

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FORREST ROBERSON, JR.,

Defendant-Appellant.

UNPUBLISHED

April 14, 1998

No. 191853

Recorder's Court

LC No. 95-003149-FH

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

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), possession of less than twenty-five grams of heroin, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to two to four years' imprisonment for each of the drug possession convictions and two years for the felony-firearm conviction, with the drug possession sentences to run concurrently with each other but consecutive to the felony-firearm sentence. We affirm.

Defendant first argues that the search warrant that lead to his arrest was based on a defective affidavit. We disagree. We review a trial court's ruling on a motion to suppress for clear error. *People v Lombardo*, 216 Mich App 500, 504; 549 NW2d 596 (1996). To prevail on a motion to suppress evidence based on a defective affidavit, the defendant must show by a preponderance of the evidence that the affiant knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause. *People v Chandler*, 211 Mich App 604, 612; 536 NW2d 799 (1995). Defendant claims that there were four errors in regards to the affidavit: (1) the affiant mistakenly used the term "prerecorded funds" in his affidavit, (2) the affiant misstated the number of convictions previously generated by his informant, (3) the affiant mistakenly testified that he was with a certain officer when the controlled purchase was made, and (4) the affidavit was misleading. None of these allegations, even if true, establish that the affiant knowingly, intentionally, or with reckless disregard for the truth, inserted false material into the affidavit.

Moreover, none of these alleged errors effect the determination of probable cause. We therefore conclude that the trial court did not err in denying defendant's motion to suppress.

Next, defendant argues that the Officer Bell's search of him went beyond the scope of the warrant and was not a valid search pursuant to arrest. Although the issue was not preserved below, we will review the issue for manifest injustice because it involves a constitutional question. *People v McCray*, 210 Mich App 9, 11; 533 NW2d 359 (1995). Defendant was arrested in his home for carrying a concealed weapon but was never charged with this crime. Defendant correctly notes that he could not have been convicted of this offense because he was in his own home, which is an exception contained in the statute. MCL 750.227; MSA 28.424. However, nothing in the record discloses that the officers were aware that the home being searched was defendant's when they executed the search warrant. This Court has long held that when ruling on the reasonableness of a search, only the facts known to the officers at the time of the search may be considered. *People v Strong*, 77 Mich App 281, 285; 258 NW2d 205 (1977). Therefore, the search of defendant was a proper search incident to a valid arrest because the officers had probable cause to arrest defendant for carrying a concealed weapon. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996); *People v Houstina*, 216 Mich App 70, 75; 549 NW2d 11 (1996).

Defendant next contends that his trial attorney did not provide effective assistance of counsel in that he failed to challenge the scope of the search warrant. Because defendant did not move for a new trial based on ineffective assistance of counsel and did not move for an evidentiary hearing, our review of the issue is limited to errors by counsel evident on the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

To establish ineffective assistance of counsel, a defendant must demonstrate (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, and (3) the result of the proceeding was fundamentally unfair or unreliable. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). As we previously noted, probable cause existed to arrest defendant, and the subsequent search of him was a lawful search incident to his arrest. Therefore, failing to challenge the search as outside the scope of the warrant was not ineffective assistance of counsel because counsel is not required to raise meritless motions or objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Next, defendant argues that the trial court erred in departing from the sentencing guidelines when it sentenced defendant. We disagree. We review sentencing decisions to determine whether an abuse of discretion has occurred. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). An abuse of discretion occurs when the sentence is not proportionate. *Id.* The principle of proportionality requires that sentences be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

The minimum sentence guidelines range for defendant's convictions was zero to six months. The trial court departed from the guidelines and sentenced defendant to a minimum term of two years. The second edition of the sentencing guidelines do not have a legislative mandate and do not carry the force of law. *Milbourne, supra* at 656-657. There is therefore no juridical basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guidelines variables. *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997). When we review a sentence, a departure from the guidelines is relevant solely for its bearing on the claim that the sentence is disproportionate. *Id.* at 177. An upward departure may be warranted where a defendant's actions are so egregious that standard scoring methods fail to reflect the severity of the defendants' actions. *People v Granderson*, 212 Mich App 673, 680; 538 NW2d 471 (1995). In the present case, the trial court departed from the guidelines because it believed that defendant suborned the perjury of a young girl and because the evidence at trial supported the conviction of a greater offense. Because the sentencing guidelines failed to reflect the severity of defendant's actions, the trial court did not abuse its discretion in departing from the sentencing guidelines and defendant's sentence was not disproportionate.

Affirmed.

/s/ Henry William Saad

/s/ Myron H. Wahls

/s/ Hilda R. Gage