STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN SALVADORE AVILES,

Defendant-Appellant.

UNPUBLISHED
June 30, 2000

No. 218343
Berrien Circuit Court
LC No. 98-403067-FH

Before: Smolenski, P.J., and Zahra and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii), one count each of possession with intent to deliver a controlled substance, diazepam and alprazolam, MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c), carrying a concealed weapon in a motor vehicle, MCL 750.227; MSA 28.424, possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and equipping a vehicle with a police scanner, MCL 750.508; MSA 28.766. The trial court sentenced defendant as a second habitual offender, MCL 769.10; MSA 28.1082, to serve concurrent terms of 3 to 8 years' imprisonment for each drug conviction and for his conviction of carrying a concealed weapon. Defendant was further sentenced to a 365-day term for his conviction of equipping a vehicle with a police scanner. Finally, defendant was sentenced to a term of 2 years' imprisonment for his felony firearm conviction, to be served consecutively to and preceding his other sentences. Defendant appeals his convictions as of right. We affirm.

This case arises from the discovery of almost nine pounds of marijuana inside a van occupied by defendant. When the marijuana was discovered, the van was parked at a rest area off I-94 near the Michigan-Indiana border. Michigan State Police Trooper James Coleman noticed the van because it was parked outside the designated parking lines and with its rear tires over the curb. As Coleman approached the rear of the van, he smelled the odor of burnt marijuana emanating from the van's rear hatch, which was slightly ajar. After Coleman tapped on the vehicle, defendant, who had been sleeping in the rear of the van, awoke and fully opened the rear hatch. As he did so, Coleman noticed that the odor of marijuana became stronger.

After Coleman asked defendant to produce identification, defendant began moving about the vehicle while digging through various bags and boxes inside the van. Because defendant turned his back on the officer, Coleman was unable to observe defendant's hands. Coleman walked around the side of the van to observe defendant through the van windows, but was unable to observe defendant's movements because the van's windows were heavily tinted. Concerned that defendant might be searching for a gun or that defendant might attempt to hide or destroy evidence of contraband, Coleman opened both the van's sliding door and the front passenger door, to observe defendant's actions. After opening the passenger door, Coleman discovered a wooden "dugout" which proved to contain marijuana.

A subsequent search of the vehicle at the rest area uncovered eight additional bags of compressed marijuana, weighing nearly one pound each, as well as two smaller bags of marijuana. The officer also found a police scanner during this search, located in a box of electronic equipment situated near the driver's seat. As a result of these discoveries, defendant was arrested and the van was towed to a private impound lot, where it was secured. Two weeks later, Coleman retrieved the vehicle from the impound lot and completed a second search of the van. At that time, Coleman discovered and seized from the vehicle a loaded .25-caliber semi-automatic handgun, as well as several dozen pills containing the controlled substances diazepam and alprazolam.

On appeal, defendant first argues that the trial court erred in denying his motion to suppress the marijuana and police scanner found by Trooper Coleman during the initial search of the van. We review de novo a trial court's ultimate decision regarding a motion to suppress evidence. *People v Goforth*, 222 Mich App 306, 310; 564 NW2d 526 (1997).

In arguing error by the trial court, defendant claims that Coleman's opening of the vehicle doors was an illegal search unsupported by probable cause to believe that the vehicle contained contraband or by a reasonable belief that defendant posed some danger to the trooper's safety. We disagree. "It is well settled that the police may lawfully search an automobile without a warrant where they have probable cause to believe that the vehicle contains contraband." *People v Carter*, 194 Mich App 58, 60-61; 486 NW2d 93 (1992). Moreover, where such probable cause exists police are justified in searching every part of the vehicle and any of its contents which might conceal the object of the search. *Id*. at 61. Recently, in *People v Kazmierczak*, 461 Mich 411, 413; 605 NW2d 667 (2000), our Supreme Court held that the smell of marijuana by a person qualified to know the odor is, in and of itself, sufficient to establish probable cause to search an automobile without a warrant. In so holding, the Court explicitly overruled its decision in *People v Taylor*, 454 Mich 580, 593; 564 NW2d 24 (1997), relied on by defendant, which held that the "odor [of marijuana] alone is not sufficient probable cause to search a vehicle," but is rather merely one factor to be considered in determining whether the totality of the circumstances establish the requisite probable cause.

In *Kazmierczak*, *supra*, the Court found the investigating officer's testimony that he had "previous experience involving marijuana investigations" and that he recognized a "very strong smell of marijuana emanating from the vehicle," sufficient to establish probable cause to search the vehicle for marijuana. *Id*. at 421-422. Although Coleman's qualifications to know the odor of marijuana were not specifically challenged by defendant below, Coleman testified that during his 5-½ years as a patrol officer

he had taken several courses on drug recognition and had been involved in other traffic stops that had resulted in the discovery of substantial amounts of marijuana. In light of this testimony we believe that, like the officer in *Kazmierczak*, Coleman was sufficiently qualified to know the odor of marijuana and thus, upon smelling the odor at the rear of the van, had probable cause to search the entire vehicle for that substance. Furthermore, we believe such probable cause was strengthened by the increase in odor noted by Coleman after defendant fully opened the vehicle's rear hatch, as well as defendant's suspicious movements within the vehicle at that time. Therefore, we find no error in the trial court's decision to deny defendant's motion to suppress evidence of the marijuana and police scanner found during the initial vehicle search.

Defendant also argues that the trial court erred in failing to suppress the evidence obtained during the second search of the van. Specifically, defendant argues that the post-impound warrantless search of his vehicle constituted an inventory search, and that the prosecutor's failure to establish that the search was conducted pursuant to an established set of departmental procedures required that the trial court suppress the handgun and pills found at that time. See *People v Long (On Remand)*, 419 Mich 636, 646-647; 359 NW2d 194 (1984). We believe this argument is without merit. There is nothing in the record to warrant defendant's characterization of the second search as an inventory procedure. To the contrary, Coleman testified that the initial search of the van at the rest area was cursory, as he intended to complete a more thorough search after the vehicle had been impounded and taken into police custody.

Moreover, contrary to defendant's claim that the subsequent search was invalid in the absence of exigent circumstances, it is well established that where police officers have probable cause, they may conduct a warrantless search of a vehicle, "even after it has been impounded and is in police custody." *Michigan v Thomas*, 458 US 259, 261; 102 S Ct 3079; 73 L Ed 2d 750 (1982); *People v Romano*, 181 Mich App 204, 217; 448 NW2d 795 (1989). As explained above, under the rule announced in *Kazmierczak*, *supra*, Coleman possessed probable cause to conduct a complete search of the vehicle for evidence of marijuana. This same probable cause justified both the vehicular seizure and the delayed search without a warrant, quite apart from any consideration of exigent circumstances. See *Thomas*, *supra* at 261-262. Therefore, the probable cause justifying the search of the van at the rest area continued at the police post following impound and thus the subsequent search was proper. See *People v Hunter*, 72 Mich App 191, 201; 249 NW2d 351 (1976). Because Trooper Coleman possessed probable cause to conduct a search of the vehicle at the rest area and to continue the search later after impound, we find that the trial court did not err in denying defendant's motion to suppress on the ground of an illegal search and seizure.

Defendant next argues that his trial counsel rendered ineffective assistance by failing to call several witnesses known to him before trial and by stipulating that with respect to the marijuana charge, possession of more than eight pounds of the drug was sufficient to infer an intent to deliver. Again, we disagree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). In order to meet this burden, a defendant must prove both that counsel's performance fell below an objective standard of

reasonableness, and that the defective representation so prejudiced defendant that he was denied the right to a fair trial. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). With respect to judicial review of such claims, the United States Supreme Court has stated:

> [A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. [*Strickland*, *supra* at 697.]

To establish the requisite prejudice, a defendant must show that there is a reasonable probability that, absent counsel's alleged error, the result of the proceeding would have been different. *Pickens*, *supra* at 312. After review of the record in the instant matter, we are convinced that defendant has not established the prejudice necessary to support his ineffective assistance claim.

In connection with his motion below for new trial, defendant submitted an affidavit in which he listed the names of twelve individuals who he claimed would have offered testimony favorable to his defense, had they been called by counsel at trial as requested by defendant. Despite defendant's claims concerning the substance of the testimony these individuals would have purportedly offered at trial, none of these individuals were called to testify at the hearing on defendant's motion. Thus, with the exception of defendant's self-serving affidavit, the record is silent as to what these witnesses would have offered as testimony had they been called at trial. Accordingly, it cannot be said that defendant has sustained his burden of showing a reasonable probability that, had counsel called these witnesses at trial, the outcome of the proceedings would have been different.

We also find that defendant has not demonstrated that he was prejudiced by counsel's stipulation that the amount of marijuana found within the van was sufficient to infer an intent to deliver. Initially, we note that a lawyer does not render ineffective assistance merely by conceding certain points at trial. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994); *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). It is only a complete concession of defendant's guilt which constitutes ineffective assistance of counsel. *Krysztopaniec*, *supra*. Here, no such concession was made by defense counsel.

Further, considering the testimony and arguments offered by the prosecution at trial, as well as the instructions given to the jurors concerning the effect of the stipulation, we find that defendant has failed to demonstrate that he was prejudiced by counsel's concession. The now contested stipulation occurred during the testimony of the prosecution's drug distribution expert. The expert was preparing to discuss the significance of the amount of marijuana found in the van when counsel for defendant interposed an offer to stipulate that the amount present in the vehicle was sufficient to infer an intent to deliver. Although the prosecutor accepted defense counsel's offer to stipulate, he continued with his questioning of the expert concerning the significance of the manner in which the marijuana was packaged, and the value of that marijuana if sold. At the close of trial, the prosecutor acknowledged counsel's stipulation as to intent to deliver, but additionally utilized the expert's testimony to argue that

the amount and value of the marijuana found indicated an intent to deliver. During jury instructions, the trial court also reminded the jurors of the prosecution's burden to establish each element of the charged crimes beyond a reasonable doubt, and instructed them that despite the parties' stipulation concerning intent to deliver, they were not required to accept that stipulation as true.

It has long been held that "one can infer the intent to deliver from the quantity of narcotics, the way they are packaged, or the paraphernalia found with the narcotics." *Wayne Co Prosecutor v Recorder's Court Judge*, 119 Mich App 159, 162; 326 NW2d 825 (1982). Here, considering the amount of marijuana found, the expert testimony concerning the packaging and value of the drugs, and the prosecution's argument that the above evidence established the necessary intent, we do not believe that counsel's concession prejudiced defendant such as to establish a reasonable probability that absent such concession, the result of the trial would have been different.

Defendant next asserts that the trial court erred in denying his motion to disqualify the assistant prosecuting attorney handling his case. Defendant's argument is based on the prosecutor's presence during the second search of the van. Defendant argues that the prosecutor should have been disqualified from participation in defendant's trial because the prosecutor could have been called as a witness regarding the search. We disagree.

Defendant cites MRPC 3.7(a), which prohibits a lawyer from acting as an advocate at a trial in which the lawyer "is likely to be a necessary witness." Defendant, however, does not cite subsection (a)(1), which provides an exception where "the testimony relates to an uncontested issue." Although defendant contested the existence of probable cause supporting the search, the manner in which it was conducted was "an uncontested issue." Further, during the hearing on defendant's motion to disqualify, the prosecutor indicated that he did not arrive at the scene of the search until after the officer had already removed the handgun and pills from the van. Thus, even had the circumstances surrounding the manner in which these items were recovered become an issue at trial, the prosecutor had no personal knowledge of those circumstances from which he could properly testify. See MRE 602. Moreover, inasmuch as the need for this prosecutor's testimony did not arise at trial, any error in the court's failure to disqualify him from further participation in defendant's prosecution is insufficient to warrant reversal of defendant's conviction. MCR 2.613(A).

Affirmed.

/s/ Michael R. Smolenski
/s/ Brian K. Zahra
/s/ Jeffrey G. Collins