STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERTO RODRIGUEZ,

Defendant-Appellant.

UNPUBLISHED
December 18, 1998

No. 197620
Recorder's Court
LC No. 91-010812

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

PER CURIAM.

Following a second jury trial, defendant appeals by leave granted his conviction for possession with intent to deliver more than 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i). The trial court sentenced defendant to mandatory life imprisonment without parole. We affirm.

I. Basic Facts And Procedural History

In June of 1991, the police arrested defendant after they conducted an inventory search of a car allegedly owned by him following a traffic stop. During the search, the police discovered approximately one kilogram of cocaine and $12,000 to $14,000 in cash in a black duffel bag located in the trunk. The police also arrested the driver of the car, Geronimo Sanchez, prior to the inventory search for an immigration violation. Both defendant and Sanchez filed motions to quash the information, or in the alternative, to suppress the evidence seized during the search, asserting that the traffic stop was merely a pretext to give the police officers access to the trunk of the vehicle. Judge Denise Page Hood granted Sanchez' motion to quash, but was unable to rule on defendant's motion because he failed to appear for the hearing. Judge William Lucas subsequently denied defendant's motion to quash and Judge Kym Worthy denied defendant's motion to suppress.

II. Standard of Review

A. Suppression of Evidence

We will not reverse a trial court's decision concerning whether to suppress evidence unless it is clearly erroneous. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). However, we review constitutional issues de novo. *Id.*

B. Sufficiency of Evidence

Viewing the evidence in the light most favorable to the prosecution, this Court must determine whether a reasonable jury could find the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). We will not interfere with the jury's role in determining the credibility of witnesses and weighing the evidence. *Wolfe*, *supra.*

C. Motion to Quash

When reviewing the district court's decision to bind over, the circuit court "must consider the entire record of the preliminary examination, and it may not substitute its judgment for that of the magistrate." *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). The circuit court may reverse the district court's decision only if the district court abused its discretion. *Id.* Likewise, "this Court reviews the circuit court's decision de novo to determine whether the district court abused its discretion." *Id.* "An abuse of discretion is found only where an unprejudiced person, considering the facts upon which the court acted, would say there was no justification or excuse for the ruling." *Id.*

D. Prosecutorial Misconduct

We review questions of prosecutorial misconduct on a case by case basis. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). This Court must evaluate the remarks in context to determine whether defendant was denied a fair and impartial trial. *Id.*

E. Effective Assistance of Counsel

Defendant did not preserve the issue of effective assistance of counsel for appeal by moving for a *Ginther*[1] hearing. Therefore, this Court's review of the issue is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). In evaluating an ineffective assistance of counsel claim, this Court should be highly deferential in its scrutiny of counsel's performance and should not second guess counsel's strategic decisions. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

III. Suppression of Evidence

Defendant argues that the trial court erred in denying his motion to suppress because the traffic stop was a pretext to give the officers, who had observed defendant place the black duffel bag in the

trunk while conducting surveillance of a residence in southwest Detroit, access to the trunk. We disagree.

The Fourth Amendment of the United States Constitution and its Michigan counterpart, Const 1963, art 1, §11, protect against unreasonable searches and seizures. *Houstina, supra* at 73-74. Evidence obtained in violation of this right generally is not admissible in criminal proceedings. *Id.* at 74. However, there are exceptions to the "right to be secure against unreasonable searches and seizures absent a warrant based upon probable cause." *Id.* One such exception includes an inventory search conducted pursuant to departmental regulations. *People v Toohey,* 438 Mich 265, 271-272, 283-284; 475 NW2d 16 (1991); *Houstina, supra* at 77. "An inventory search that is conducted pursuant to standardized police procedure is considered reasonable because the resulting intrusion will be limited to the extent it is necessary to fulfill the caretaking function." *Toohey, supra* at 275-276.

However, an inventory search may not be used as a pretext for conducting "an investigative search of an arrested person's personal property without a warrant." *Id.* at 276. Important factors to consider in determining the validity of an inventory search are whether the search was conducted in accordance with departmental regulations and the presence or absence of an underlying motive or bad faith on the part of police. *Id.* at 276-277, 279, 284. Because the public policy concerns and the purpose of impoundment is similar to that concerning inventory searches:

> [I]t is appropriate to apply the same standard for determining the constitutionality of the initial impoundment of an automobile as for a subsequent inventory search, i.e., an established set of procedures which the police must follow in making the determination whether to impound and not used as a pretext for conducting a criminal investigation. [*Id.* at 285.]

In *Toohey,* the defendant was stopped for crossing the yellow line and driving in an erratic manner; the police arrested him after he failed a sobriety test. *Id.* at 268. Because the defendant's passenger also appeared intoxicated, the police impounded the defendant's vehicle. *Id.* During an inventory search of the vehicle, the police officer discovered a baggie of cocaine underneath the driver's seat. *Id.* The police officer then searched the trunk and discovered more cocaine in the defendant's golf bag. *Id.* at 268-269. The Court concluded that the impoundment and subsequent inventory search were constitutionally valid because they were conducted in accordance with departmental procedures which permitted the police to impound a vehicle if, as a result of the driver being taken into custody, the vehicle would be left unattended. *Id.* at 285-286, 291. The Court determined that the police were not required to turn the vehicle over to the defendant's passenger, who appeared "to be sufficiently intoxicated as to be unable to legally operate the automobile." *Id.* at 288-290.

In *People v Haney,* 192 Mich App 207, 208-209; 480 NW2d 322 (1991), an undercover police officer, who was observing a house while he waited for a search warrant for the house, was ordered to secure any and all people leaving the residence until the warrant arrived. The police officer observed the defendant enter and leave the house and, ultimately, stopped him for failure to signal a left turn. *Id.* at 209. The police arrested the defendant after they discovered that he did not have a valid driver's license and that the license sticker on the car was expired. *Id.* During a search of the vehicle,

the police discovered cocaine underneath the driver's seat. *Id.* In determining whether the stop for the traffic violation was a pretext to search for evidence of another offense, this Court adopted an objective analysis that considers, first, whether the arresting officer had "probable cause to believe that the defendant had committed or was committing an offense," and, second, whether the arresting officer was "authorized by state or municipal law to effect a custodial arrest for the particular offense." *Id.* at 210, citing *United States v Trigg*, 878 F2d 1037 (CA 7, 1989). In other words, a stop or arrest is constitutional "as long as the police are doing no more than they are legally permitted and objectively authorized to do." *Haney, supra* at 210. This Court concluded that the stop and the arrest were not pretextual because the police officer was authorized by law to make the stop and subsequent custodial arrest. *Id.* at 210-211. Accordingly, this Court further held that the search incident to arrest was constitutional. *Id.* at 211.

In case law relied on by the trial court, the Sixth Circuit Court of Appeals characterized the *Trigg/Haney* approach as the "could test," which maintains that "a stop is valid if the officer 'could' have stopped the car in question for a suspected traffic violation." *United States v Ferguson*, 8 F3d 385, 388-389 (CA 6, 1993). This approach contrasts with the "would" test, that inquires "whether a reasonable officer would have made the seizure in the absence of illegitimate motivation." *Id.* at 388, quoting *United States v Smith*, 799 F2d 704, 708 (CA 11, 1989). In determining which test to apply, the *Ferguson* Court rejected a straight "would" or "could" approach and adopted a new test based on whether the:

> particular officer in fact had probable cause to believe that a traffic offense had occurred, regardless of whether this was the only basis or merely one basis for the stop. The stop is reasonable if there was probable cause, and it is irrelevant what else the officer knew or suspected about the traffic violator at the time of the stop. It is also irrelevant whether the stop in question is sufficiently ordinary or routine according to the general practice of the police department or the particular officer making the stop. [*Id.* at 390-391.]

The court expressed the belief that this standard would better achieve an objective assessment of the police officer's actions and further stated, "By adopting this standard, we make explicit that which was simply an inference under our prior cases: traffic stops based on probable cause, even if other motivations existed, are not illegal." *Id.* at 391-392.

In *Ferguson*, the police officer began following the defendant after observing suspicious activity in a motel parking lot. *Id.* at 386-387. The police officer pulled over the car in which the defendant was riding after he noticed that there was no visible license plate on the car, a violation of a local traffic ordinance. *Id.* at 387. The police officer admitted that his number one reason for stopping the car was because of the activity at the motel. *Id.* Applying the probable cause test, the Sixth Circuit Court of Appeals concluded that the police officer clearly had probable cause to stop the defendant based on the traffic violation, because driving without a visible license plate was a violation of local law. *Id.* at 392. The court found that it was irrelevant that the license plate was lying on the rear shelf because the ordinance prohibited driving without a visible license plate and the plate was not visible. *Id.* The court also found that it was irrelevant that the police officer had other reasons for the stop and that the police

officer did not normally stop vehicles for such a violation. *Id.* at 392-393. Accordingly, the court affirmed the denial of the defendant's motion to suppress. *Id.* at 393.

Here, we conclude that the trial court did not err in denying defendant's motion to suppress the evidence. First, under the *Ferguson* test, the police officers had probable cause to believe that a traffic offense had been committed, as they observed the vehicle make an illegal left-hand turn. The fact that the police officers may have also been motivated to make the traffic stop because they were suspicious about the contents of the black duffel bag does not negate the probable cause, nor does the fact that the police officers did not normally make traffic stops in the course of their duties.

Further, we conclude that the trial court did not err in denying defendant's motion because the police officers were doing no more than they were legally permitted and objectively authorized to do. The police officers had probable cause to believe that the vehicle in which defendant was riding had made an illegal left-hand turn, and defendant has never suggested that the border patrol agent was not authorized to arrest Sanchez for an immigration violation when Sanchez failed to produce his green card during the traffic stop. Thus, the police officers complied with the objective test articulated in *Trigg* and *Haney*.

Moreover, the police officers complied with departmental policy in impounding the vehicle and conducting the subsequent inventory search. Pursuant to the policy, a vehicle can be impounded if it constitutes a traffic hazard. Sanchez could not drive the vehicle away because he had been arrested and defendant could not legally drive the vehicle because he did not possess a valid driver's license. The vehicle was parked in a traffic lane, and there was no parking on that portion of the street. Thus, the police officers were authorized to impound the vehicle. Further, the department policy permits the police officers to search all areas of the vehicle that may contain property, including any containers. Therefore, the police officer was authorized to search the black duffel bag located in the trunk.

IV. Sufficiency of Evidence

Defendant argues *in propria persona* that there was insufficient evidence to sustain his conviction. We disagree. To sustain a conviction for possession with intent to deliver more than 650 grams of cocaine, the prosecution must prove (1) that the recovered substance was cocaine, (2) that the cocaine was in a mixture weighing more than 650 grams, (3) that defendant was not authorized to possess the substance, and (4) that defendant knowingly possessed the cocaine with the intent to deliver. *Wolfe, supra* at 508-509; *People v Catanzarite*, 211 Mich App 573, 577; 536 NW2d 570 (1995). "Possession may be either actual or constructive." *Id.* "'Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime.'" *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996) (citation omitted).

The only element disputed by defendant is that he knowingly possessed the cocaine with the intent to deliver. We conclude that the prosecution offered sufficient evidence from which a rational trier of fact could have determined that this element was proven beyond a reasonable doubt. Both police officers observed defendant walk out of the house carrying the black duffel bag. After briefly conferring with Sanchez and Gonzalez, a known drug dealer, defendant placed the duffel bag in the trunk of the

car, entered the car with Sanchez and proceeded to follow the vehicle in which Gonzalez was riding. It may be reasonably inferred from these facts that defendant knew that the duffel bag he was carrying contained cocaine. *Catanzarite, supra* at 578. Moreover, given the amount of cocaine involved and the amount of money found in the duffel bag with the cocaine, it can also be reasonably inferred that defendant intended to sell the cocaine. *Id.*

Defendant also contends that there is insufficient evidence because Officer Cardoza gave perjured testimony. However, we find that this argument is wholly unsupported. Officer Cardoza explained that while the police report indicated that both males placed the duffel bag in the trunk, Sanchez opened and closed the trunk and defendant placed the duffel bag in the trunk. It was for the jury to assess the credibility of the police officers and weigh their testimony.

V. Motion to Quash

Defendant argues *in propria persona* that the trial court erred in denying his motion to quash when it granted Sanchez' motion on the same charge. We disagree and find that the district court did not abuse its discretion in binding defendant over on the charge of possession with intent to deliver more than 650 grams of cocaine. To bind a defendant over for trial, the prosecution must present evidence during the preliminary examination that a crime has been committed and that there is probable cause to believe that the defendant was the perpetrator. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997). As we have already indicated, there was sufficient evidence to convict defendant. Where sufficient evidence is presented at trial to convict, any alleged errors regarding the sufficiency of evidence at preliminary examination must be deemed harmless. *People v Meadows*, 175 Mich App 355, 359; 437 NW2d 405 (1989). Moreover, sufficient evidence was presented during the preliminary examination to bind defendant over on the charge. Both police officers observed defendant, who had physical possession of the black duffel bag containing the cocaine, place the bag in the trunk of the car.

VI. Prosecutorial Misconduct

Defendant argues *in propria persona* that he was denied a fair trial as the result of prosecutorial misconduct. We find that defendant's argument is entirely without merit. A review of the record demonstrates that the prosecutor did not mislead the trial court by asserting that Sanchez had only filed a motion to quash. Sanchez filed one motion seeking alternate forms of relief, one of which the trial court granted. Further, the prosecutor did not fail to defend the motions; the motions were not argued during the February 1992 hearing because defendant failed to appear. Finally, we reject defendant's argument that the prosecution offered a frivolous defense to defendant's motion because it stated that the inventory search was conducted after a valid arrest. The inventory search was conducted after Sanchez was validly arrested.

VII. Effective Assistance of Counsel

Defendant argues *in propria persona* that he was denied effective assistance of counsel. To establish an ineffective assistance of counsel claim, defendant must satisfy a two-part test. First, defendant must demonstrate "that counsel's performance fell below an objective standard of

reasonableness," and second, defendant must show "that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

We hold that defendant has failed to establish that his counsel's performance fell below an objective standard of reasonableness. As already discussed, the prosecution did not commit any misconduct during the February 1992 hearing to which defense counsel should have objected. Defense counsel is not required to raise a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Further, defense counsel was unable to argue defendant's motion during the hearing because defendant failed to appear. Although defendant alleges that counsel failed to inform him that he was required to appear, defendant has offered no evidence to support his allegation. In fact, during the hearing before Judge Worthy, defense counsel explained that Judge Hood had not ruled on the motion because defendant had become a fugitive. Moreover, defendant cannot show that he was prejudiced by counsel's failure because subsequent counsel was permitted to argue the motions before Judge Lucas and Judge Worthy, who rendered decisions on the motions.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ William C. Whitbeck

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).