STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT CLAUDE JONES,

Defendant-Appellant.

UNPUBLISHED
March 19, 1999

No. 201538
Kalamazoo Circuit Court
LC No. 94-0128 FH

Before: Cavanagh, P.J., and Murphy and White, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession with intent to deliver an imitation controlled substance, MCL 333.7341(3); MSA 14.15(7341)(3). He was sentenced to four days in jail, with credit for four days served, and assessed fees and costs. He appeals his conviction and sentence as of right, and we affirm.

Defendant's conviction arose from an undercover investigation of street-level narcotics sales in Kalamazoo. At around 6:45 p.m. on January 14, 1994, defendant was walking in the vicinity of the 1000 block of Princeton Street in Kalamazoo when an undercover plain-clothes police officer drove by in an unmarked car and asked defendant if he "had a twenty on him," meaning a $20.00 rock of crack cocaine. The plain-clothes officer testified that defendant responded that he did not have any on him, but he would take the officer to get some if the officer let him in the vehicle. Defendant testified that he did so because the plain-clothes officer promised to buy him a bus ticket home to Ann Arbor; the officer testified that he did not make such a promise. Another police officer, in uniform, was hidden under a blanket in the back seat. The undercover officer driving the vehicle had not seen or met defendant before this incident. After defendant got in the vehicle, they drove around for about fifteen minutes in areas known for street-level narcotics buys and, at some point, defendant told the officer to stop the car because he saw someone who had crack cocaine on him.

Defendant asked the officer to give him the twenty dollars, but the officer refused because he wanted to see the crack before exchanging the money. Defendant then got out of the car and made contact with the person while the officer remained in the vehicle. Defendant returned to the vehicle and

said "I got it, I got it," and the officer handed defendant a twenty dollar bill through the car window, and observed defendant holding an unwrapped "off-white chunk" between the thumb and forefinger of his left hand.

The plain-clothes officer testified that at that point the person who had provided the off-white chunk, who was standing next to the vehicle with defendant, appeared to have spotted the second police officer in the back seat, and the plain-clothes officer then noticed that the blanket had slipped partially off the uniformed officer, exposing the letters I - C - E of the word "police" on the officer's jacket. The plain-clothes officer testified that at that point he knew the investigation was compromised and that he asked defendant to return the twenty dollars. Defendant returned the money, the officers got out of the car, and defendant ran. The plain-clothes officer then saw defendant make a throwing motion with his right hand, and the officers announced that they were the police. After defendant was handcuffed, he said "That wasn't nothing but soap."

The officers remained on the scene and searched the ground, which was snow-covered, for the off-white chunk, but did not find it. Another officer, who was called to the scene to assist, and with whom the uniformed officer hidden in the back seat was communicating by radio as the events unfolded, testified that she helped look for the possible rock of crack and that the street was snow-covered. She also testified that as she drove defendant to be booked at the city jail, defendant spontaneously asked her "Did you find it?" She asked what defendant was talking about, and defendant said "the soap." The plain-clothes officer testified that he read defendant his rights at the police station, and that while voluntarily responding to questions, defendant said that when the officer picked defendant up defendant intended to get the officer some crack, that defendant had given the crack back to the "dude" and that the chunk was not crack, but a rock of soap, which he knew because he had tasted it. The plain-clothes officer testified that defendant told him that he intended to sell him the soap.

Defendant testified that he came to Kalamazoo on business on January 12, 1994 and stopped for gas, at which time his car and belongings were stolen. He reported the incident to the police and searched for his car, spending the nights at a rescue center. Defendant testified that on the evening in question, the plain-clothes officer approached him on the street and asked him if he would help him, and defendant told him he needed nineteen dollars for a bus ticket to get back to Ann Arbor. Defendant denied intending to help the officer purchase drugs, and testified that he intended only to introduce the officer to a potential seller. Defendant testified that the plain-clothes officer instructed him to approach the person on the street. Defendant did so, and the person said he was going to beat the officer out of his money. Defendant testified that he returned to the vehicle, and the plain-clothes officer insisted that defendant get the dope and insisted on giving defendant the money. Defendant testified that he resisted and tried to warn the officer that the purported seller would cheat him out of his money. Defendant denied ever having a chunk of soap in his possession and mentioning soap, and denied making the alleged statements to the police.

The trial court concluded that the police officers' testimony was credible and that defendant's testimony was not credible. The court found that defendant attempted to deliver an imitation controlled substance to the plain-clothes undercover officer in exchange for money, and that the imitation controlled substance was soap.

I

Defendant first argues that he was denied effective assistance of counsel because trial counsel did not raise an entrapment defense. Appellate counsel raised this issue in a post-judgment motion for a judgment of acquittal based on ineffective assistance and entrapment. The trial court denied the motion after hearing oral argument, concluding that counsel was not ineffective because the court would not have found entrapment had a motion been brought.

To establish ineffective assistance of counsel, a defendant must show that (1) trial counsel's performance was below an objective standard of reasonableness according to prevailing professional norms, and (2) that there is a reasonable probability that absent counsel's errors, the outcome of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Graham*, 219 Mich App 707, 711; 558 NW2d 2 (1996). A reasonable probability is a probability sufficient to undermine the outcome. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway*, *supra* at 687.

Michigan courts employ an objective test of entrapment. *People v Juillet*, 439 Mich 34, 53; 475 NW2d 786 (1991) (Brickley, J). Entrapment exists if either: "(1) the police engaged in impermissible conduct that would have induced a person similarly situated as the defendant, though otherwise law-abiding, to commit the crime, or (2) the police engaged in conduct so reprehensible that it cannot be tolerated by the Court." *People v Fabiano*, 192 Mich App 523, 526; 482 NW2d 467 (1992). See also *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). Merely presenting an opportunity to commit a crime is not entrapment. *Id.* The burden is on the defendant to show by a preponderance of the evidence that he was entrapped. *Juillet*, *supra* at 61.

Defendant argues that the undercover officer went beyond merely presenting an opportunity for defendant to commit this crime, and actually instigated the crime by approaching defendant on the street, having defendant get in the vehicle to make a purchase of drugs for him, and then driving defendant around in search of a seller of crack cocaine for fifteen minutes, while promising to help defendant get back home. Defendant contends that any law-abiding citizen in his position, stranded without his personal belongings or money, would have acted as he did if it meant that he could get home. We disagree.

We first observe, as did the trial court in denying the motion, that the officer testified that when he asked defendant if he had a "twenty" on him, defendant said he did not, but that if the officer would let him in the vehicle, he would take the officer to get some. The officer's testimony also indicated that as they drove around, defendant knew which persons had crack and which did not. The plain-clothes officer denied that defendant told him he needed money to get back home and denied having promised defendant money for the bus trip. The potential seller with whom defendant had contact testified that he did not know defendant but had seen defendant in the area before. Assuming that defendant was indeed stranded in Kalamazoo, we cannot agree that a normal law-abiding person would have reacted the same way defendant did. The record does not support that trial counsel's performance fell below

an objective standard of reasonableness or that defendant suffered prejudice from the failure to raise the entrapment defense. Defendant's claim of ineffective assistance therefore fails.

II

Section 7341 of the controlled substances act prohibits the manufacture, distribution or possession with intent to distribute of an "imitation controlled substance." MCL 333.7341(3); MSA 14.15(7341)(3). Defendant argues that he cannot be guilty of possession with intent to deliver an "imitation controlled substance" because soap is not an "imitation controlled substance" under MCL 333.7341; MSA 14.15(7341):

> "Imitation controlled substance" means a substance that is not a controlled substance or is not a drug for which a prescription is required under federal or state law, which by dosage unit appearance including color, shape, size, or markings, and/or by representations made, would lead a reasonable person to believe that the substance is a controlled substance. However, this subsection does not apply to a drug that is not a controlled substance if it was marketed before the controlled substance that it physically resembles. [MCL 333.7341(1)(b); MSA 14.15(7341)(1).]

Defendant asserts that the statute ambiguously defines an "imitation controlled substance," and that, arguably, soap does not fall within the definition of an "imitation controlled substance" because it was marketed before cocaine, the controlled substance that it physically resembles, and is a "drug" as defined by MCL 333.7105(7); MSA 14.15(7105)(7). Defendant contends that because section 7341 is ambiguous, this Court should look to legislative history, which, he argues, supports his position. We disagree.

Soap is not "a controlled substance"[1] and is not "a drug for which a prescription is required." Further, there was evidence that its appearance in the instant case, and the implied representation defendant made in showing the soap to the plain-clothes officer,[2] would lead a reasonable person to believe that it was crack cocaine.

Defendant relies on the exception found in the last sentence of section 7341(b), asserting that soap "may be considered a 'drug' that was marketed before the controlled substance it physically resembles," because "reasonable minds would agree soap is 'a substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in human beings or animals.'" However, while we do not question that there may be a relationship between personal hygiene and physical health, we are not persuaded that ordinary bar soap is included within the definition of "drug" on the basis that it is intended for use in the cure, mitigation or prevention of disease. Defendant simply relies on the definition of "drug" and provides no other support for his assertion that soap is a "drug" within the meaning of the act.[3] Defendant's claim fails.

III

Defendant's final argument is that he should be resentenced under MCL 333.7411; MSA 14.15(7411), pursuant to which a court, without entering a judgment of guilt, may defer further proceedings and place the individual on probation if the individual has not previously been convicted of a controlled substance offense and has pleaded guilty or been found guilty of any of the crimes delineated in section 7411(1). We disagree.

Insofar as crimes involving an "imitation controlled substance" are concerned, by its plain language MCL 333.7411; MSA 14.15(7411) applies only to *possession* or *use* of an imitation controlled substance under § 7341(4) for a second time. It does not apply to the crime of possession with intent to distribute an imitation controlled substance, of which defendant was convicted, or to the remaining crimes set forth in the same provision (manufacturing and distributing). Defendant's argument thus fails.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Helene N. White

[1] The term "controlled substance" is defined not in § 7341, but is defined in § 7401 as "a drug, substance, or immediate precursor in schedules 1 to 5 of part 72 [MCL 333.7201 *et seq.*; MSA 14.15(7201)]." Defendant does not argue that soap is a controlled substance, and soap does not fall under any of the applicable schedules of the Act. See MCL 333.7201; MSA 14.15(7201); and §§ 7212, 7214, 7216, 7218, 7220.

[2] Section 7341 provides that:

> In addition to all logically relevant factors, the following factors as related to 'representations made' shall be considered in determining whether a substance is an imitation controlled substance:
>
> * * *
>
> (c) Any express or implied representation made that the substance is a controlled substance. [MCL 333.7341(2)(c); MSA 14.15(7341)(2)(c).]

Defendant in this case implied that the chunk of soap was crack cocaine and proceeded with transacting a sale of the soap as crack.

[3] To the extent defendant relies on legislative history, we find it insufficient to support defendant's position. Defendant contends, quoting from the Senate Legislative Analysis , SB 221, December 20, 1984, that the legislature intended that MCL 333.7341; MSA 14.15(7341) would criminalize

"pharmaceuticals containing legal substances but which look like and are promoted either directly or by implication as illicit drugs," and that soap would not fall under this classification. Defendant argues that it is clear from the Legislative Analysis, *supra*, that the statute was intended to apply to concentrations of substances which pose a danger by giving the user a similar effect as the illicit drugs they resemble. While this is an accurate reading of the Legislative Analysis, the Legislative Analysis also indicates that the Legislature focused on the complications look-alike drugs pose for law enforcement.

> Look-alike drugs cause complications for law enforcement, as well, because they divert limited police resources away from hard drug traffic. A law enforcement team may spend weeks building up to a large 'buy' of an illicit drug only to discover that they have purchased look-alikes and have no criminal case since the ingredients of the look-alike drugs are not on the register of controlled substances and the substances themselves are legal. . . . [Legislative Analysis, *supra*.]

Further, the statute does not use the word "pharmaceuticals." Rather includes within its definition "a substance that is not a controlled substance or is not a drug for which a prescription is required." Thus, by its clear terms, the statute includes **any** substance that is not a controlled substance or is not a drug for which a prescription is required, provided the other requirements of the statute are met.