one Spencer, had violated MCL 750.317a. The Court said that the offense is a general intent crime, and in *that* context said it "provides an additional punishment for persons

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[2] *People v. Plunkett*, 485 Mich. 50 (2010).

[3] See e.g. *Matter of Estate of Kappler*, 418 Mich. 237, 240 (1983) ("We think the Court of Appeals majority reads too much into our decision . . . .").

who 'deliver[ ]' a controlled substance in violation of MCL 333.7401 when that substance is subsequently consumed by 'any ... person' and it causes that person's death. It punishes an individual's role in placing the controlled substance in the stream of commerce, even when that individual is not directly linked to the resultant death."[4] But this is no different than saying that the murder statute is a penalty-enhancement statute because it provides an additional penalty to one who assaults with intent to do great bodily harm when that assault causes death. It means nothing with regard to the elements of the offense, and the acts which must be proven.

The Court of Appeals said that the statute simply provides a penalty enhancement whenever the defendant's criminal act of delivery "has the result or effect of causing a death to any other individual," and that the "defendant's criminal act is complete upon the delivery of the controlled substance."[5] But though the penalty is "enhanced" in a sense, it is enhanced because of certain consequences that flow from the act of delivery when a further act—unarguably intended by the deliverer—of use or consumption of the delivered controlled substance occurs, with a result of death. This does not defeat venue in Monroe County here. The offense described by the statute consists of—is the culmination of—more than the *deliverer's* act. By its very terms, it requires the act of consumption by the purchaser or some other person—"that is consumed by that person or any other person"—and, as it were, the "act" of death of that person *caused* by that consumption. As set out in M Crim JI 12.2a, the prosecution must prove, among the elements,"(5)Fourth, that the controlled substance was consumed by [state name of person who consumed]. (6)Fifth, that consuming the controlled substance caused the death of [state victim's name]." Even if the death

[4] *People v. Plunkett*, 485 Mich. at 60.

[5] Slip opinion, at 4.

of the consumer is not viewed as an "act," consumption of the controlled substance surely is, and that act occurred in Monroe County. Without that consumption, and the consumption causing death, the offense described in MCL 750.317a is not made out. The act of delivery of the controlled substance is insufficient. The Court of Appeals overread *Plunkett*, and in so doing erred in its conclusion.

2. An act of consumption or use of the delivered drugs is within MCL 762.8

Once again, MCL 762.8 provides that "[w]henever 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." Delivery of a controlled substance causing death "consists of" or is the "culmination" of 2 or more acts—delivery alone *does not constitute the crime*, there must be consumption by some other person, and that consumption must cause death. Though the act of consumption is not an act committed by the deliverer, it is certainly one anticipated by him or her, and the offense is the culmination of, or consists of, the acts of delivery, and consumption causing death. These two acts are part of the perpetration of the crime, and not all acts necessary to the perpetration of the offense need be committed by the defendant. Commission is a synonym for perpetration,[6] and the commission—the perpetration—of an offense may be the culmination of multiple acts, including even the employment of innocent dupes to commit acts necessary for the culmination of the offense.[7]

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[6] Merriam-Webster Dictionary.

[7] See *United States v. Bryan*, 483 F.2d 88, 92 (CA 3, 1973) ("there are numerous examples of convictions of defendants who used innocent dupes to commit crimes").

Defendant in his answer to the People's application says that "'Acts done in perpetration' of a felony refers to acts of the defendant, not the alleged victim,"[8] that "[i]n the context of criminal law, a perpetrator refers to a defendant, not a victim; or, more colloquially, someone who is guilty," and that, as to the reference of amicus to innocent dupes, "the state and amicus cannot have it both ways—Abraham cannot simultaneously be an 'innocent dupe' and a guilty perpetrator."[9] As to defendant's statement that "acts done in perpetration" refers only to acts done by the defendant, defendant offers no argument beyond mere assertion; as to his reference to the point made by amicus concerning innocent dupes, he misunderstands the import. Though of course it is the case that ordinarily the acts in perpetration of a criminal offense will be accomplished by the criminal defendant and his cohorts, nothing in the word demands that universal meaning. As noted, "commit" is a synonym for perpetrate;[10] a criminal defendant could be referred to colloquially as a "commitor" or a "doer" (and sometimes *is* called a "doer"). And indeed, the statute itself says "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*," not "where any of those acts were *perpetrated*." As to innocent dupes, the point of amicus is not that the deceased here was simultaneously an innocent dupe and a guilty perpetrator, but that the innocent dupe doctrine demonstrates that is possible that an act done in the perpetration of an offense may be done by one who is *not*, as defendant would have it, a "criminal perpetrator." Here, the offense defined by MCL 750.317a necessarily involves an act of delivery and an act of

[8] Defendant's answer, p. 12.

[9] Id., at 13.

[10] And see http://www.thesaurus.com/browse/perpetrating.

consumption. As the supplier of the controlled substance, defendant is responsible for the act of consumption, which is done in the perpetration of "commission" of the charged offense, though defendant does not himself commit or "perpetrate" the act of consumption of the controlled substance. The offense is nonetheless the culmination of two or more acts done in its perpetration.[11]

The offense charged here consisted of, or was the culmination of, at least two acts done in its perpetration—delivery of the drugs, and their consumption (causing death). Consumption (and death) took place in Monroe County, and venue is proper there. The Court of Appeals erred in holding otherwise. This Court should reverse the Court of Appeals.

[11] Cf. *People v. Alexander*, 17 Mich. App. 30, 32 (1969), concerning larceny: "It is well established that the asportation need not be effectuated by the perpetrator of the crime. It may be accomplished by a confederate or an innocent agent. In the case of the innocent agent, the asportation is imputed to the defendant because he directed and controlled the innocent agent's actions."

Relief

Wherefore, amicus requests that this Court reverse the Court of Appeals.

Respectfully submitted,

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