STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DESZAR KAREEM CALHOUN,

Defendant-Appellant.

UNPUBLISHED
January 27, 1998

No. 195314
Saginaw Circuit Court
LC No. 95-11222 FH

Before: O'Connell, P.J., and White and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by jury of possession with intent to deliver less than fifty grams of cocaine. MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). Defendant was sentenced to ten to twenty-five years' imprisonment, the sentence for the underlying offense having been enhanced under MCL 769.12(1)(a); MSA 28.1084(1)(a) because of defendant's fourth habitual offender status. We affirm.

Defendant first argues that the recorded statement introduced against him at trial was not voluntary because the interviewing detective promised to talk with the prosecutor and get defendant out of jail if defendant cooperated in making the recorded statement. This Court first reviews the trial court's factual findings at the suppression hearing under a clearly erroneous standard. *People v Cheatham*, 453 Mich 1, 30; 551 NW2d 355 (1996). We then review the entire record below de novo to determine whether defendant's statement was voluntary. *Id*. To the extent that resolution of the disputed factual question turns on the credibility of witnesses or the weight of the evidence, however, this Court will ordinarily defer to the findings of the trial court. *People v Marshall*, 204 Mich App 584; 517 NW2d 554 (1994).

On the first day of trial, a *Walker* hearing[1] was held regarding defendant's motion to suppress a recorded statement which defendant made on September 1, 1995. Defendant testified that he and Detective Moton engaged in two unrecorded conversations prior to the recorded statement, that Moton did not explain defendant's *Miranda* rights[2] until the recorded statement was made, and that Moton conveyed to defendant that there was a chance that he could get him out of jail if he were to give a

confession or to testify regarding the distribution of drugs in the southern part of the City of Saginaw. Moton denied having told defendant that he could get him out of jail, acknowledging only that he advised defendant that he would inform the prosecutor that defendant had cooperated by giving a statement. The trial court ruled that Detective Moton's testimony was more credible and denied defendant's motion to exclude the confession.

First, we conclude that the trial court's factual findings were supported by the evidence. When faced with the conflicting testimony of defendant and Detective Moton, the court deemed the detective's testimony to be more credible. Because the trial court's credibility determination carries great weight, *Cheatham*, *supra* at 30, and because defendant did not support his own testimony with any other evidence, we cannot say that the trial court clearly erred in making its credibility determination in favor of the detective. Second, upon de novo review of the evidence, we find no indication that defendant's recorded statement was made involuntarily. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). Not only did defendant have several encounters with the police prior to making his recorded statement, but he was not subjected to prolonged detention or questioning. Furthermore, defendant waived his *Miranda* rights prior to making the statement. Most importantly, defendant explicitly admitted in his recorded statement that the detective had not threatened him in any way or otherwise tried to coerce him into making the statement. We thus conclude that defendant voluntarily offered his recorded statement.

Defendant next argues that his sentence was disproportionate to the crime committed. We disagree. We review a trial court's sentencing of an habitual offender under an abuse of discretion standard. *People v Hansford (After Remand)*, 454 Mich 320, 323-24; 562 NW2d 460 (1997). "[A] trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *Id*. at 326. In making its sentencing determination, the trial court considered the fact that defendant had a number of prior offenses and that, after receiving lenient treatment for his prior convictions, he had not yet learned to avoid criminal conduct. The fourth offense habitual offender statute, MCL 769.12(1)(a); MSA 18.1084(1)(a), authorized the trial court to impose any penalty up to a maximum of life imprisonment. Therefore, we conclude that the trial court did not abuse its discretion by sentencing defendant to ten to twenty years in prison.

Defendant's next argument is that his sentence amounts to cruel and/or unusual punishment under the Michigan and federal constitutions. We review this issue de novo, *Mahaffey v Attorney General*, 222 Mich App 325, 334; 564 NW2d 104 (1997), and disagree. A proportionate sentence is not cruel or unusual. *People v Terry*, 224 Mich App 447; 569 NW2d 641 (1997); *People v Williams (After Remand)*, 198 Mich App 537; 499 NW2d 404 (1993). Because defendant's sentence is proportionate, this claim must fail.

Finally, defendant sets forth several issues in a Rule 11 brief pursuant to Administrative Order 1981-7. On February 5, 1997, this Court granted defendant's motion for remand in relation to defendant's claim that he was entitled to a new trial based on newly discovered evidence. This Court denied defendant's motion to remand based on ineffective assistance of counsel. The trial court

conducted hearings in March 1997, and denied defendant's motion for a new trial on April 7, 1997. We affirm the trial court's determination and deny defendant's renewed motion to remand for an evidentiary hearing.

Defendant argues that the trial court abused its discretion in denying defendant's motion for a new trial. We disagree. MCR 2.611(A)(1) provides that a new trial may be warranted where a party presents the court with "material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial." The newly discovered evidence must not be cumulative and must be such that it would likely cause a different result on retrial. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995). The trial court has discretion in determining whether a retrial is warranted due to newly discovered evidence; if the court's reasoning is supported by any reasonable interpretation of the record, the court's holding will be upheld. *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 539; 506 NW2d 890 (1993).

At defendant's hearing on his motion for a new trial, defendant presented the court with the testimony of Anthony Franklin, a witness who was with defendant at the time of his arrest. Franklin testified that he was in possession of cocaine and that defendant did not have any drugs in his possession. Franklin testified that he did not come forward earlier because his trial attorney told him to invoke his Fifth Amendment right not to testify against himself. At the hearing, Franklin was unable to remember what he was wearing at the time of the arrest, the source of the drugs, where he was when he used the drugs, or the amount and cost of the drugs. The trial court determined that the testimony probably would not render a different result on retrial. The court pointed to the police officers' testimony and defendant's own confession, and determined that the officer's testimony was more credible than that of defendant or Franklin. Given the evidence presented at trial, as well as the trial court's unique ability to assess the credibility of witnesses, *Cheatham*, *supra* at 30, we do not believe the court's determination was erroneous.

Defendant also claims that this Court erred in denying his motion to remand for a new trial based on ineffective assistance of counsel. Defendant specifically argues that his counsel's performance was deficient because he failed to seek suppression of illegally seized evidence and because he failed to call a particular defense witness at trial. We find these arguments to be meritless.

The record indicates that the arresting officers received an anonymous phone call indicating that a drug sale was taking place at a particular address. When the officers arrived at the address, defendant and a number of other individuals were outside on the porch. As the officers approached the residence, they saw defendant put a plastic bag in a hole in the porch. As this Court recognized in *People v Dinsmore*, 103 Mich App 660, 670; 303 NW2d 857 (1981) (overruled on other grounds in *People v Russo*, 439 Mich 584, 602; 487 NW2d 698 [1992]), it is not illegal for an officer to approach a residence during daylight hours with the intent of asking questions of the occupant(s). Since the porch was open to view from a public area, and the officers openly viewed defendant engaging in suspicious activity, we believe that the officers had an individualized, articulable and reasonable suspicion that criminal activity was afoot and that they were justified in detaining defendant for further investigation. *People v LaGrange*, 40 Mich App 342, 348; 198 NW2d 736 (1972). Therefore, we find it highly unlikely that any motion to suppress would have been successful.

With regard to defense counsel's failure to call a witness, we note that counsel placed on the record that his decision was based on strategic purposes; he decided that the witness had nothing new to add to the case, and that his testimony would have been duplicative of defendant's trial testimony. Generally, matters of trial strategy do not constitute a basis for reversal. *People v Butler*, 193 Mich App 63, 66-67; 483 NW2d 430 (1992). Given that we believe that counsel's decision was a matter of strategy, we will not evaluate his decision with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Richard A. Bandstra

[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

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