STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 1999
v	No. 206311 Washtenaw Circuit Court
KENNETH DANCY, Defendant-Appellant.	LC No. 96007066 FH

Before: Gribbs, P.J., and Kelly and Hood, JJ.

PER CURIAM.

Defendant appeals by right his conviction and sentence for possession with intent to deliver 50 or more, but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Defendant was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to thirteen to forty years' imprisonment. We affirm.

An undercover drug enforcement team, in possession of a search warrant, raided defendant's home, arresting defendant and seizing approximately 140 grams of cocaine. On pretrial motions the trial court upheld the search warrant, denied suppression of the evidence seized in the raid, and denied a motion to dismiss for speedy trial violation. Then at trial, police officers DeRidder, Greer and Neeb separately testified to essentially the same sequence of events. The officers stated that they approached defendant's residence as a team at approximately 9:00 p.m., took positions on the porch and then knocked and announced their presence. Neeb and DeRidder, closest to the house, testified that they heard no immediate vocal response, but rather heard sounds resembling footsteps moving quickly away from the door.

Indicating that such sounds raise fears for officer safety and suggest the possibility of evidence destruction, Neeb, the lead officer, testified that despite the passage of only four to five seconds since the knock on the door, he stated "they're running," and rammed open the door. Both DeRidder and Greer testified that they heard Neeb's statement immediately before he forced the door. DeRidder, the first officer to enter the residence, testified that he saw defendant standing at the edge of the living room and hallway, that he watched defendant grab a plastic bag of cocaine from the kitchen counter and turn to run down the hallway, and that he chased after defendant, tackling him at the threshold of the

bedroom. Greer testified that as he entered the house he saw defendant grab the bag of cocaine and run, and that he followed DeRidder down the hallway and saw him tackle defendant in the bedroom doorway. Both officers testified that as defendant was tackled he threw the bag of cocaine beneath the bed. Cocaine, totaling 140 grams, was recovered from beneath the bed, and this evidence was seized along with a small electronic scale. No other items commonly associated with drug sales were discovered.

Defendant first alleges that the trial court erred when it denied his pretrial motion to suppress the evidence seized during the raid. He argues that the trial court incorrectly found that exigent circumstances existed, and thus erred in determining that the officers' violation of the knock and announce statute, MCL 780.656; MSA 28.1259(6),[1] was excused. We find no error.

We review a trial court's factual findings regarding a motion to suppress for clear error. A finding is clearly erroneous if, although there is evidence to support it, the appellate court is left with a definite and firm conviction that a mistake was made. *People v Howard* 233 Mich App 52, 54; ___ NW2d ___ (1998). The trial court's application of constitutional standards regarding the motion is subject to de novo review. *Id.*

The trial court held an evidentiary hearing on the motion, at which officers DeRidder and Greer testified to the same facts they related at trial. Also testifying at this hearing, though not at trial, was a female acquaintance of defendant who was in the house at the time of the raid. DeRidder had testified that he saw a black female sitting in the corner of the bedroom when he tackled defendant, and Greer had testified that on following DeRidder into the bedroom he secured a female who was crouching in the corner. This individual, Latalia Poole, testified in contrast that she came out from the bedroom at the sound of a loud boom. She testified that defendant made no attempt to run toward the bedroom, stating that he never had a chance because the police had subdued him in the living room. She also testified that the police beat defendant in the living room as they made the arrest. Defendant then testified, stating that he heard no knock or announcement of police presence; rather, he was startled by the door being violently forced open. Defendant testified that he did not have drugs in his hand when the door was forced open, and stated that officers tackled him in the living room, kicking and beating him while he was down and leaving his blood on the living room carpet. Defendant, however, introduced no evidence supporting his testimony that he bled onto the living room floor. He further testified that he made no report of this brutality.

The trial court found that the officers had violated the knock and announce statute by entering the house after only four or five seconds. The court also found, however, that noise indicating that someone was running away from the door presented an exigent circumstance justifying the early entry. Consequently, the trial court denied defendant's motion to suppress.

When a method of entry violates the knock-and-announce statute, "the exclusionary rule may come into play if the Fourth Amendment standard of reasonableness is also offended." *People v Polidori,* 190 Mich App 673, 677; 476 NW2d 482 (1991). The idea that suppression is not automatic when the knock-and-announce statute is violated was recently repeated. In *Howard, supra,* 60, we explained that "the propriety of the remedy for a violation of the knock-and-announce statute in

light of Fourth Amendment suppression requirements must be determined on a case-by-case basis." "Because the primary purpose of the constitutional guarantee is to prevent unreasonable invasions, if a police officer has reasonable cause to enter a dwelling to make an arrest, his entry and search are not unreasonable." *Id.* (citing *Polidori, supra*). By way of example, we held that "if the police officers have a basis to conclude that evidence will be destroyed or lives will be endangered by delay, strict compliance with the statute may be excused." *Polidori, supra*.

Because questions regarding the credibility of the witnesses are for the trier of fact, in reviewing the trial court's findings of fact on this issue we must give regard to its opportunity to gauge the credibility of the witnesses appearing and testifying. MCR 2.613(C). Thus, we agree with the trial court that having announced their presence, sounds indicating sudden flight from the door presented a reason for the officers to legitimately fear for their safety. Moreover, acting on a warrant that specified drugs were located at the house, the officers had understandable concern that the evidence they sought could be easily destroyed. These circumstances were sufficient to render noncompliance with the knock-and-announce statute reasonable. See *People v Williams*, 198 Mich App 537, 545; 499 NW2d 404 (1993). We are not "left with a definite and firm conviction that a mistake has been made," and therefore find no error in the trial court's decision to suppress the evidence seized. *Howard, supra*.

Defendant also argues that the trial court erred in denying his pretrial motion to dismiss on the grounds of speedy trial violation. The motion was argued May 30, 1997, ten days before trial and approximately eight months after defendant's October 9, 1996 arraignment. The trial court denied the motion on a finding that there was "insufficient establishment of prejudice." Presenting no additional argument, defendant simply contends that the trial court's decision was wrong.

The determination whether a defendant was denied a speedy trial is a mixed question of fact and law. We review the factual findings for clear error, and the constitutional issue de novo. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). Four factors are balanced when determining whether a defendant has been denied a speedy trial: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; and (4) prejudice to the defendant from the delay. *Id*. A delay of six months is required to trigger an investigation into a claim that a defendant has been denied a speedy trial. *People v Quinn*, 185 Mich App 40, 47-48; 460 NW2d 264 (199). If the delay is for less than 18 months, however, the burden is on defendant to prove prejudice. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994).

Defendant argues that all delays were attributable to the prosecution. Scheduling delays and delays caused by the court system are attributed to the prosecution, but should be given a neutral tint and only minimal weight. *Gilmore, supra*, 460. Delays caused by the adjudication of defense motions are attributable to the defendant. *Id.*, 461. The trial court's ruling distinguished delays attributable to defense motions and evidentiary hearings, and the unavoidable delay presented by the retirement of the originally assigned judge. The court concluded that some of the delay, in excess of six months, was attributable to additional defense activity. Having reviewed the record, we hold that this finding was not clearly erroneous. *Id.*, 459. The combined delays total only eight months, and consequently the burden of demonstrating prejudice rests with defendant. Ruling on the motion, the court found that there was

"insufficient establishment of prejudice." Defendant now merely asserts that a delay beyond six months is presumptively prejudicial. We again agree that the trial court's finding was not clearly erroneous. *Id.* Consequently, we hold that the trial court did not err in denying defendant's motion to dismiss for speedy trial violation.

Defendant next argues that the trial court erred in concluding that defense counsel was not duly diligent in its efforts to locate Poole before trial, alleging that the court thereby abused its discretion in failing to grant his request for adjournment on the second day of trial. We disagree with both contentions.

We review the denial of a continuance for abuse of discretion. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). The factors to be considered include "whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." *Id.* Defendant must also demonstrate prejudice. *Id.* In addition, a trial court's determination of due diligence will not be overturned on appeal absent an abuse of discretion. That determination is a factual matter for which the court's findings will not be reversed unless clearly erroneous. *Id.*

Although Poole testified at the May 2, 1997 evidentiary hearing on defendant's motion to suppress, the record demonstrates that shortly thereafter she moved from Ypsilanti to Detroit and that by the time of the pretrial motion to dismiss, held May 30, 1997, defense counsel was having trouble contacting her. As noted above, in denying defendant's motion to dismiss, the trial court indicated various means by which Poole's appearance could be secured before the June 9, 1997 trial:

> The potential to find a res gestae witness can be remedied in part by ordering an expedited transcript which can be done and in part by making a request to the prosecutor's office for their assistance in locating that res gestae witness. And if the prosecutor won't agree, the Court can order that assistance since it is a res gestae witness and if that person is making herself unavailable, the Court can issue a warrant. There are a lot of remedies to try and contact that witness and have her present.

Raising this issue on the second day of trial, defendant first sought to introduce a transcript of Poole's evidentiary hearing testimony, then alternatively requested that the trial be adjourned overnight in the hope of securing Poole's appearance. The prosecution objected to defendant's request to introduce a transcript of the earlier testimony arguing that Poole had not been declared unavailable. The trial court agreed, holding that the defense had not exercised due diligence in attempting to locate Poole, and that she was not, therefore, considered unavailable. The court denied defendant's subsequent motion for adjournment on the same grounds.[2]

MCR 2.503(C)(2) provides:

> An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence.

This Court previously held that "the failure to attempt to secure the attendance of the witness by subpoena is such lack of diligence as to warrant the trial judge's denial of the motion for adjournment." *People v Taylor*, 159 Mich App 468, 490; 406 NW2d 859 (1987) (decided under GCR 1963, 503.2, the precursor to MCR 2.503(C)). Here, beyond the fact that defense counsel indicated on May 30 that he was having trouble locating Poole, the record demonstrates that little or no effort had been made since the May 12 pretrial conference at which the trial date of June 9 had been set. Moreover, despite the court's May 30 ruling discussing options for assistance in locating Poole, defense counsel indicated that his next attempt to contact Poole was made the weekend immediately before trial. Defense counsel explained that because she had indicated she was a willing witness, he had neither subpoenaed Poole nor requested the prosecutor's assistance. He also asserted that the fact that he had not worked during the intervening week because of a death in his own family, a circumstance of which the court was aware, should not be considered further evidence of lack of due diligence.

The trial court found that defense counsel's personal situation did not justify the lack of a concerted attempt to contact Poole between the May 12 pretrial hearing and the May 30 hearing. This omission, when combined with the subsequent failure to utilize any of the suggested assistance options (requiring no more effort than simply requesting the state's assistance), amounted to a lack of due diligence. We do not find these conclusions clearly erroneous. *Lawton, supra*. Moreover, by failing to specifically argue how Poole's testimony would have changed the verdict, defendant has not demonstrated prejudice. *Id.* Under the circumstances, the trial court's denial of defendant's motion to adjourn was not an abuse of discretion. *Id.*

Defendant's fourth allegation of error is that he was deprived of the effective assistance of counsel. Defendant hints at numerous failings but primarily bases this contention on the trial court's ruling that counsel did not exercise due diligence in attempts to locate Poole. We disagree.

An ineffective assistance of counsel claim is reviewed to determine whether defendant has shown that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Because defendant failed to move for a *Ginther*[3] hearing or a new trial based on ineffective assistance of counsel, this claim is not properly preserved and our review is limited to mistakes apparent on the record. *People v McCrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995).

To demonstrate ineffective assistance, defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Agreeing with the trial court's finding that defense counsel's efforts to locate Poole exhibited a lack of due diligence, we believe it arguable that this was not sound trial strategy, and therefore, limited to this particular circumstance, arguable that counsel's performance fell below an objective standard of reasonableness. *Pickens, supra*. Defendant must also show, however, that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Stanaway, supra*, 687-688. Asserting that Poole would have testified to the same facts she presented at the suppression hearing, the closest defendant comes to arguing prejudice is the statement that Poole's absence resulted in an "inability to afford the trier of fact the opportunity to hear from the

only witness who was present and neither the police officers nor defendant." Considering the court's pretrial determination that Greer and DeRidder's combined testimony was more credible than that of defendant and Poole, and giving weight to the additional trial testimony of Neeb, we are unconvinced that the jury would have come to a different conclusion at trial. Defendant wholly fails to demonstrate that the addition of Poole's testimony would have changed the result of his trial. *Id.* Acknowledging that defense counsel's performance may have fallen below an objective standard of reasonableness, defendant has not demonstrated that this representation so prejudiced him as to deprive him of a fair trial. *Pickens, supra.*

Defendant additionally alleges that cumulative trial errors denied him due process. In determining if the cumulative effect of numerous minor errors requires reversal, the test is whether defendant had a fair trial. *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987). Reference is made to some of the above allegations of error, which we have already determined to be without merit. Additional reference is made to prejudice arising from prosecutorial comments and the jury instructions. These references, however, fail to specify particular remarks and are presented in the absence of relevant developed argument. Having reviewed the entire record of trial proceedings, we are convinced that defendant received a fair trial. *Id.*

Defendant's final claim alleges that the trial court imposed a disproportionate sentence. Defendant argues first, that the court abused its discretion in sentencing him as an habitual offender because it did not "exercise" discretion, and second, that his sentence was disproportionate either because there was no proof of "intent" to distribute or because the court improperly "focused exclusively on sending a message about drugs" and did not consider his circumstances.

We review habitual offender sentencing for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995). An abuse of discretion will be found where the sentencing court violates the principle of proportionality, which requires sentences imposed by the court to 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).

With regard to defendant's first argument, he bases this claim solely on a perceived lack of specific language, within the sentencing transcript, indicating that the court chose to enhance the sentence. The record belies this supposed premise. Both the prosecutor and defense counsel referenced defendant's habitual offender status. Imposing sentence, the court in part stated, "I do believe it's appropriate to enhance the maximum sentence given the prior convictions of the defendant and given the statutory scheme." This language alone indicates that the trial court exercised a choice, and this portion of defendant's claim is entirely without merit. With regard to the second part of defendant's argument, to the extent he alleges that the court sentenced him for a crime that was not proven, defendant argues mistakenly. Defendant asserts that the prosecution never proved his intent to deliver the cocaine, thereby arguing that his sentence is disproportionate as his only crime was possession. The jury found defendant guilty, however, of "possession with intent to deliver more than 50 grams and less than 225 grams of cocaine." This verdict was returned after the jury requested and received additional instructions regarding the element of "intent to deliver." The assertion that the prosecution failed to prove the element of intent is wholly unsupported by the record.

Defendant's more recognizable claim, that the court failed to consider his circumstances and instead "focused exclusively on sending a message about drugs," is again contradicted by the record. The trial court made the following comments at sentencing:

> I think that [the prosecutor] appropriately points out that a person with no prior record who is convicted of this offense would receive ten to twenty and it would not be proportional for Mr. Dancy to receive the same offense [sic].
>
> I also don't believe that given the circumstances in this case that the maximum of sentences is proportionate. There are some rehabilitable factors, although they might not be sufficient to depart from the minimum, they certainly are sufficient to urge the Court not to give the maximum sentence in this case.
>
> And so taking all of that into account, the fact that this is a third drug conviction and there are seven prior misdemeanor convictions, the fact that the defendant was before the Washtenaw County Circuit Court on a drug offense within the last several years before committing this offense, I think it's appropriate to give something more than the minimum.

The record clearly indicated the trial court's consideration of the circumstances of the offense and of defendant.

Defendant's proportionality arguments have no support in the record or under the recognized statutory scheme. Convicted of possession with intent to deliver more than 50 but less than 225 grams of cocaine, as a third-time offender, defendant's sentence of 13 to 40 years' imprisonment was not disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra*. We hold that there was no abuse of discretion. *Cervantes, supra*.

Affirmed.

/s/ Roman S. Gribbs
/s/ Michael J. Kelly
/s/ Harold Hood

[1] The statute provides: "The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant."

[2] The court ruled on this issue twice during the second day of trial. Defendant first raised the motion at the start of the day, at which time the court initially expressed uncertainty that a transcript of Poole's earlier testimony could be rush ordered. Apparently informed that a video copy of the testimony was in the building, defendant raised the issue for a second time at the close of the prosecution's case. The

court again denied the motion, explaining its reasons for doing so in more detail. Because the availability of a copy of Poole's testimony has no bearing on this issue, for the purposes of this decision we treat the repeated motions and rulings as one.

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