STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES R. KAUFMAN,

Defendant-Appellant,

UNPUBLISHED
April 4, 1997

No. 183091
Barry Circuit Court
LC No. 94-000128-FH

Before: Hood, P.J., and Saad and T.S. Eveland*, JJ.

PER CURIAM.

Defendant was convicted of manufacturing marijuana, second offense, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), MCL 333.7413(2); MSA 14.15(7413)(2), following a jury trial. Defendant, thereafter, admitted to being a habitual offender, third offense, MCL 769.11; MSA 28.1083. He was sentenced to five to sixteen years' imprisonment, and appeals as of right. We reverse and remand.

State Trooper Terry Klotz testified at the preliminary examination that he received an anonymous telephone call on May 22, 1994. The caller indicated that Molly Westrate had approximately 200 marijuana plants growing in her basement and that her son, defendant, had a gun buried in his backyard that was used by his brother in an armed robbery. As a result of the call, without a search warrant, Trooper Klotz and Trooper Michael Herendeen went to Westrate's house. The troopers, both in uniform, arrived at the house in separate patrol cars. The front door was open but the screen door was closed. Trooper Klotz testified that he knocked on the door, and when he did not receive a response, he rang the doorbell. Westrate, whom Trooper Klotz was "familiar with," came to the front door. Trooper Klotz identified himself and Trooper Herendeen and "advised her that [they] were there to get the marijuana out of her basement." Westrate said "[e]xcuse me?" and Trooper Klotz repeated his statement. Westrate "turned around and started to walk away from the door." Trooper Klotz called out "Molly" and Westrate returned to the door. Trooper Klotz testified that he then said, "the marijuana's in your basement, isn't it?" and she replied that it was. Trooper Klotz testified that she then opened the door and said "come in." The troopers went into the kitchen area, and Trooper Herendeen proceeded into the basement.

* Circuit judge, sitting on the Court of Appeals by assignment.

Trooper Herendeen testified that Westrate let them into the house and directed them to the basement. He proceeded into the basement and "looked around." He noticed a locked door in the basement and went to the foot of the stairs and called Westrate. When she came to the top of the stairs, he told her that he "would need a key . . . to the locked door." Westrate patted her pockets looking for the key, said "I don't have it," and walked away. A few minutes later, defendant appeared with the key and unlocked the door. There were 594 marijuana plants behind the locked door. Defendant admitted that the marijuana plants belonged to him.

The two troopers were the only witnesses presented at the preliminary examination. After hearing the evidence, defendant was bound over to the circuit court on the charge of manufacturing marijuana.

At a pretrial hearing, defense counsel made an oral motion to suppress the evidence, arguing that the search was illegal. In making their arguments, the parties simply referred to the preliminary examination transcript. The trial court did not order an evidentiary hearing or rule on the propriety of the search. The trial court simply denied defendant's motion by reaffirming the findings of the district court that there was sufficient evidence presented to indicate that defendant had committed a crime.

At trial, Trooper Klotz and Trooper Herendeen testified in conformity with the testimony given at the preliminary examination. After the prosecution presented its case, defense counsel made a motion for a directed verdict, again arguing that the search was illegal. The trial court, in denying defendant's motion, indicated that it was "satisfied that the Court's decision was correct and I would reaffirm the decision that the search and seizure was appropriate and did not violate the rights of --[defendant]."

Defendant first argues that the trial court abused its discretion in denying his motion to suppress the evidence because any consent to the search of the room containing the marijuana was involuntary and the production of the key to unlock the door in the basement was coerced. This Court will not reverse a trial court's decision following a suppression hearing unless it is clearly erroneous. *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). Therefore, the trial court's decision will be affirmed unless, upon a review of the record, this Court is left with a definite and firm conviction that a mistake was made. *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1992).

We need not discuss the interplay between the Fourth Amendment and the consent exception[1], because we find that the trial court abused its discretion in denying defendant's motion to suppress the evidence without first holding an evidentiary hearing. In *People v Talley*, 410 Mich 378, 382, 391 n 3; 301 NW2d 809 (1981), our Supreme Court specifically disapproved of the practice of relying exclusively on preliminary examination transcripts in conducting suppression hearings. See also *People v Whittaker*, 187 Mich App 122, 129-130; 466 NW2d 364 (1991). Our Supreme Court further stated:

> Even had the trial court chosen to give express consideration to the constitutionality of the seizure, it could not properly have decided whether or not the evidence should have been suppressed without a full evidentiary hearing--listening to

> witnesses and judging other evidence--to determine whether or not the seizing officer had probable cause to seize the evidence. Since the trial court did not have such a full evidentiary hearing it would have no way of knowing whether the facts in the case authorized or did not authorize the officer to seize the evidence. For the Court of Appeals to presume to rule on the merits in such an absence of proper procedure requires this Court to point out to that Court and all trial courts that a motion to suppress evidence requires the *holding of a full evidentiary hearing and any attempt to rule on such a motion on the basis of a preliminary examination transcript alone is inadequate and erroneous.*
>
> * * *
>
> The hearing upon remand is to be a de novo inquiry into the constitutional validity of the contested seizure. The trial court in this case, and all other trial courts in the conduct of all future suppression hearings, shall not place exclusive reliance on the preliminary examination transcript in the determination of the legality of a contested search or seizure. [*Id.* at 389-390.]

There are factual differences between the instant case and *Talley*. In this case, defense counsel did not file a written motion to suppress the evidence or formally request an evidentiary hearing. Further, in *Talley*, the defendant's motion to suppress focused on the lack of probable cause. We, nevertheless, believe that *Talley* is still controlling. Accordingly, the trial court erred in deciding defendant's motion to suppress solely on the basis of the preliminary examination transcript.

Defendant also argues that he was denied effective assistance of counsel because defense counsel failed to effectively challenge the improper search of the premises. We disagree. Defendant raises several claims of ineffective assistance of counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

In this case, at the pretrial hearing, defense counsel indicated:

> Its our position that the district judge abused its discretion in binding this matter over on several respects. One, he allowed the illegal search and seizure to come in, which is where these fellows allegedly found all these plants growing.

However inexpertly, defense counsel did move to suppress the evidence on the grounds that the search of the premises was illegal, and the trial judge understood and addressed the motion. We are not convinced that, but for this counsel's actions, the outcome of defendant's trial would have been different. Rather, the trial court improperly addressed the motion. As previously discussed, the trial

court should have held an evidentiary hearing before ruling on defendant's motion to suppress the evidence. We, therefore, conclude that defendant was not denied effective assistance of counsel on this basis.

Finally, defendant argues that the trial court erred by applying both the controlled substance sections of the Public Health Code, § 7413(2) and the habitual offender, third offense statute, MCL 769.11, thereby quadrupling the maximum punishment for his offense from four years' imprisonment to sixteen years' imprisonment. We agree.

Section 7413 of the Public Health Code provides:

> (1) An individual who was convicted previously for a violation of any of the following offenses and is thereafter convicted of a second or subsequent violation of any of the following offenses shall be imprisoned for life and shall not be eligible for probation, suspension of sentence, or parole during that mandatory term:
>
> (a) A violation of section 7401(2)(a)(ii) or (iii).
>
> (b) A violation of section 7403(2)(a)(ii) or (iii).
>
> (c) Conspiracy to commit an offense proscribed by section 7401(2)(a)(ii) or (iii) or section 7403(2)(a)(ii) or (iii).
>
> (2) Except as otherwise provided in subsections (1) and (3), an individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both.

MCL 769.11(1)(a); MSA 28.1083(1)(a) provides:

> (1) If a person has been convicted of 2 or more felonies, attempts to commit felonies, or both, whether the convictions occurred in this state or would have been for felonies in this state if the convictions obtained outside this state had been obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction as follows:
>
> (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, then the court, except as otherwise provided in this section or section 1 of chapter 11, [] may sentence the person to imprisonment for a maximum term which is not more than twice the longest term prescribed by law for a first conviction of that offense or for a lesser term.

* * *

> (c) If the subsequent felony is a major controlled substance offense, the person shall be punished as provided by part 74 of the public health code, Act No. 368 of the Public Acts of 1978, being sections 333.7401 to 333.7415 of the Michigan Compiled Laws.

Generally, a person convicted of manufacturing marijuana can be imprisoned for not more than four years. MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). However, under § 7413(2) of the Public Health Code, a person convicted of a second offense may be imprisoned for a term of not more than twice the term otherwise authorized. Under the third-felony statute, MCL 769.11(1)(a); MSA 28.1083(1)(a), a person who has been convicted of two or more felonies, may be sentenced to imprisonment for a maximum term which is not more than twice the longest term prescribed by law for a first conviction of that offense.

In this case, both enhancement statutes applied. However, this Court has held, without subsequent contradiction, that while the prosecutor may choose one or the other enhancement statute, both may not be simultaneously applied. *People v Sears*, 124 Mich App 735, 742; 336 NW2d 210 (1983); *People v Edmonds*, 93 Mich App 129, 135; 285 NW2d 802 (1980). According, the trial court erred when it accepted the prosecutor's position that it could double defendant's potential four-year maximum sentence to eight years under § 7413(2) and then double that eight-year potential maximum sentence to sixteen years under the third-felony offender statute. It was, therefore, error to sentence defendant to a maximum sentence of greater than eight years' imprisonment.[2]

Reversed and remanded for an evidentiary hearing on defendant's motion to suppress the evidence. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Thomas S. Eveland

[1] See discussion of the consent issue in *United States v Shaibu*, 920 F2d 1423 (CA 9, 1990).

[2] The prosecutor relies on an unpublished opinion of this Court. An *unpublished* opinion is not precedentially binding under the rule of stare decisis. MCR 7.215(C)(1).