STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DAVID G. RYAN,

Defendant-Appellee.

UNPUBLISHED
September 9, 1997

No. 195902
Oakland Circuit Court
LC No. 87-082806-FH

Before: Corrigan, C.J., and Markey and Markman, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of one count of delivering more than 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), one count of delivering more than 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and two counts of delivering less than 50 grams of cocaine, MCL 333.7401(1)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court originally declared the mandatory life sentence provision of MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i) unconstitutional and sentenced defendant to seven to thirty years' imprisonment. This Court vacated defendant's sentence in an unpublished per curiam opinion and remanded the case for resentencing, instructing the court to impose the mandatory life sentence. *In re People v David Gordon Ryan,* unpublished per curiam opinion of the Court of Appeals, issued July 27, 1990 (Docket No. 113462). After defendant was resentenced, he filed a motion for relief from judgment, arguing that his previous counsels had rendered ineffective assistance because they had failed to raise an entrapment defense either at trial or on appeal. The trial court granted defendant's motion and dismissed the charge against defendant of delivery of more than 650 grams of cocaine. The prosecution appeals by leave granted the decision. We reverse and remand for reinstatement of defendant's conviction.

Defendant's conviction arose from a series of drug transactions between defendant and an undercover officer working for the Oakland County Narcotics Enforcement Team. Defendant and the officer were introduced by a friend of defendant. This friend had told the officer that defendant was a drug dealer who sold cocaine. Following the meeting, defendant and the officer engaged in a series of transactions in which defendant sold cocaine to the officer in increasingly large amounts. The first

transaction involved one-eighth of an ounce of cocaine; the second and third transactions each involved one-fourth of an ounce of cocaine; the fourth transaction involved two ounces of cocaine; and the fifth transaction involved one kilogram of cocaine. Defendant stated that before meeting the officer, he had dealt exclusively in transactions of one-ounce or less.

Collateral postconviction relief pursuant to MCR 6.508 is narrower in scope than direct appeal, and an error which may afford appellate relief will not necessarily warrant postconviction relief. *People v Reed*, 449 Mich 375, 388-389; 535 NW2d 496 (1995). In evaluating an ineffective assistance claim, the court should be highly deferential in its scrutiny of counsel's performance and should not normally second guess counsel's strategic decisions. *Id.* at 384, 391. This case involves both findings of fact and conclusions of law, the former which we review for clear error and the latter which we review de novo. *People v Barrera*, 451 Mich 261, 268-269; 547 NW2d 280 (1996). A trial court's determination that entrapment occurred will not be reversed unless clearly erroneous. *People v Killian*, 117 Mich App 220, 222; 323 NW2d 660 (1982).

Under MCR 6.508(D), defendant has the burden of establishing that he is entitled to post-conviction relief. A court may not grant defendant relief unless defendant can demonstrate "(a) good cause for failure to raise such grounds on appeal" and "(b) actual prejudice from the alleged irregularities that support the claim for relief." MCR 6.508(D)(3)(a) and (b). A defendant can establish good cause by proving he was denied effective assistance of counsel pursuant to the test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 674 (1984), which was adopted by the Supreme Court in *People v Pickens*, 446 Mich 298, 323-324; 521 NW2d 797 (1994). *Reed, supra* at 378. A defendant can establish actual prejudice by demonstrating that he would have had a "reasonably likely chance of acquittal" but for the alleged error. MCR 6.508(D)(3)(b)(i).

To establish an ineffective assistance of counsel claim, which here is the basis of the motion for post-conviction relief, a defendant must satisfy a two-part test. First, a defendant must demonstrate "that counsel's representation fell below an objective standard of reasonableness and second, a defendant must show counsel's inadequate performance prejudiced the defendant because it deprived the defendant of a fair trial. *Strickland, supra* at 687-688; *Pickens, supra* at 303. In assessing counsel's performance under the first prong, the court must take great care to evaluate the performance from counsel's perspective at the time of trial (or appeal). *Strickland, supra* at 689. "The role of defense counsel is to choose the best defense for the defendant under the circumstances." *Pickens, supra* at 325. The court should not, in hindsight, second guess counsel's decisions. *Id.* at 330; *Strickland, supra* at 689. In analyzing prejudice under the second prong, the Court must inquire whether "there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 689.[1]

In the context of this case brought pursuant to MCR 6.508, defendant must prove ineffective assistance of counsel on two occasions because defendant is arguing, in essence, that appellate counsel was ineffective for failing to raise the claim that trial counsel was ineffective for failing to raise the entrapment defense.

> To excuse this double procedural default, defendant must "show that [trial] counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *Pickens, supra* at 303. Defendant must also show that appellate counsel's performance fell below an objective standard of reasonableness and was constitutionally deficient. [*Reed, supra* at 390.]

Whether it was reasonable for the appellate attorney not to raise the entrapment issue on appeal turns on whether trial counsel was ineffective for failing to raise it in the first place. *Id.* at 391-392. This is a very substantial burden for defendant to meet. *Id.* at 390. Once defendant satisfies the good cause requirement of MCR 6.508(D)(3)(a) by proving ineffective assistance of counsel, he must still satisfy the actual prejudice analysis of MCR 6.508(D)(3)(b).

The trial court agreed with defendant's argument that the performances of both trial and appellate counsel were ineffective because each failed to raise an entrapment defense. The purpose of the entrapment defense is to deter law enforcement officials from instigating or manufacturing a crime by a person who would not otherwise commit the crime. *Killian, supra* at 221. See also *People v Juillet*, 439 Mich 34, 52; 475 NW2d 786 (1991). This state has adopted an objective test for determining whether entrapment has occurred. *Id.* at 222. Such test, as it was applied at the time of the offense, focused on the conduct of the government and inquired whether "agents of the government have acted in a manner likely to instigate or create a criminal offense." *Id.*

In *Killian*, this Court was troubled by police conduct because the conduct tended to escalate defendant's criminal culpability. *Id.* at 223. The defendant pleaded guilty to a charge of delivery of cocaine. *Id.* at 221. The police knew that the defendant used both marijuana and cocaine and that the defendant also sold marijuana. *Id.* at 223. The police also "had good reason to believe that [the] defendant was not involved in cocaine sales." *Id.* This Court concluded that, while the reason police induced the defendant to sell cocaine was not reprehensible, police nevertheless had entrapped the defendant because the crime of selling substantial amounts of cocaine differs from the crime of using cocaine or selling marijuana. *Id.* at 223-224. "A person such as defendant who is used as a pawn in an undercover scheme may not be prosecuted for the crimes manufactured by police agents to advance the scheme." *Id.* at 224. The trial court concluded that the present case was controlled by *Killian*. However, we find *Killian* readily distinguishable from the present case because here police had evidence that defendant sold cocaine. The undercover officer in the present case was given defendant's name by an informant and upon meeting defendant, was told by defendant that he sold cocaine. The officer stated that he had no information that defendant was not, in fact, selling cocaine. See *People v Nixten*, 160 Mich App 203, 207-208; 408 NW2d 77 (1987); *People v Matthews*, 143 Mich App 45, 55-56; 371 NW2d 887 (1985).

In rendering its decision, the trial court also relied on cases decided after the commission of the crime. We believe it was improper for the court to evaluate counsel's performance using this more recent case law because performance must be evaluated from the perspective of counsel at trial. *Strickland, supra* at 689. However, even if this law were to apply, we would still conclude that defendant was not entrapped.

In *People v Fabiano*, 192 Mich App 523, 625; 482 NW2d 467 (1992), this Court determined that despite its statement to the contrary, the Supreme Court modified the objective entrapment test in *Juillet*, *supra*. This Court concluded that entrapment could now be found under one of two prongs: "(1) the police engaged in impermissible conduct that would have induced a person similarly situated as the defendant, though otherwise law-abiding, to commit the crime, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated by the Court." *Fabiano*, *supra* at 526. This Court has identified several factors to consider under the first prong of this test:

> (1) whether there existed any appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime with which he was charged; (3) whether there were any long time lapses between the investigation and the arrest; (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; (5) whether there were offers of excessive consideration or other enticement; (6) whether there was a guarantee that the acts alleged as crimes were not illegal; (7) whether, and to what extent, any government pressure existed; (8) whether there existed sexual favors; (9) whether there were any threats of arrest; (10) whether there existed any government procedures that tended to escalate criminal culpability of the defendant; (11) whether there was police control over any informant; and (12) whether the investigation is targeted. [Id. at 661-662.]

Only three of the factors are potentially relevant in the present case: (2) whether defendant had been known to commit the crime with which he was charged; (5) whether there were offers of excessive consideration; and (10) whether there existed government procedures which escalated culpability. The undercover officer testified that defendant indicated he could deliver increasing amounts of cocaine and did not seem at all hesitant to do so. In fact, defendant stated expressly that selling larger amounts of cocaine did not concern him and it is undisputed that, after the first transaction, it was defendant himself who initiated contact with the officer to arrange additional transactions.[2] It is only with respect to the final transaction that the accounts of defendant and the undercover officer differ. The officer testified that it was defendant who specifically suggested the one-kilogram transaction while defendant asserted that the officer asked to purchase that amount of cocaine. Defendant also stated that the officer offered $1,000 to complete the transaction; the officer denied making such an offer and another officer, who was monitoring the transaction through the undercover officer's wire transmitter, testified that he did not hear such an offer. The trial court stated that it found defendant to be more credible than the officer and a trial court's determinations of credibility are entitled to deference. *People v Lucas*, 188 Mich App 554, 571; 470 NW2d 460 (1994). We still conclude, however, that even if defendant's testimony is believed and the case is analyzed under the factors of the more recent case law, that defendant was not entrapped. Where defendant admitted he sold cocaine and stated that selling increasing amounts of cocaine did not bother him, we find it difficult to conclude that the officer's conduct induced defendant to commit the crime. We believe that the police did no more than offer defendant the opportunity to commit the crime. See *People v Ealy*, 222 Mich App 508, 510; ___ NW2d ___ (1997).

Both defendant and the trial court rely principally upon an unpublished per curiam opinion of this Court to support the argument that entrapment may be found where police escalate the amount of cocaine purchased in subsequent transactions. *People v Darden*, unpublished opinion per curiam of the Court of Appeals, issued November 3, 1994 (Docket No. 153078). Defendant asserts that under *Darden* a court could find entrapment based solely on an escalation in amount. We disagree.[3] While the *Darden* panel did determine that there was no difference between escalation of culpability and escalation in amount and criticized police conduct designed to enhance mandatory minimum sentences, the panel also determined that a court could not find entrapment on the basis of the escalation factor alone, stating,

> Nonetheless, we are aware that the legitimate goal of determining a known multiple ounce dealer's sales capacity may require a similar process of police escalation. For that reason, an escalating pattern of solicitation cannot by itself be regarded as conduct so reprehensible that it cannot be tolerated. Rather, as *Williams* and *Butler* have indicated, the existence of a governmental procedure which tends to escalate criminal culpability is a factor pointing towards entrapment under the first prong of *Fabiano*, requiring close scrutiny of the rest of the record evidence. Further, it is conduct which may constitute reprehensible conduct under the second prong of *Fabiano*, where its sole purpose is to increase the mandatory penalty for a dealer who is not previously known to sell large quantities. However, where police legitimately believe themselves to be dealing with a multiple ounce dealer, the deliberate escalation of the quantity involved to eventually secure an amount believed to be within the target's prior capacity and consistent with the target's prior conduct is not reprehensible per se.

Escalation in amount is one *factor* upon which an entrapment defense might have been raised. However, as *Darden* acknowledges, this factor alone is not sufficient. Further, the officer testified that defendant indicated that he could deliver large amounts of cocaine and that he believed that defendant was, in fact, a large-scale cocaine dealer. Summers denied he was trying to increase defendant's mandatory sentence. However, even if *Darden* were applied, because defendant indicated he could deliver larger amounts of cocaine and because the officer believed defendant was a large scale cocaine dealer, we would still conclude defendant was not entrapped.

We would also note that recently this Court concluded under circumstances similar to those of the present case that the police had not committed "sentencing entrapment" by inducing the defendant to participate in transactions involving increasingly large amounts of cocaine. *Ealy*, *supra*. In *Ealy*, the defendant was involved in five separate sales: the first two sales involved one-half of one gram, the third sale an eighth of an ounce, the fourth sale two ounces and the last sale, 250 grams. The Court agreed with the trial court's conclusion that the police conduct was "good and proper police work," *id* at 2, and determined that the police did no more than present the defendant with the opportunity to commit the crime and that there was no evidence police increased the purchases solely to enhance the defendant's sentence. *Id.* "Although an informant told police that defendant was capable of supplying a couple of grams of cocaine and defendant initially sold small amounts of cocaine to the undercover

officer, defendant did not hesitate in selling the officer increasing amounts and eventually sold him 250 grams of cocaine." *Id*.

Because the present case is distinguishable from the law which applied at the time of the offense, we conclude that the trial court clearly erred in determining that defendant was entrapped and that trial counsel's performance fell below an objective standard of reasonableness for failing to raise this defense. Trial counsel cannot be ineffective for failing to raise a defense which did not exist under the law at the time of the offense. Likewise, appellate counsel cannot be ineffective for failing to raise such an issue on appeal. Further, even when the case is analyzed under the more recent case law, we conclude that defendant was not entrapped.

Reversed and remand for reinstatement of defendant's conviction of delivering more than 650 grams of cocaine. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Jane E. Markey
/s/ Stephen J. Markman

[1] Once defendant satisfies the good cause requirement of MCR 6.508(D)(3)(a) by proving ineffective assistance of counsel, he must still satisfy the actual prejudice analysis of MCR 6.508(D)(3)(b), although it appears that the analysis would be very similar to the prejudice analysis performed under the initial ineffective assistance of counsel determination.

[2] The officer stated that initially he negotiated to purchase only one-eighth of an ounce of cocaine because it was his first contact with defendant and because it was necessary for safety as well as investigative purposes to establish a rapport with defendant. He testified that he purchased larger amounts of cocaine during later contacts because defendant had quoted prices for larger amounts at their first meeting and because he indicated during the investigation that he had better sources and prices. No arrest was made after the completion of the two-ounce transaction because two other unknown people were involved, and he was not prepared to arrest three people at that time. The officer denied that he was waiting for defendant to exceed the 650-gram mark before making an arrest.

[3] We also note that unpublished per curiam opinions are not binding on this Court. MCR 7.215(C)(1); *People v Rodriguez*, 212 Mich App 351, 356 n 3, lv den 451 Mich 912 (1996).