

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRENDA HUGHES WILLIAMS, a/k/a BRENDA
DRING WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

August 15, 1997

No. 187856

Jackson Circuit Court

LC No. 95-071781-FH

Before: Cavanagh, P.J., and Holbrook, Jr., and Jansen, JJ.

PER CURIAM.

Defendant was convicted by a jury of delivery of less than fifty grams cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and was sentenced to five to forty years' imprisonment as third felony offender, MCL 769.11; MSA 28.1083. Defendant now appeals as of right. We affirm.

Defendant's argument that she was denied effective assistance of counsel is without merit because she has failed to demonstrate that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced defendant to the extent that she was denied a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defense counsel's questioning of defendant regarding her prior criminal history was clearly trial strategy. In particular, it is clear from the record that counsel hoped to use the information to challenge the credibility of one of the key prosecution witnesses. This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant further argues that counsel was ineffective when he substituted defendant's sister for defendant at counsel table at the start of the preliminary examination without getting permission from the trial court. We agree that it was inappropriate for trial counsel to act in this manner no matter what his objective. However, because defense counsel wanted to challenge whether the police officer involved in the drug buy could identify defendant, he achieved his purpose when the trial court ordered a lineup at which the officer had to pick out defendant from a lineup of six persons, three of whom were chosen by

defense counsel. Trial counsel was not ineffective for trying to weaken the identification testimony even if he was ultimately unsuccessful.

Defendant further argues that the trial court abused its discretion in refusing to allow testimony at trial that would have suggested that the officer did not realize that a switch had been made at the preliminary examination. She further argues that the trial court abused its discretion in failing to order a new trial on this ground or, at least, an evidentiary hearing. The trial court did not abuse its discretion on either ground. *People v Hubbard (Aft Rem)*, 217 Mich App 459, 472; 552 NW2d 493 (1996); *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992).

In particular, defendant argues that the lineup was tainted because the officer viewed photographs prior to the lineup. The record does show that, in the course of his investigation, the officer viewed a LEIN photograph of defendant and a booking photograph. However, the review of those photographs took place prior to the trial court's ordering of the lineup and could not, therefore, have tainted the lineup. In addition, the evidence on the record demonstrated that the officer did not view any photographs after the lineup was ordered. With regard to a discussion the officer had with a prosecutor intern regarding the facial characteristics of defendant, that intern testified that the officer seemed to know what defendant looked like. In addition, even if the lineup was tainted, the record shows a more than adequate independent basis for the officer's identification of defendant. *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995).

Finally, defendant argues that her sister should have been allowed to testify that the officer "may" have misidentified her as defendant when he came to counsel table and discussed with trial counsel a possible plea. The trial court properly found that such evidence was not admissible because of the possibility of confusion of the issues. MRE 403. In particular, this testimony would have been pure speculation because there was no actual misidentification of defendant's sister for defendant, but instead only the sister's speculation that such was the case. Any question about the officer's ability to identify defendant was settled when the officer took only thirty seconds to identify her in the lineup.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen