4-7-1986

People v. Montoya

IN THE SUPREME COURT, STATE OF COLORADO
Case No. 86 SA 22

OPENING BRIEF

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellant,

v.

PAUL MONTOYA,

Defendant-Appellee.

Appeal from the District Court, Adams County, Colorado, Case Number 85CR0088.

The Honorable Philip F. Roan, Chief Judge, Adams County, District Court.

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STATEMENT OF FACTS

In the summer of 1984 Michael Stanley was a reserve officer for the Brighton Police Department, working undercover investigating narcotics. (Preliminary Hearing of April 24, 1985, Reporters Transcript, hereinafter "T.," p. 2, l. 16-20). In that capacity, on July 4, 1984, he went to 226 South Second Street in Brighton, Colorado for the purpose of purchasing cocaine. (T. p. 3, l. 7-10). There he met a Ray Montoya and made arrangements for the purchase of three and a half grams of cocaine. (T. p. 3, l. 7-11). Ray Montoya told the officer that they "would have to go to another location and purchase the cocaine from his brother who is named Paul." (T. p. 4, l. 10-11).

Officer Stanley and Ray Montoya drove to 344 North 15th Street in Brighton, which was subsequently found to be a house belonging to Paul Montoya. (Hereinafter "the defendant"). (T. p. 3, l. 14-17). Once there, Ray Montoya went inside the residence at that address and returned to the car where Officer Stanley was waiting. (T. p. 5, l. 15-16). He then handed a paper bindle containing cocaine for the officer to examine to determine whether he would purchase the other three grams. (T. p. 5, l. 15-18).

Officer Stanley handed $350.00 to Ray Montoya, who then returned to the house. (T. p. 5, l. 23-24). Ray Montoya returned to the car with the rest of the cocaine, then the defendant went to the door of the house and indicated to Ray to come back up to the door. (T. p. 5, l. 25; p. 6, l. 1-17). The

defendant then handed Ray a beer for both Ray and Officer Stanley. (T. p. 6, l. 3, 4).

When Ray Montoya returned to the car, Officer Stanley asked Ray if that was his brother's home. Ray replied "yes, that's Paul, the person you bought the drugs from." (T. p. 6, l. 23-24).

On July 20, 1984, Officer Stanley again went with Ray Montoya to the South Second Street address. (T. p. 7, l. 15-22). Officer Stanley discussed the purchase of more cocaine, and Ray left alone with the money. (T. p. 8, l. 3-22). During the discussion, Ray told Officer Stanley the he was getting the drugs from Paul Montoya. (T. p. 8, l. 5). Ray returned after approximately forty-five minutes and gave Officer Stanley $800.00 worth of cocaine. (T. p. 10, l. 21-25).

Officer Stanley again went to the house on South Second street, this time with Reserve Officer Falliaux on August 3, 1984. (T. p. 11, l. 3-11). Ray Montoya's wife, Priscilla Montoya was at the house with Ray Montoya. (T. p. 11, l. 16-21). A discussion was held regarding the purchase of $3,000.00 worth of cocaine. (T. p. 11, l. 22-25).

During the discussion, Ray Montoya said that he would "have to call his brother, Paul, to check and see if the drugs were available." (T. p. 13, l. 17-18). He indicated the purpose of the call was to determine whether there was enough cocaine to purchase for $3,000.00. (T. p. 14, l. 4-5). Ray Montoya placed a telephone call, asked for "Paul," left the house and returned twenty-five to forty-five minutes later. (T. p. 13, l. 23, p.

14, l. 9-15). When he returned, he gave Officer Stanley thirty bindles of cocaine. (T. p. 14, l. 17-24).

The final transaction began on August 9, 1984. On that date, Officers Stanley and Falliaux again went to the address on South Second Street. (T. p. 14, l. 25; p. 15, l. 1-3). Priscilla Montoya was the only person present and she discussed with the officers the purchase of $10,000.00 worth of cocaine. (T. p. 15, l. 10-16). She indicated that Ray Montoya was not home and that "she would have to place a telephone call to Paul Montoya." (T. p. 15, l. 16-18). She placed a telephone call, asked for "Paul," and acted as an intermediary in the telephone conversation between Officer Stanley and the person named Paul. (T. p. 15, l. 25; p. 16, l. 1). Officer Stanley asked Priscilla to ask Paul if he could go down to his house to purchase the cocaine. Priscilla asked him and then returned the message that he (Paul) did not want Officer Stanley coming over to the house. (T. p. 16, l. 1-6). She then left, was gone for approximately fifteen minutes, and returned with $1,000.00 worth of cocaine. (T. p. 16, l. 10-14).

While Priscilla was gone, Ray Montoya and Pete Gabaldon entered the residence. (T. p. 16, l. 19-21). Officer Stanley spoke with them and, during the conversation, Pete Gabaldon indicated that he and Paul were "partners in selling cocaine in the city of Brighton." (T. p. 17, l. 5-10). The officer indicated his intention to buy $10,000.00 worth of cocaine from Pete and Paul, to which Pete Gabaldon replied that "he would have to call Paul Montoya to see if he had come up with $10,000.00

worth of cocaine in a twenty-four hour period" since Officer Stanley intended to purchase it on August 10, 1984. (T. p. 17, l. 15-19). Pete then placed a telephone call and asked for "Paul," returned and told the officer that they could only handle $6,000.00 worth. (T. p. 17, l. 20-22). Arrangements were then made for the purchase. (Volume III, hereinafter Vol. III, p. 5, l. 18-19).

On August 10, 1984, Officer Stanley and Officer Falliaux again responded to the house on South Second Street. (Vol. III, p. 5, l. 24-25; p. 6, l. 1). It was arranged that Officer Falliaux would accompany Ray Montoya for the purchase. (Vol. III, p. 6, l. 2-3). Ray then went to the defendant's house. (Vol. III, p. 6, l. 4-5). As Officer Falliaux stayed in the car, Ray went to the house and returned with over twenty-eight grams of cocaine. (Vol. III, p. 6, l. 5-8).

STATEMENT OF THE CASE

On November 15, 1984, an information was filed in Adams County Court naming Paul Montoya as a defendant. The information consisted of four counts. It alleged that the defendant conspired to distribute a Schedule II Controlled Substance, contrary to C.R.S. §18-18-105 and C.R.S. §12-22-310, on July 4, 1984, (Count I), July 20, 1984 (Count II), July 30, 1984 (Count III), and August 9 and 10, 1984 (Count IV).

A preliminary hearing was held on January 23, 1985, at which time the first three counts were dismissed. The People of the State of Colorado (hereinafter "the People") then filed a

petition in the District Court for leave to file a direct information and a motion to add an fifth count.

On March 14, 1985, argument was heard on the Petition for Direct Filing. The District Court, on March 20, 1985, entered an order to permit the direct filing by the People and set a preliminary hearing for April 24, 1985.

The preliminary hearing was held before the Honorable Philip Roan on April 24, 1985, in Adams County District Court Division F. At the hearing, the Court bound Counts I, II, and III over for arraignment. The Court also denied the People's motion to add a fifth count. The defendant pled not guilty to the four count information at the arraignment on May 3, 1985. The defendant subsequently filed motions.

On August 9, 1985, a hearing was held on the defendant's Motion for Discovery and Inspection and Motion for Separate Trials. On that date, the Court granted in part the Motion for Discovery and Inspection. It also ruled that it would sever Count IV. A separate trial date was then set for Counts I, II, and III.

The defendant later filed a Motion to Dismiss and Motion to Suppress on December 20, 1985. A hearing was held on January 3, 1986 at which time the Court denied the motion to dismiss or suppress evidence with regard to the destruction of notes made by an officer in the case.

The Court on that date also heard argument on the defendant's Motion to Dismiss based on the absence of independent evidence of a conspiracy. During the hearing, the parties

proceeded by offer of proof. No evidence was produced. The court ruled that the defendant's presence at the doorway of the house immediately after the drug transaction linked him to the conspiracy and denied the motion.

On the morning of trial on January 8, 1986, the Court stated that after the defendant's motion to dismiss, it notified the People to be prepared for further argument on the date of trial. Argument was held. After argument, the court reversed its prior ruling and held that there was not sufficient independent evidence to link the defendant to a conspiracy. Therefore, the court dismissed Counts I, II, and III.

The defendant then filed a motion to dismiss, which was set for hearing on January 30, 1986. The People filed a Notice of Appeal and Designation of Record on January 17, 1986.

ISSUES PRESENTED

I

If the prosecution presents independent evidence to establish a defendant's connection with a conspiracy, then should the trial court allow the jury to consider a co-conspirator's statement to determine whether the prosecution has established the defendant's guilt.

IA

Was it proper for the court, prior to trial and without hearing testimony, to dismiss a case on the grounds that there was insufficient independent evidence of a conspiracy.

IB

Was there sufficient independent evidence of a conspiracy so that the judge should have allowed a jury to hear the statements of the co-conspirators.

SUMMARY OF THE ARGUMENT

The trial court should not have determined at a pre-trial proceeding, by an offer of proof, the issue of whether there is proper foundation for the admission of statements of co-conspirators. In addition to problems of efficiency, determining the issue in that manner does not adequately allow the court to consider all of the evidence of the conspiracy.

Even if it was proper to make the determination of admissibility at that stage of the proceedings, the court's ruling that the statements were inadmissible was improper. There are four reasons why the court should have found that there was sufficient independent evidence before it to determine that a conspiracy existed and that the defendant was a participant in that conspiracy.

First, the court could have followed the minority view and looked at the statements themselves to determine that the conspiracy existed. Some courts have held that F.R.E. 104(a) allows the court to ignore the rules of evidence and look at all evidence of the conspiracy. Thus, the statements of the co-conspirator's themselves created independent evidence of the conspiracy and the defendant's participation therein.

Second, the court should have considered non-hearsay statements in determinating that a prima facie case of the defendant's involvement in a conspiracy was presented. There is authority in Colorado that it is proper for the courts to look at such non-hearsay statements when making the determination.

Third, the court should have considered statements of co-conspirators that fall within exceptions to the hearsay rule. In Colorado, case law allows those statements alone to establish a defendant's participation in a conspiracy.

Finally, the court should have determined from the evidence itself, without considering the co-conspirator's statements, that the defendant was part of a conspiracy. There were other facts and circumstances that the court did not consider that establishes the defendant's participation in the conspiracy.

ARGUMENT

I

SINCE THE PROSECUTION COULD HAVE PRESENTED INDEPENDENT EVIDENCE TO ESTABLISH THE DEFENDANT'S CONNECTION TO A CONSPIRACY, THE TRIAL COURT SHOULD HAVE ALLOWED A JURY TO CONSIDER A CO-CONSPIRATOR'S STATEMENTS.

The defendant contended, and the trial court agreed, that there was insufficient independent evidence of a conspiracy in the case at bar to allow statements of co-conspirators to be heard by a jury. Before addressing that issue, the threshold inquiry is whether the trial court should have determined the issue prior to trial.

1A

RULINGS ON THE ADMISSIBILITY OF CO-CONSPIRATOR'S STATEMENTS SHOULD BE MADE AT TRIAL OR AFTER AN EVIDENTIARY HEARING.

On January 3, 1986 and January 8, 1986, hearings were held on the defendant's motion to dismiss. At those hearings, no testimony was produced by either side. At the conclusion of the hearing on January 8, 1986, the court ruled that there was insufficient independent evidence of a conspiracy to allow statements of co-conspirators to be admitted against the defendant. (Volume III, p.12, l. 7-14).

It is clear that the initial determination of the admissibility of co-conspirator's statements is to be determined by the court. People v. Schlepp, 184 Colo. 28, 518 P.2d 824 (1974); People v. Braly, 187 Colo. 324, 532 P.2d 325 (1975). See C.R.E. 104(a). After placing the admissibility decision in the hands of the judge, it must be determined when the court should make the decision.

Some courts have developed guidelines concerning the procedure to be used. In United States v. Peterson, 611 F.2d 1313 (C.A. 1979), cert. den. 447 U.S. 905 (1980), the Tenth Circuit Court of Appeals outlined a series of rules designed to control the issues surrounding the admissibility of hearsay statements by co-conspirators. In that case, the Court reaffirmed that the judge alone was to make the determination about the admissibility of the hearsay. The Court then revealed that the district court's "threshold determination is normally to be made during the presentation of the government's case-in-chief, and before the evidence is heard by the jury." United States v. Peterson, 611 F.2d at 1330, quoting United

States v. James, 590 F.2d 575, 581 (C.A.5 1979) cert. den., 442 US. 917 (1979). [Emphasis added].

To guard against any potential prejudice to the defendant when using this procedure, several safeguards have been adopted. At trial, the trial court should require the showing of the conspiracy and the connection of the defendant to the conspiracy before admitting the declaration of a co-conspirator. United States v. James, supra; United States v. Peterson, supra. If the court concludes the prosecution has not borne its burden of proof on the issues, and the statement was produced at trial, the statement cannot remain in evidence to be submitted to the jury. In that event, the judge must decide whether the prejudice arising from the erroneous admission of the statement can be cured with a cautionary instruction or whether a mistrial is required. United States v. James, supra.

The Tenth Circuit Court of Appeals again addressed the issue in United States v. Monaco, 700 F.2d 577 (C.A. 10 1983). In that case, as in the case at bar, the defendant filed a motion prior to trial to determine whether the statements of co-conspirators would be admissible at trial. The judge refused to enter a pre-trial order and denied the motion.

The Court of Appeals held that the judge properly denied the motion as a trial court has no obligation to determine the admissibility of possible hearsay at the pre-trial stage. The Court reasoned that the judge could rule on the questions of admissibility as they were raised by the parties at trial.

This procedure has several advantages. The first is simply efficiency. Such a one step admissibility determination avoids the impracticality of a mini-trial before the trial. See Butler v. United States, 481 A.2d 431 (C.A.D.C. 1984).

Furthermore, a trial enables the judge to determine the credibility of the conspiracy evidence as witnesses are cross-examined by the defense. The court must do so because it becomes the trier of fact when it decides the preliminary matter of admissibility. F.R.E. 104, Advisory Committee's Notes. Thus, because at trial inquiries are made about the credibility of witnesses, the judge sitting as a trier of fact at trial is in a better position to determine the strength of the conspiracy evidence than when he only considers an offer of proof.

In addition, at trial, the court is able to hear all of the prosecution's evidence pertaining to the conspiracy. When proceeding by offer of proof, and especially by a pre-trial evidentiary hearing, it becomes difficult, if not impossible for the prosecution to present all of its evidence of a conspiracy.

In the case at bar, the problem is revealed when the court, in its ruling, said:

> As the court understands it, what happens is that after the transaction was completed and Ray Montoya had returned from the house...and the officer never testified that he saw into the house and whoever was in the house or saw anything that was taking place in the house...Paul Montoya stepped out onto the porch of the house with two beers in his hand and gave them to Ray Montoya. That, as the court understands this case, is the only independent evidence of the establishment of a conspiracy....

[Volume III, p. 11, l. 15-22]. [Emphasis added].

If the matter would have proceeded to trial, the officer's observations or lack of observations of the actions inside the house may have been presented. Further, it is possible that other evidence of the conspiracy could have been elicited, like exclusive possession or control of the house, the possibility of anyone else in the house at the time of the transaction, or non-hearsay statements indicating the existence of a conspiracy.

For all these reasons, the court should have followed the procedure recommended in United States v. Peterson, supra and United States v. Monaco, supra, and decided the admissibility of the co-conspirator's statement at trial. Then, many of the inadequacies of proceeding by offer of proof at the pre-trial stage would be avoided.

Even if this Court is not willing to make a blanket ruling that the determination of the admissibility of co-conspirator's statements at a pre-trial hearing is per se improper, the Court should find that it was improper in this case. Here, the underlying substantive charge was conspiracy. All the relevant evidence at trial is designed to establish a conspiracy and the defendant's involvement in it. As such, it is possible that more evidence of the conspiracy would have been revealed than that presented by a prosecutor at a pre-trial hearing proceeding by an offer of proof.

IB

BECAUSE STATEMENTS THAT ARE NOT HEARSAY AND STATEMENTS THAT ARE EXCEPTIONS TO THE HEARSAY RULE CAN BE CONSIDERED BY THE COURT IN ADDITION

TO OTHER INDEPENDENT EVIDENCE OF THE CONSPIRACY, THERE WAS SUFFICIENT INDEPENDENT EVIDENCE OF A CONSPIRACY TO ALLOW THE TRIAL COURT TO ADMIT THE STATEMENTS OF THE CO-CONSPIRATORS.

The trial court ruled that the only evidence of the defendant's participation in the conspiracy consisted of the statements of the other co-conspirators and the incident in which the defendant handed Ray Montoya some beer after the transaction was completed. [Volume III, p. 11, l. 15-25; p. 121.1]. Relying only on that incident, it found that there was insufficient independent evidence of a conspiracy.

In Colorado, statements made by a co-conspirator are admissible if made during the course and in furtherance of that conspiracy. People v. Small, 631 P.2d 148 (Colo. 1981) cert. den. 454 U.S. 1101 (1982); People v. Best, 665 P.2d 644 (Colo.App. 1983); C.R.E. 801(d)(2)(E). Under C.R.E. 801(d)(2)(E) statements of a co-conspirator are not hearsay if:

> (1) The existence of the conspiracy and the members participation therein can be established by independent evidence, (2) statement is made during the pendency of the conspiracy, and (3) the statements were made in furtherance of the conspiracy. People v. Watson, 668 P.2d 965 (Colo.App. 1983).

The issue of admissibility of the testimony ultimately presents a question of law to be decided by the judge. People v. Akins, 36 Colo. 337, 541 P.2d 338 (1975). A judge is not required to find that the evidence proves a conspiracy beyond a reasonable doubt, but only that a prima facie case of conspiracy exists. People v. Anaya, 545 P.2d 1053 (Colo.App. 1975), People v. Gable, 674 P.2d 246 (Colo.App. 1982).

If the above requirements are met, the statements of the co-conspirators are admissible and are competent evidence to prove the guilt of a substantive crime. People v. Schlepp, supra; People v. Nunez, 698 P.2d 1376 (Colo.App. 1984). As such, the issue in the case at bar involves what kind of evidence the court may consider. There appears to be a split of authority on this issue.

Before the Federal Rules of Evidence came into effect, it was clear that judges could only consider evidence other than the statements of the co-conspirators when determining the existence of a conspiracy. In Glasser v. United States, 315 U.S. 60, (1942), the United States Supreme Court prohibited judges from considering the co-conspirator's statements themselves when determining whether the co-conspirator's hearsay statements should be admitted. The Court reasoned at p. 62 that "the danger to be avoided is that the hearsay may be lifted by its own boot straps to the level of competent evidence." The Colorado Supreme Court was in accord with that position. See People v. Braly, supra.

After Glasser, supra, the Federal Rules of Evidence were adopted, creating tension with the Court's position that only evidence other than the co-conspirator's statements can be considered when determining whether there is a conspiracy and the defendant is a part of it. F.R.E. 104(a) provides that:

> Preliminary questions concerning...the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision(b). In making its determination, it is not bound by the rules of evidence

except those with respect to privileges. [Emphasis added].

In 1980, Colorado adopted C.R.E. 104(a), which is identical to the federal rule. See C.R.E. Chapter 33 C.R.S., C.R.S. 104(a).

F.R.E. 104(a) can be interpreted as overruling Glasser to the extent that Glasser prohibits the hearsay statements themselves from being considered when making the preliminary determination of whether a conspiracy exists and whether the defendant is a part of it. The courts are apparently divided over the issue and two approaches subsequently developed.

One approach is to strictly construe F.R.E. 104(a). For example, the First Circuit found that F.R.E. 104(a) overruled Glasser, supra, to "the extent that it [Glasser] held that the statement seeking admission cannot be considered at all in making the determination whether a conspiracy exist." United States v. Mantocano, 557 F.2d 1, 12 (C.A. 1 1977), reh. den. 561 F.2d 406 (C.A. 1 1977), cert. den. 435 U.S. 922 (1978). This approach allows the hearsay statements themselves to be considered by the judge in deciding the preliminary question of admissibility of a co-conspirator's statements. See United States v. Hamilton, 689 F.2d 1262 (C.A. 6 1982), cert. den. 459 U.S. 1117, 1983; United States v. Vinson, 606 F.2d 149 (C.A. 6 1979), cert. den. 444 U.S. 1074 (1980).

If this approach is followed, it is clear that the conspiracy was established. When all of the co-conspirator's statements are considered, along with other evidence of the conspiracy, the conclusion is inescapable that a conspiracy existed and the defendant was a part of it.

Other jurisdictions have not strictly applied F.R.E. 104(a). They appear to allow consideration of only independent non-hearsay evidence in the admissibility determination. E.g., United States v. James, supra, United States v. Cambindo Valencia, 609 F.2d 603, 631 (C.A. 2 1979), cert. den., 446 U.S. 940 (1980); United States v. Macklin, 573 F.2d 1046, 1048 (C.A. 8 1978), cert. den., 439 U.S. 852 (1978); United States v. Andrews, 585 F.2d 961, 965 (C.A. 10. 1978); United States v. Dixon, 562 F.2d 1138, 1141, (C.A. 9 1977), cert. den., 435 U.S. 927 (1978); United States v. Stroupe, 538 F.2d 1063, 1065 (C.A. 4 1976); United States v. Buschman, 527 F.2d 1082, 1087 (C.A. 7 1976); United States v. Hopkins, 518 F.2d 152, 156 (C.A. 3 1975); Butler v. United States, 481 A.2d 431 (C.A.D.C. 1984).

This split of authority is highlighted by two recent United States Supreme Court opinions dissenting from a denial of certiorari. See Arnott v. United States, 464 U.S. 948 (1983) (Justice White dissenting from certiorari); Means v. United States, 83 L.ed.2d 429 (1984) (Justices White and Brennan dissenting from denial of certiorari.) In both Arnott v. United States, supra and Means v. United States, supra, the issue would have been squarely confronted by the Court. Justice White, in his dissenting opinion, affirms his belief that the Court should resolve the matter, and warns that there is no sign of it disappearing.

The Colorado courts appear to have taken the second approach. See People v. Braly, supra. However, it should be noted that Braly was decided prior to the adoption of the

Colorado Rules of Evidence in 1980. The Colorado courts have, however, considered statements that are not hearsay or are exceptions to the hearsay rule. See: People v. Gable, 647 P.2d 246 (Colo.App. 1982); People v. Gallegos, 680 P.2d 1294 (Colo.App. 1983); People v. Nunez, supra.

The Colorado Court of Appeals considered non-hearsay statements of co-conspirators when making the admissibility determination in People v. Gable, supra. In that case, the defendant was one of twenty-three people in a large conspiracy to distribute drugs. The prosecution's evidence consisted primarily of tape recorded telephone conversations between the defendant and other co-conspirators.

The Court of Appeals held that non-hearsay conversations in which the defendant was a participant, combined with testimony concerning police surveillance, constituted a prima facie showing of a conspiracy. The Court reasoned that the statements of the other parties to the conversations were not introduced to prove the truth of the matter asserted, but to place the defendant's own statements in context.

Similarly, in the case at bar, the court should have considered the instances where "Paul" is called on the telephone. Ray Montoya, Pete Gabaldon, and Priscilla Montoya placed telephone calls and asked for "Paul." See [T. p. 13, l. 23; T p. 15, l. 23, p. 17, l. 21].

These statements were non-hearsay statements. They can be considered to show that when Ray, Pete and Priscilla needed to find out if drugs were available, they called "Paul," rather than

for the truth of the matter that they actually spoke to the defendant.

The Colorado courts have also considered statements that are exceptions to the hearsay rule in making the admissibility determination. In a case very similar to the case at bar, the Colorado Court of Appeals also ruled that a statement by a co-conspirator that falls within an exception to the hearsay rule alone is sufficient to establish a conspiracy. People v. Nunez, supra.

In that case, an undercover officer and an informant entered a bar to buy heroin. A co-conspirator (named Lamorie) approached them, told them he knew of a source, and said he would "call his connect." The co-conspirator later said his connect's name was "Pic" and that "Pic" was coming to the bar. The defendant then came to the bar, exchanged drugs with the co-conspirator (under a table), and left with the co-conspirator.

The trial court ruled that the co-conspirator's statement that he would "call his connect" was admissible under the state of mind exception to the hearsay rule. See C.R.E. 803(3). The Colorado Court of Appeals ruled at 1379:

> Since the trial court correctly ruled that Lamorie's extra-judicial statement was admissible under C.R.E. 803(3), this testimony provided enough independent evidence of the conspiracy to warrant admission of the other extra-judicial statements. [Emphasis added].

Similarly, in the case at bar, there are several statements that fall within a hearsay exception that would warrant the admission of the other co-conspirator's statements. In

particular, four statements of co-conspirators fall under the state of mind exception found in C.R.E. 803(3). First, Ray Montoya told the undercover officer that they would "have to go to another location and purchase the cocaine from his brother who was named Paul." (T. p. 4, l. 10, 11); Second, Ray Montoya's stated that he would have to "call his brother, Paul to check and see if the drugs are available." (T. p. 13, l. 17-18); Third, Priscilla Montoya stated when discussing a cocaine purchase, that "she would have to place a telephone call to Paul Montoya." (T. p.. 15, l. 17-18). Fourth, Pete Gabaldon stated he would have to "call Paul Montoya to see if he could come up with $10,000.00 worth of cocaine in a twenty-four hour period. (T. p. 17, l. 16-18).

The statements squarely fall within the state of mind exception to the hearsay rule. This exception is found in C.R.E. 803, which provides:

> The following are not excluded by the hearsay rule, even though the declarant is available at as witness: (3) then existing mental, emotional, or physical condition.
>
> > "A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling pain, and bodily health),..."

The four statements above all exhibit the declarant's intent and plan to purchase drugs from "Paul", the defendant.

Further, the statements also present an intent to engage in future conduct, which can be used as proof of his subsequent acts. People v. Madson, 638 P.2d 18 (Colo. 1981). As such, they

provide some proof that the intended contacts occurred. Therefore, it is clear that the four statements of the declarants produced enough independent evidence of the conspiracy to admit other statements by co-conspirators.

Other courts have also found sufficient independent evidence of a conspiracy using an exception to the hearsay rule as the basis for the finding. United States v. Andrus, 775 F.2d 825 (C.A. 7 1985); United States v. Perez, 658 F.2d 654 (C.A. 9 1981). In United States v. Andrus, supra, the defendant was sitting at a table with other co-conspirators. They discussed one co-conspirator leaving and the defendant "taking over" for him, but the defendant did not say anything. The Court of Appeals upheld the trial court's ruling that the statement was admissible under F.R.E. 801(d)(2)(b) as an adoptive admission. That admission created independent evidence that the defendant was a member of the conspiracy.

In the case at bar, it is unclear whether Ray Montoya's statement to the officer that "that's the person you bought the drugs from" was within the defendant's hearing. If the case were allowed to go to trial, or if an evidentiary hearing were held, its possible that the evidence would show that the statement was in hearing distance. If so, the statement would be admissible as an adoptive admission and would constitute independent evidence that the defendant was a member of the conspiracy. United States v. Andrus, supra.

In addition to the statements, there is other independent evidence that the conspiracy existed. For example, there is

evidence that the defendant lived at 344 North 15th Street, the location at which the first transaction apparently took place. There is also evidence that, immediately after the transaction, the defendant gave Ray Montoya a couple of beers. There was also proof that immediately after requests for the purchase of drugs were made, a telephone call was placed, and the co-conspirators drove to the defendant's house and returned with the drugs. This evidence was not considered by the trial court.

CONCLUSION

As shown above, the court should not have resolved the issue of admissibility of co-conspirator's statements at the pre-trial stage proceeding by an offer of proof. That procedure did not allow the court to adequately consider all of the evidence of the conspiracy.

If it is found that it was proper for the court to decide the issue in that manner, there are four principles that mandate a finding that there was sufficient evidence that the defendant was a participant in the conspiracy. The court could have considered all of the statements of the co-conspirators. The court also should have considered non-hearsay statements of the co-conspirators. In addition, it should have considered statements that are exceptions to the hearsay rule. Finally, the court should have considered all of the facts and circumstances surrounding the conspiracy rather than one isolated incident.

It is submitted that if the court would have applied any one of these principles to the facts in the case at bar, it would

have found that there is sufficient evidence to establish the defendant's involvement in the conspiracy. Therefore, the People respectfully request that this Court reverse the trial court's ruling and remand this matter for trial.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 7th day of April, 1986, a true copy of the Opening Brief was deposited in the U. S. Mail at Adams County, State of Colorado, postage prepaid in a securely sealed envelope addressed to:

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_____