STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OTHEL THOMAS LOFTIES,

Defendant-Appellant.

UNPUBLISHED
August 17, 1999

No. 204456
Kent Circuit Court
LC No. 96-005065

Before: Cavanagh, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of possession with intent to deliver more than 650 grams of cocaine, MCL 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), conspiracy to possess with intent to deliver more than 650 grams of cocaine, MCL 750.157a; MSA 28.354(1), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii). The trial court sentenced defendant to consecutive terms of one to four years' imprisonment for the marijuana possession conviction, life imprisonment without parole for the cocaine possession conviction, and life imprisonment without parole for the conspiracy conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in failing to exclude evidence of drugs the police discovered during an improper warrantless search. Defendant failed to raise before the trial court any challenge to the introduction of this drug evidence,[1] and consequently has not properly preserved this argument. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). We may consider defendant's claim of constitutional error for the first time on appeal, however, when the alleged error could have been decisive of the outcome. *Id*. at 547.

The error alleged by defendant does not qualify as outcome determinative because defendant lacked standing to challenge the introduction of the drug evidence. The Fourth Amendment of the United States Constitution, US Const, Am IV, and its counterpart in the Michigan Constitution, Const 1963, art 1, § 11, guarantee the right of persons to be secure against unreasonable searches and seizures. *People v Catanzarite*, 211 Mich App 573, 580; 536 NW2d 570 (1995). The right to freedom from unreasonable searches and seizures is personal, and the defendant bears the burden of proving standing as a result of a personal expectation of privacy. *People v Lombardo*, 216 Mich App

500, 505; 549 NW2d 596 (1996). An individual has no standing to challenge a search or seizure unless the person asserts a possessory or proprietary interest in the property searched. *People v Rasmussen*, 191 Mich App 721, 725; 478 NW2d 752 (1991).

No evidence at trial definitively indicated whether defendant had initially mailed the package containing the drugs. Even assuming defendant's identity as the package sender, defendant cannot show that he had any reasonable expectation of privacy in the package's contents. The package's return address reflected that the sender was "Steven Johnston, 3072 30th Street, San Diego, California 49507," and that the intended recipient was "Barbara Williams, 518 Gilbert, S.E., Grand Rapids, MI 49507." Harriette Naves testified at trial that she had resided at 518 Gilbert when the package was delivered. Other trial testimony, including a police officer's description of defendant's own statement, suggested that defendant resided in Sandusky, Ohio. No evidence tended to establish any connection between defendant and the package's return address. In *People v Zahn*, 234 Mich App 438; 594 NW2d 120 (1999), this Court recently addressed a defendant's expectation of privacy in a package that did not bear his name.[2] The Court noted that while the defendant had admitted, in an attempt to establish standing, having sent the package, the mere fact of his identity as the sender was insufficient to establish his reasonable expectation of privacy in the package's contents. *Id*. at 447.

> Defendant has failed to establish any connection between himself and the package beyond the fact that he was the person who caused its delivery by Federal Express. Nothing in the record suggests that defendant was known as "John Hoelzer," the name listed on the package as being the sender, and there is no apparent connection between defendant and the return address listed on the package. In [*United States v*] *DiMaggio*, [744 F Supp 43, 46 (ND NY, 1990)], a federal district court held that the true sender's legitimate expectation of privacy "vanishes" when his identity is not indicated on the surface of the package. In such a case, "it is as if the package had been abandoned since by withholding from society that he is the source, [the true sender] has effectively repudiated any connection or interest in the item vis-a-vis society, and no longer has the means to exclude others from intruding upon the contents of the package." A person can deprive himself of standing by abandoning the object of the search or seizure. We are persuaded by, and adopt, the reasoning employed by the federal district court in *DiMaggio, supra*. Accordingly, we hold that by effectively abandoning the package and its contents in the manner described, defendant has abandoned his right to challenge the search and seizure of the package. [*Zahn, supra* at 447-448 (some citations omitted).]

We likewise conclude that because (1) defendant's name does not appear on the package and (2) no record evidence otherwise tended to establish any connection between defendant and the addresses appearing on the package, defendant had no expectation of privacy in the package. Therefore, defendant lacks standing to challenge the police search.[3] *Lombardo, supra*.[4] Furthermore, because defendant lacked standing, we reject his claim that defense counsel was ineffective for failing to move to suppress the drug evidence. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998) (Defense counsel is not required to make frivolous or meritless motions.).

Defendant also argues that "[t]he government deprived [him] of his Fifth Amendment right against self-incrimination by requiring him to make financial disclosures in order to establish his eligibility or ineligibility for appointed counsel, then at his trial using those same disclosures as substantive evidence of his guilt." We note again that defendant failed to object at trial to testimony concerning his statements regarding his income, and has thus failed to preserve this issue. *Grant*, *supra* at 546. We will, however, review this second claim of constitutional error. *Id*. at 547.

After defendant was arrested, Ann Marie Godell, a court services pretrial investigator, interviewed defendant to obtain information she needed to make a bond recommendation to the court. During the interview, Godell asked defendant about his income to determine whether he qualified for court appointed counsel. Defendant responded that his only source of income consisted of two rental properties he owned in Sandusky, Ohio, from which he received a net income of $1,300 each month.[5] When investigators searched defendant's wallet, however, they found several credit cards, car rental cards, hotel cards, frequent flier cards from three different airlines, and cards from other businesses in California, Illinois and Texas. Investigators also learned that within approximately one month prior to his arrest, defendant had purchased a used BMW from a San Diego dealer, giving the dealer a $7,500 cash or money order down payment. From this evidence, the prosecutor urged the jury to reject defendant's assertion that his income derived completely from his activity as a landlord.

In support of his argument that the prosecutor's use of this information violated his constitutional rights, defendant cites *United States v Hardwell*, 80 F 3d 1471 (CA 10, 1996). The Tenth Circuit therein reasoned that absent "some sort of protection against the use of financial disclosures made to establish eligibility for appointed counsel . . . . a defendant would be forced to choose between the Sixth Amendment right to counsel and the Fifth Amendment right against self incrimination." *Id*. at 1483-1484.

We find the instant case more akin to *United States v Kahan*, 415 US 239, 94 S Ct 1179, 39 L Ed 2d 297 (1974). In *Kahan*, the defendant, charged with receiving bribes and perjury before a grand jury, requested appointed counsel. At his arraignment, the defendant asserted that he had insufficient funds to retain counsel, but neglected to disclose $27,000 he had deposited in certain savings accounts. *Id*. at 299. At trial, the prosecutor introduced evidence of the defendant's statement that he lacked funds together with evidence of the unreported $27,000 to create the inference that the defendant had improperly received the unreported money. *Id*. at 300. The United States Supreme Court rejected the defendant's position that the introduction of his statements regarding income violated his Fifth and Sixth Amendment rights:

> [T]he incriminating component of respondent's pretrial statements derives not from their content, but from respondent's knowledge of their falsity. The truth of the matter was that respondent was not indigent, and did not have a right to appointment of counsel under the Sixth Amendment. We are not dealing . . . with what was 'believed' by the claimant to be a 'valid' constitutional claim. Respondent was not, therefore, faced with the type of intolerable choice *Simmons* [*v United States*, 390 US 377, 88 S Ct 967, 19 L Ed 2d 1247 (1968)] sought to relieve. [*Kahan*, *supra* at 301.]

In the instant case, the record evidence, including defendant's possession of the various credit cards and frequent flier cards and his placement of a $7,500 down payment, representing almost half his reported yearly income, on a used BMW, likewise indicates that defendant falsely underrepresented his actual income. Furthermore, within two weeks of the appointment of his defense counsel, defendant stipulated to the dismissal of this counsel in favor of another attorney apparently selected by defendant. Because defendant was not therefore faced with choosing to invoke either his Fifth or Sixth Amendment right at the expense of the other, we reject defendant's assertion that his Fifth Amendment right was violated by the prosecutor's introduction of defendant's pretrial statements.[6] "The protective shield of *Simmons*[, *supra*] is not to be converted into a license for false representations on the issue of indigency free from the risk that the claimant will be held accountable for his falsehood." *Kahan*, *supra*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage

[1] Defendant maintains that he properly preserved this issue for review when "defense counsel sought a ruling on the legality of [Police Investigator] Slattery's warrantless search and Judge Kolenda ruled that a warrant 'simply wasn't needed.'" Defendant refers to the following exchange during trial:

Defense counsel: Okay. And then you proceed and open it some more?

Witness: Yes.

Defense counsel: And no search warrant?

Witness: Not necessary.

Defense counsel: I know in California people do things differently but—

Prosecutor: Your Honor, I would object to this line of questioning. [Defense counsel] knows full well that the law even in Michigan does not require search warrant under these circumstances. He is trying to prejudice the jury against what this man did in California. Now, if he has some evidence that we violated the law, he hasn't brought it forward. Let's bring it forward now.

Defense counsel: This is a legal issue that ought to be resolved in front of the Court.

The Court: Why are we making this inquiry? The search warrant is not necessary.

Defense counsel: I want to know exactly what happened with those packages.

> *The Court*: Just a moment. Then you may inquire as to what happened, but ladies and gentlemen, under the circumstances of this case there was no search warrant that was necessary to open the packages, so not having one—it may mean something of significance to you, of course, in terms of evaluating the facts, but it does not suggest that anyone did anything improper in their handling of the package. It simply wasn't needed.

A review of this testimony indicates that defendant neither argued that a warrant was necessary nor objected to the introduction of the drug evidence.

[2] The defendant in *Zahn*, *supra*, who lived in Florida, mailed to James Hall in Flint a package containing cocaine. *Id*. at 442. The defendant addressed the package to "Jane Hoelzer, 2220 East Court Street, Flint, MI," and identified the sender as "John Hoelzer, 400 Park Street, Hollywood, FL." *Id*. at 442-443.

[3] While the trial court did not rely on defendant's lack of standing in rejecting his argument that it should have suppressed the drug evidence, we may nonetheless affirm the trial court ruling because the court reached the correct result. *People v Lyon*, 227 Mich App 599, 612-613; 577 NW2d 124 (1998).

[4] To the extent defendant suggests that we may remand this case for further factual findings with respect to his identity as the package's intended recipient, we decline this invitation. See *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998) (This Court's review is generally limited to the record of the trial court, and it will generally allow no enlargement of the record on appeal. When the record does not support the defendant's claim, he has not established error requiring reversal.), lv granted in part ___ Mich ___ (Docket #111745, ordered 6/9/99).

[5] The lower court record includes a "Petition for Court Appointed Attorney" that contains the same information.

[6] In light of our conclusion that defendant's claim is without merit, we reject defendant's related assertion that defense counsel rendered ineffective assistance in failing to object to the prosecutor's introduction of defendant's pretrial statements. *Darden*, *supra*.