

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY C. ALLEN,

Defendant-Appellant.

UNPUBLISHED
October 30, 1998

No. 198856
Recorder's Court
LC No. 96-002688

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). Defendant was sentenced to four to eight years' imprisonment as a third habitual offender, MCL 769.11; MSA 28.1083. We affirm.

Defendant first argues that he was denied effective assistance of counsel at trial. We disagree. Because defendant failed to move for a new trial or evidentiary hearing in the trial court, our review is limited to errors by counsel evident in the existing trial record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989).

To establish a denial of effective assistance of counsel, a defendant must demonstrate that counsel's performance was objectively deficient and that the deficiency was prejudicial to the defendant. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Furthermore, the defendant must overcome the presumption that the challenged action was sound trial strategy. *Daniel, supra*, 207 Mich App 58.

Defendant argues that he had a property interest in the house where the items were seized. He claims that counsel's failure to move to suppress the evidence was prejudicial to his case. While it is true that defense counsel did not make a motion to suppress the evidence, the evidence presented at trial dealt primarily with whether the house was inhabited and whether defendant, in fact, had any reasonable expectation of privacy. Defense counsel used the fact that defendant may have leased the premises as impeachment evidence against the prosecution's witnesses. Throughout defense counsel's

questioning of both witnesses, he attempted to discredit their testimony that the house was not lived in as well as their testimony concerning the events of the night in question. Defendant has failed to overcome the presumption that the challenged conduct was sound trial strategy. *Daniel, supra*, 207 Mich App 58.

In addition, defendant has not demonstrated that, but for his counsel's "errors," there was a reasonable probability that the result of his trial would have been different or that the proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). The trial court concluded that a lease purporting to grant defendant interest in the house held little or no evidentiary value for defendant's case where the alleged lessor did not have record title to the premises. It is not counsel's fault that defendant's purported lease was not introduced into evidence where defendant was unable to reveal any information about the lessor or where the lessor could possibly be found. Thus, defendant's argument that he had an interest in the house held no value with the court. Instead, the court considered the testimony of two police officers and concluded that defendant was guilty. There is no evidence that the court's verdict would have been different but for counsel's actions. *Id.*

Defendant also claims that counsel was not adequately prepared for trial, evidenced by counsel's failure to properly cross-examine the prosecution's witnesses, failure to set forth a defense by calling witnesses for defendant, and failure to introduce the lease into evidence. Where a defendant claims ineffective assistance of counsel due to counsel's failure to adequately prepare for trial, a defendant must show prejudice resulting from lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Where a defendant claims that counsel was ineffective for failure to call witnesses or present other evidence, a defendant must show that the attorney's conduct deprived him of a substantial defense. *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). This Court is not convinced that counsel was not properly prepared for trial to the extent that his conduct prejudiced defendant or deprived him of a substantial defense. Defense counsel was able to challenge the testimony of the prosecution's witnesses on cross-examination. He also attempted to support defendant's testimony through use of the lease. As discussed above, defendant has failed to show that the results of trial would have been different under the circumstances.

Defendant next argues that the trial court pierced the veil of judicial impartiality by conducting its own investigation as to the record owner of the property, thereby denying defendant his constitutional right to a fair and impartial trial. We disagree. Because defendant did not object to the trial court's action during trial, this Court will review the matter only if manifest injustice would result from failure to consider the issue. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995)

A defendant in a criminal trial should be able to expect that a "neutral and detached magistrate" will preside over his case. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). However, when it comes to trial conduct and process, the trial court is granted wide, yet limited, discretion. *Paquette, supra*, 214 Mich App 340; MRE 611(a). For example, while a trial court may question witnesses in order to determine an issue relevant to trial, the court must take care to not invade the role of the prosecutor. *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992); *People v Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989). When determining whether the court

acted with bias against a defendant, the record should be read as a whole and not merely in portions. *Paquette, supra*, 214 Mich App 340. In a jury trial, the court pierces the veil of impartiality "where its conduct or comments unduly influence the jury and thereby deprive the defendant of a fair and impartial trial." *Id.* By analogy, the court in a bench trial pierces the veil where its conduct indicates bias or partiality toward a party, thereby denying the defendant a fair and impartial trial.

The court in this case was merely trying to control the conduct of trial. *Paquette, supra*, 214 Mich App 336. The court's actions did not indicate that it was partial to either party. Rather, the court's telephone call to the Register of Deeds was its way of expediting the proceedings. The case had already been adjourned once in order to allow defense counsel to bring forth evidence regarding the lease. When the parties returned to court two weeks later, defense counsel presented a copy of the alleged lease, but he and his client were unable to locate the lessor to verify its authenticity. At this time, defense counsel requested that the court appoint a private investigator to determine who was the record holder of the property. Defendant made no objection when the court indicated that it would find out on its own. The court exercised reasonable control of the proceedings in avoiding the "needless consumption of time" for the "ascertainment of the truth." MRE 611(a). There is absolutely no evidence that the court's actions were the result of a bias toward defendant, nor does defendant challenge the accuracy of the information. Defendant received a fair and impartial trial. *People v Cole*, 349 Mich 175, 187; 84 NW2d 711 (1957); *Cheeks, supra*, 216 Mich App 480-481.

Affirmed.

/s/ Jane E. Markey

/s/ David H. Sawyer

/s/ William C. Whitbeck