STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant

v

DOMINGO GOMEZ,

Defendant-Appellee

UNPUBLISHED
September 9, 1997

No. 192290
Ingham Circuit Court
LC No. 88-058013-FH

Before: Gribbs, P.J., and Sawyer and Young, JJ.

PER CURIAM.

On remand from the Supreme Court for consideration as on leave granted, see 450 Mich 994; 550 NW2d 524 (1996), defendant appeals the trial court's order denying his motion for relief from judgment based on a claim of ineffective assistance of counsel. Defendant was convicted of possession of more than 225, but less than 650, grams of cocaine, MCL 333.7403(2)(a)(ii); MSA 14.15(7403)(2)(a)(ii), and was sentenced to ten to thirty years' imprisonment. His trial counsel was subsequently convicted of cocaine-related charges in federal court. Counsel admitted that he had been using cocaine during the period of time in which defendant's trial took place, but denied being under the influence of the substance while in court. We affirm.

We first address defendant's claim that, because counsel admitted to using drugs during the time that he was representing defendant, automatic reversal is warranted. This argument is without merit. Under federal law, "any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance." *Strickland v Washington*, 466 US 668, 691-692; 104 S Ct 2052; 80 L Ed 2d 674 (1984).[1] Defendant relies primarily on the Supreme Court's decision in *People v Garcia*, 398 Mich 250; 247 NW2d 547 (1976), and this Court's decision in *People v Jenkins*, 99 Mich App 518; 297 NW2d 706 (1980), for the proposition that reversal of a conviction is required even if defense counsel's alleged errors did not prejudice the defendant. However, the Supreme Court, addressing *Garcia* and this Court's various interpretations of its holding, expressly rejected such a claim in *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994).[2]

In order to establish a claim of ineffective assistance of counsel under the Sixth Amendment, as well as the analogous provision in the Michigan Constitution, a defendant must show that "counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced the defendant so as to deprive him of a fair trial." *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995); *Strickland*, *supra* at 687. There is a strong presumption that counsel rendered adequate assistance and exercised reasonable judgment. *Strickland*, *supra*. A defendant must show that there is a reasonable probability that, but for the deficient performance, the result of the proceeding would have been different and that the result of the proceeding was fundamentally unfair or unreliable. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996); *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Defendant's claim that counsel failed to challenge the validity of the search warrant or to request the production of a confidential informant is factually unsupported. Our review of the record indicates that counsel raised both issues. Defendant has also failed to show how he was prejudiced by counsel's exercise of a peremptory challenge rather than a challenge for cause in excusing an assistant prosecutor from the jury. With respect to counsel's opening statement, defendant has failed to explain how it was defective. Moreover, although defense counsel was twice late for trial and momentarily forgot defendant's name during voir dire, defendant has failed to establish how this constitutes ineffective assistance. Finally, defendant maintains that counsel was ineffective in failing to challenge the admissibility of defendant's post-arrest statements to the police. However, defendant does not articulate a basis for exclusion of these statements, and, in any event, the record suggests that they were made pursuant to a valid *Miranda*[3] waiver. In sum, we conclude that defendant has failed to establish that he was denied the effective assistance of counsel at trial.[4]

Affirmed.

/s/ Roman S. Gribbs
/s/ David H. Sawyer
/s/ Robert P. Young, Jr.

[1] While we recognize that there may be extreme circumstances under which prejudice may be presumed, i.e., in the face of a complete denial of counsel, or where counsel completely fails to subject the prosecution's case to meaningful adversarial testing, see *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), this is not such a case.

[2] In light of *Pickens*, defendant's reliance on *People v Degraffenreid*, 19 Mich App 702; 173 NW2d 317 (1969), and *Beasley v United States*, 491 F2d 687 (CA 6, 1974), is equally unavailing.

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] Defendant also briefly raises a claim that his first appellate counsel was ineffective because defendant's first claim of appeal was dismissed for lack of progress. The trial court agreed with this assertion. We

believe that this Court's consideration of defendant's appellate claims in the instant case provides a sufficient remedy.