STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE TIDWELL,

Defendant-Appellant.

UNPUBLISHED
May 6, 1997

No. 190005
Van Buren Circuit
LC No. 95-009437 FH

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of possessing less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), resisting and obstructing an officer, MCL 750.479; MSA 28.747, furnishing false information to a peace officer, MCL 257.324; MSA 9.2024, and operating a motor vehicle without a license, MCL 257.904(1); MSA 9.2604(904)(1). We affirm.

Defendant was stopped by two Covert Township police officers after the officers witnessed defendant fail to make a complete stop at an intersection and then cross into oncoming lanes of traffic. Defendant was arrested after he acknowledged that he did not have a driver's license, and he struggled with the officers as he was being handcuffed. After defendant was subdued, a package of cigarettes and a folded piece of paper containing .210 grams of cocaine were found on the ground near defendant. A search of defendant revealed two plastic bags containing cocaine residue, a plastic bag containing .96 grams of cocaine, and a bundle of cash estimated at $700. Another plastic bag containing crack cocaine was found near the driver's door of defendant's car. An orange pill, a razor blade, and a crack pipe were also found on the front seat of the car.

Defendant's motions to dismiss and to suppress evidence were denied.

I

Defendant contends that he was denied effective assistance of counsel because his trial attorney failed to timely challenge the trial court's continuance of the preliminary examination. The trial court

granted the prosecutor's request for a one-week continuance of the preliminary examination in order to secure the laboratory analysis of the substance alleged to be cocaine. The preliminary examination therefore occurred fifteen days after defendant's arraignment, one day beyond the time period established by MCL 766.4; MSA 28.992. On the day of trial, defendant's attorney filed a motion to dismiss, stating that the lab report was actually completed seven days before the first scheduled preliminary examination.

MCL 766.4; MSA 28.992 requires that a preliminary examination be scheduled for a date "not exceeding 14 days after the arraignment." Adjournment or continuance "shall not be granted by a magistrate except for good cause shown." MCL 766.7; MSA 28.925. Where the fourteen-day rule is violated, the appropriate remedy is dismissal without prejudice. *People v Weston*, 413 Mich 371, 376; 319 NW2d 537 (1982); *People v Fuqua*, 146 Mich App 250, 253; 379 NW2d 442 (1985). "Even if a particular trial might be barred by the failure to hold the preliminary examination in a timely fashion, the state is still fully authorized to bring defendant to trial again." *People v Dunson*, 139 Mich App 511, 513; 363 NW2d 16 (1984). We have expressly declined to impose the extraordinary remedy of dismissal with prejudice for a trivial delay not affecting the integrity of the fact-finding process. *Fuqua, supra* at 253.

In order to obtain a reversal of a conviction on the grounds of ineffective assistance of counsel, a defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Launsburry*, 217 Mich App 358, 362; 551 NW2d 460 (1996). Even if defendant's trial counsel was ineffective by failing to timely challenge the holding of defendant's preliminary examination fifteen days after his arraignment, the mistake is not one but for which defendant would have had a reasonably likely chance of acquittal. *People v Cavitt*, 189 Mich App 31, 32; 471 NW2d 630 (1991). If defendant's counsel had timely challenged defendant's preliminary examination and the trial judge had dismissed the charges against defendant, the dismissal would have been without prejudice and the prosecutor could simply reinstate the charges against defendant. *Fuqua, supra* at 253.

Because defendant was not prejudiced by trial counsel's failure to timely object to defendant's preliminary examination being held fifteen days after his arraignment, defendant was not denied effective assistance of counsel.

II

Next, defendant contends that the traffic stop was pretextual, the subsequent arrest and search of defendant was illegal, and therefore the evidence seized should be suppressed. Defendant maintains that he did not fail to stop at a stop sign as stated by the officers, and he questions the officers' ability to observe the alleged traffic violation. The trial court denied defendant's pretrial motion to quash, stating that defendant's explanation was "just slightly incredulous and less believable than the officers." A trial court's decision following a suppression hearing will not be reversed unless it is clearly erroneous. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

An arrest or stop may not be used as "pretext" or "subterfuge" to search for evidence of crime. *People v Haney*, 192 Mich App 207, 209; 480 NW2d 322 (1991). However, if the arresting officer had probable cause to believe that the defendant had committed or was about to commit an offense, and the officer was authorized by state or municipal law to effect a custodial arrest for the particular offense, a stop or arrest is necessarily reasonable under the Fourth Amendment. *Id*. at 210.

The officer here testified that he had probable cause to believe defendant committed an offense, because he saw defendant fail to stop at a stop sign. There is no dispute that the officer was authorized by law to make the traffic stop based on that offense. The officer's testimony supports the trial court's determination that defendant drove through the intersection without stopping. We defer to the trial court's determination that the officer was more credible than defendant. See *People v Bender*, 452 Mich 594, 599; 551 NW2d 71 (1996). Therefore, the trial court's determination is not clearly erroneous, and the evidence seized was properly admitted. *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1992).

III

Defendant argues next that the cumulative effect of errors at his trial denied him due process and a fair trial. Although due process does not require that a trial be perfect and without irregularities, the total weight of errors at trial may constitute imperfection to the point of violating due process. *People v Rosales*, 160 Mich App 304, 312-313; 408 NW2d 140 (1987). Here, defendant alleges the following errors: (1) the delay of the preliminary examination and accompanying ineffectiveness of counsel; (2) the pretextual traffic stop and failure to suppress evidence issues; (3) the defense attorney's failure to make an opening statement; and (4) ineffective assistance of counsel. We find no merit to this argument.

As discussed in Issue I, defendant was neither prejudiced nor denied effective assistance of counsel due to the delay of defendant's preliminary examination. As discussed in Issue II, the traffic stop of defendant was not pretextual and the evidence seized from defendant was properly admitted.

With regard to defense counsel’s failure to make an opening statement, we will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). In the absence of a record made in connection with a motion for new trial, defense counsel's failure to make an opening statement is presumed to be a decision made pursuant to defense counsel's permissible trial strategy. *People v Harlan*, 129 Mich App 769, 779; 344 NW2d 300 (1983). Therefore, defendant was not denied effective assistance of counsel and counsel's decision to waive his opening statement was not in error.

Because no errors have been found at defendant's trial, defendant's claim that the cumulative effect of such errors denied him a fair trial is without merit. Likewise, his claim that he received ineffective assistance of counsel due to such alleged errors must fail.

IV

In light of the January 19, 1996 amendment to the judgment of sentence, defendant's argument that the habitual offender charge should be deleted is moot.

V

Finally, defendant argues that he is entitled to an evidentiary hearing regarding money confiscated from him at the time of his arrest. Because the trial court did not address the issue of forfeiture proceedings, and the record is silent about the facts necessary to determine the issue, we lack jurisdiction to review this matter. See *In re Forfeiture of $28,088,* 172 Mich App 200, 204; 431 NW2d 437 (1988).

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Hilda R. Gage