STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ETHAN HATCHER,

Defendant-Appellant.

UNPUBLISHED
September 25, 1998

No. 196419
Oakland Circuit Court
LC Nos. 95-140954-FH
95-140955-FH
95-141176-FH

Before: Talbot, P.J., and Fitzgerald and Young, Jr., JJ.

PER CURIAM.

Defendant was tried in a joint trial before a single jury on three separate charges from three lower court files. In No. 95-140954-FH, defendant was convicted of delivery of less than fifty grams of a mixture containing cocaine, MCL 333.7401(2)(a)(*iv*); MSA 14.15(7401) (2)(a)(*iv*), and sentenced to five to forty years' imprisonment as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. In No. 95-140955-FH, defendant was convicted of delivery of less than fifty grams of a mixture containing cocaine, and sentenced to three to forty years' imprisonment as a subsequent controlled substance offender, MCL 333.7413(2); MSA 14.15(7413)(2). In No. 95-141176-FH, defendant was convicted of possession with intent to deliver less than fifty grams of a mixture containing cocaine, MCL 333.7401(2)(a)(*iv*); MSA 14.15(7401)(2)(a)(*iv*), and sentenced to three to twenty years as a subsequent controlled substance offender. Defendant's sentences are to run consecutively. Defendant appeals as of right. We affirm.

This case arises out of an allegation that defendant was selling crack cocaine out of his mother's house in the City of Pontiac, and that he possessed crack cocaine, with the intent to deliver, in an apartment in the City of Bloomfield Hills. A police officer, acting undercover, twice purchased crack cocaine from defendant in the area around the Pontiac house. Two months later, police recovered six rocks of crack cocaine during a raid on the Bloomfield Hills apartment. Defendant admitted to police that the cocaine was his. During the raid, police also recovered some plastic baggies with "corner ties" (drug paraphernalia associated with selling cocaine) and a handwritten letter inside of an open envelope addressed to defendant at the Pontiac address. The letter was a solicitation for narcotics ostensibly written by an incarcerated person. Defendant presented an alibi defense to the two delivery charges.

The officer in charge of defendant's investigation swore in an affidavit in support of the warrant for the search of the Bloomfield Hills apartment that a confidential informant of established reliability had twice purchased cocaine at that location. Before trial, defendant moved to compel the disclosure and production of the confidential informant. Defendant now contends that he was entitled to confront the confidential informant in an evidentiary hearing in order to challenge the veracity of the police officer who signed the affidavit. We disagree.

Historically, courts have not permitted defendants to challenge the veracity of allegations contained in search warrant affidavits. *People v Poindexter*, 90 Mich App 599, 603; 282 NW2d 411 (1979). Affidavits offered in support of search warrants are presumed to be valid. *Poindexter*, *supra* at 604, quoting *Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978). However, when certain circumstances are met, a court may order the production of a confidential informant for an in camera evidentiary hearing held for the purpose of challenging the veracity of the allegations contained in a search warrant affidavit. See *Poindexter*, *supra* at 604-610. To mandate such a hearing, the defendant's attack must be more than conclusory and must be supported by more than a mere desire to cross examine. *Poindexter*, *supra* at 604, quoting *Franks*, *supra* at 171-172. The defendant must (1) allege deliberate falsehood or reckless disregard for the truth, and (2) support the allegation with an offer of proof. *Id.* Otherwise, the presumption of the validity attached to the search warrant affidavit remains intact. See *id.*

In this case, it is clear that defendant failed to meet the requirements of *Poindexter* and *Franks*. Although he asserted in his motion to compel that it was his "belief" that "no informant observed or purchased narcotics from [him]," this allegation of falsehood was not accompanied by any offer of proof. Defendant merely stated in the brief in support of his motion that he "has named several alibi witnesses who can report his whereabouts on that said location, on said times and dates." This was clearly insufficient to overcome the "presumption of validity." First, the officer's affidavit did not specify the precise dates on which narcotics were purchased at the Bloomfield Hills location, so defendant's alibi witnesses could not have shown "deliberate falsity or reckless disregard for the truth" on the part of the affiant. Second, defendant's notice of alibi—which he specifically relied on in his motion to compel—stated that his alibis were for the offenses the allegedly took place in Pontiac on June 19, 1995, and June 23, 1995. The affiant, however, swore that the confidential informant had twice purchased narcotics from the Bloomfield Hills apartment in the month preceding August 12, 1995. Apart from this, there was no other offer of proof. In the absence of a sufficient offer of proof, defendant's allegation was merely a conclusory attack on the affiant's veracity. Therefore, we hold that the trial court did not abuse its discretion when it denied defendant's pre-trial motion to compel the disclosure and production of the confidential informant.

Defendant next argues that the trial court erred in admitting the contents of the letter recovered during the search of the Bloomfield Hills apartment. We disagree. The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Although defendant objected to the letter on three separate grounds at trial, his only argument on appeal is that its contents were hearsay. Hearsay is a statement, other than the one made by the

declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Harris*, 201 Mich App 147, 150-151; 505 NW2d 889 (1993). Evidence of an out-of-court statement is not hearsay merely because it is offered to prove the truth of the matter asserted by the prosecution at trial. Instead, evidence of an out of court statement may be hearsay if it is offered to prove the truth of the matter asserted in the out of court statement. See, e.g., *People v Jones*, 228 Mich App 191, 206-207 & n 4; 579 NW2d 82 (1998). In this case, the evidence was not admitted to prove the truth of any of the specific matters asserted in the letter. While the contents of the letter might be read as an "implied assertion" of the writer's belief that defendant was a drug dealer (from which an inference might be drawn that the writer's belief is true), the hearsay rule, as written, does not restrict the admission of "implied" assertions suggested by out-of-court statements. See *id.* at 205-226. Accordingly, we hold that the trial court did not abuse its discretion in admitting the letter.

Next, defendant argues that the evidence was insufficient to support his convictions. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). In this case, the testimony of the undercover police officer who twice purchased cocaine from defendant constituted sufficient evidence to support the two delivery convictions. Any "inconsistencies" or "discrepancies" in his testimony were issues of credibility for the trier of fact and have no bearing on this Court's resolution of the issue. See *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). With respect to the possession with intent to deliver conviction, defendant's admission regarding the cocaine, along with the recovery of the letter and the drug paraphernalia constituted sufficient evidence.

Defendant next argues that his sentences were disproportionately severe. We disagree. Sentencing decisions are subject to review by this Court on an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of the trial court's discretion if it violates the principle of proportionality. The principle of proportionality requires sentences to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 636. In his brief on appeal, defendant repeatedly stressed the consecutive nature of his sentences. This argument is not well taken. The consecutive nature of a defendant's sentences is irrelevant to the determination whether his sentences are excessive. *People v Warner*, 190 Mich App 734, 736; 476 NW2d 660 (1991). Defendant also questions how the trial court could have sentenced him to a minimum sentence of five years on one delivery count and three years on the other, when the facts underlying the two offenses were virtually indistinguishable. This argument too is misplaced, as one of the sentences was enhanced pursuant to the habitual offender statute. Given defendant's deplorable criminal record, as indicated by his presentence investigation report, we hold that the trial court did not abuse its discretion in imposing defendant's sentences.

Defendant next argues that the trial court erred in denying his motion for a new trial in No. 95-140954-FH and No. 95-140955-FH. We disagree. A trial court's decision on a motion for new trial is reviewed for an abuse of discretion. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

After defendant filed his claim of appeal, a panel of this Court, on defendant's motion, remanded the case to the trial court for a post-trial evidentiary hearing limited to the issue whether defendant was denied the effective assistance of counsel based on his attorney's failure to challenge the execution of the search warrant as an alleged violation of MCL 780.656; MSA 28.1259(6), the so-called "knock and announce" statute. As provided by This Court's order remanding the case, defendant moved for a new trial with respect to his two delivery convictions. On appeal, he now argues that the trial court abused its discretion by making its decision summarily, and without entertaining meaningful argument by counsel.

Defendant's contention that the trial court improperly failed to consider his allegations regarding counsel's failure (1) to secure the presence of a "black female" witness allegedly present during the June 23rd sale of cocaine, and (2) to secure and review alleged exculpatory audio and video tapes possessed by the police is wholly without merit. These issues were clearly beyond the scope of this Court order remanding the case to the trial court. Defendant's further contention that the trial court erred in failing to consider his contention that the unchallenged evidence of the "Bloomfield Hills" cocaine might have had a prejudicial effect on the jury's consideration of the separate "Pontiac" delivery charges is also without merit. First, contrary to defendant's assertion, the trial court did allow defendant to argue the merits of the knock and announce/ineffective assistance of counsel issue. Second, the trial court specifically stated, at the close of the post-trial evidentiary hearing, that defendant had not been denied the effective assistance of counsel. This determination was based on its finding that defendant's trial counsel was testifying truthfully when she explained that the parties had mutually agreed before trial not to pursue the issue. Accordingly, the trial court did not make its decision "summarily" as suggested by defendant.

Finally, defendant argues that the trial court erred denying his motion to dismiss No. 95-141176-FH. Specifically, defendant contends that the trial court's findings of fact with respect to the ineffective-assistance-of-counsel issue were clearly erroneous. We disagree. Findings of fact are clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). Here, despite the existence of other testimony corroborating defendant's version of events, the trial court found, as a matter of fact, that defendant and his trial counsel had mutually agreed before trial not to pursue the knock and announce issue. Credibility issues will not be resolved anew on appeal. *Vaughn*, *supra* at 380. Because the trial court, sitting as trier of fact, was entitled to believe the testimony of defendant's trial counsel, we cannot conclude that its findings were clearly erroneous. *Mendez*, *supra* at 382.

Defendant's trial counsel testified that defendant specifically instructed her not to involve Atricia Hunt in the matter. Atricia Hunt was present in the Bloomfield Hills apartment during the raid. According to defendant's trial counsel, Hunt was concerned that her involvement in defendant's criminal defense would jeopardize her employment at Oakland County Friend of the Court. The Comment to Michigan Rule of Professional Conduct 1.2 provides as follows:

> A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues,

but should defer to the regarding such questions as the expense to be incurred *and the concern for third parties who might be adversely affected*. [Emphasis added.]

Thus, it cannot be said that trial counsel's decision to defer to defendant's wishes with regard to Hunt constituted ineffective assistance of counsel. See *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (explaining that to constitute ineffective assistance of counsel, counsel's performance must fall below an objective standard of reasonableness under prevailing professional norms). For these reasons, we hold that the trial court did not err in denying defendant's motion to dismiss.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Robert P. Young, Jr.