STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 28, 2000
v	No. 213015 Washtenaw Circuit Court
KEVIN MAHDI MARSHALL, Defendant-Appellant.	LC No. 94-002251-FH

Before: Wilder, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession of a controlled substance in an amount of 225 to 649 grams, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). The trial court sentenced defendant to fifteen to thirty years' imprisonment. Pursuant to this Court's order, we consider this an appeal as of right.[1] We affirm.

This appeal arises from a search of defendant's apartment that took place on April 11, 1994, in which police found over four hundred grams of cocaine in defendant's apartment. The legality of the search was the primary issue in the trial court and is the source of three of the four issues raised by defendant.

Defendant first argues the affidavit accompanying the search warrant did not establish probable cause. We disagree. A search warrant may issue only on a showing of probable cause, supported by oath or affirmation. *People v Sloan*, 450 Mich 160, 166-167; 538 NW2d 380 (1995). Probable cause exists when the facts and circumstances would justify a reasonable person in concluding that identifiable objects are probably to be found at the present time in a certain identifiable place. *People v Russo*, 439 Mich 584, 605; 487 NW2d 698 (1992); *People v Dowdy*, 211 Mich App 562, 568; 536 NW2d 794 (1995). Probable cause must be shown in the form of an affidavit presented to a magistrate. *Sloan, supra* at 167; MCL 780.651(1); MSA 28.1259(1)(1). The affidavit must contain facts within the knowledge of the affiant, as distinguished from mere conclusions or beliefs. *Sloan,*

[1] *People v Marshall*, unpublished order of the Court of Appeals, issued November 18, 1998.

supra at 169-170, citing *People v Rosborough*, 387 Mich 183, 199; 195 NW2d 255 (1972). The magistrate must then decide whether to issue a warrant based on the contents of the affidavit. *Id*.; MCL 780.653; MSA 28.1259(3). In reviewing a magistrate's decision to issue a search warrant, the warrant and underlying affidavit are to be read in a commonsense and realistic manner. *Russo, supra* at 604. The reviewing court must pay deference to a magistrate's determination that probable cause existed by inquiring whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause. *Illinois v Gates*, 462 US 213, 236-237; 103 S Ct 2317; 76 L Ed 2d 527 (1983); *Russo, supra* at 603-604. This Court reviews de novo the trial court's ultimate decision with regard to a motion to suppress evidence; however, we review the trial court's findings of fact in deciding the motion for clear error. *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

In the present case, the affidavit said that LAWNET officers had observed a controlled buy made less than twenty-four hours before the affidavit was presented. The officers observed defendant leave his apartment and proceed to the place where the drug delivery took place. The officers had watched defendant follow this procedure on three prior occasions. Defendant was arrested at the location at which the latest drug delivery took place. This information was sufficient, in and of itself, to allow the magistrate to conclude that there was probable cause to believe that defendant kept drugs at his apartment. *People v Darwich*, 226 Mich App 635, 637-638; 575 NW2d 44 (1997). Defendant argues that the averments concerning the confidential informant who originally notified police that he had bought drugs from defendant did not sufficiently show particularized knowledge. However, reading the affidavit in a common-sense manner, it is clear that the affidavit was based in large part on a controlled buy observed by police within twenty-four hours of the time the search warrant was requested. We conclude that probable cause was shown.

Next, defendant argues there were material omissions from the affidavit and that, had these omissions been included, a magistrate would not have issued a warrant. We disagree. If the reviewing court concludes that an affiant knowingly and intentionally, or with reckless disregard for the truth, either inserted false material or omitted material information from the affidavit, the reviewing court may redact the improper information and determine whether probable cause exists based on the remaining information. See *Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978); *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992).

First, the affidavit did not state that defendant was briefly out of sight of the surveillance team while he was inside a Service Merchandise store immediately before the drug transaction.[2] This was not a material omission. The police were not required to eliminate all sources of the drugs, but instead were only required to establish probable cause to establish that there were drugs at defendant's home. *People v Kort*, 162 Mich App 680, 687-688; 413 NW2d 83 (1987). Moreover, when the information regarding the lapse in surveillance is considered along with the other information that would

[2] Defendant has attempted to characterize the period in which he was not visible to officers as fifteen to seventeen minutes. However, the record supports the trial court's finding that he was actually out of the sight of the officers for approximately one minute.

have accompanied it if included in the affidavit, such as the fact that officers saw no other customers in the store and that defendant's behavior made him appear to be "surveillance-conscious," probable cause remains. See *United States v Frost*, 999 F2d 737, 743 (CA 3, 1993) (Omission of information that drug-sniffing dog had not alerted to luggage containing contraband not fatal, where if included it would have been accompanied by evidence that drug couriers often engage in "scent-masking".) The other two omitted facts were that defendant received a flier from someone when he left his apartment and that he walked to a dumpster before he left to meet the confidential informant to whom he sold the drugs. From testimony it was clear that the flier was given to defendant by an undercover officer and that defendant did not retrieve anything from the dumpster. Accordingly, none of the omissions were material, and they could not have changed the magistrate's decision that probable cause existed.

Defendant next claims he was denied effective assistance of counsel. We disagree. To establish a claim of ineffective assistance of counsel, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant did not obtain a hearing to make a testimonial record to support his claim. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Although defendant filed a motion to remand with this Court to make such a record, his motion was denied. As a result, review of his claim is foreclosed unless the record contains sufficient detail to support defendant's position. *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

Defendant contends that counsel was ineffective because he did not introduce demonstrative evidence to support his claim that police could not see defendant inside the Service Merchandise store. Decisions concerning what evidence to present are matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one which might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Defendant was not deprived of a substantial defense by counsel's decision as to how to present his case. We will not inquire into counsel's trial strategy. *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). In addition, defendant takes issue with counsel's decision as to how to cross-examine police witnesses. Again, this is no more than trial strategy. We cannot conclude that counsel was ineffective.

Finally, defendant argues the 1998 amendments to MCL 791.234; MSA 28.2304, which allow a person convicted of possession with intent to deliver 650 grams or more of a controlled substance, 333.7401(2)(a)(i); MSA 14.15(7401)(2)(a)(i), to be eligible for parole as little as fifteen years from the date of sentence, violate his right to equal protection of laws because it allows a person convicted of such an offense to be released five years earlier than a person convicted of possession with intent to deliver 225 to 649 grams of a controlled substance, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). In the present case, however, the trial court departed downward from the twenty-year minimum sentence and sentenced defendant to fifteen to thirty years' imprisonment.

Defendant does not have standing to raise this issue. See *People v Hamp*, 170 Mich App 24, 37; 428 NW2d 16 (1988), vacated in part on other grounds 437 Mich 865 (1990); *People v Acosta*, 153 Mich App 504, 515; 396 NW2d 463 (1986) (holding that defendant found in possession of cocaine which, in pure form, would have exceeded 225 grams had no standing to challenge on equal protection grounds provisions of MCL 333.7401; MSA 14.15(7401) which punish possession on the basis of aggregate weight of mixture which includes controlled substance).

Even if defendant had standing, however, we would find his argument to be without merit. This Court has discussed analysis of equal protection challenges as follows:

> Equal protection of the law is guaranteed by both the United States and Michigan Constitutions. US Const, Am XIV, § 1; Const 1963, art 1, § 2. The state constitutional guarantee provides no greater protection than does its federal counterpart. *Moore v Spangler*, 401 Mich 360, 370; 258 NW2d 34 (1977); *Doe v Dep't of Social Services*, 439 Mich 650, 670-674; 487 NW2d 166 (1992); *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 310; 553 NW2d 377 (1996). The constitutional guarantee of equal protection requires that the government treat similarly situated persons alike. *El Souri v Dep't of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987), quoting *F S Royster Guano Co v Virginia*, 253 US 412, 415; 40 S Ct 560; 64 L Ed 989 (1920). The party challenging the statute must demonstrate that it evidences intentional discrimination against a particular group of persons. *Harville*, supra at 306-309. Where, as in the instant case, the different treatment is not based on a suspect classification, such as race or ethnicity, and does not impinge the exercise of a fundamental right, rational basis scrutiny applies. *Doe* supra at 662; *Yaldo v North Pointe Ins Co*, 457 Mich 341, 349; 578 NW2d 274 (1998). Under rational basis scrutiny, "the challenged statute will be upheld if it furthers a legitimate governmental interest and if the classification is rationally related to achieving the interest." *Id.* at 349. This is a deferential standard, for we presume the statute to be constitutional, *Doe*, supra at 662, and the party challenging the statute has the burden of demonstrating that the classification is arbitrary and irrational. *Yaldo*, supra at 349. [*People v Conat*, 238 Mich App 134, 153-154; 605 NW2d 49 (1999).]

In the present case, the amendments appear to have been aimed at three problems: prison overcrowding caused by mandatory life sentences, a perception that the punishment did not fit the crime, and the Legislature's perception that offering opportunities for reduced periods of incarceration for individuals convicted of major drug offenses could increase the possibilities for law enforcement officials to use the terms as leverage from those individuals in uncovering other major drug operations. See House Legislative Analysis, SB 281, January 26, 1999. MCL 791.234(9); MSA 28.2304(9) provides for a reduction of 2-1/2 years confinement if the court finds that the defendant cooperated with law enforcement authorities. We conclude that the statute is rationally related to the legitimate governmental purposes of reducing the prison population and the fight against drugs. The statute targets the persons who have been convicted of possession of 650 or more grams of a controlled substance because they are the persons deemed most likely to have access to larger drug dealers. Defendant

contends that the reductions should be given to all drug offenders. This Court is clearly not the proper forum for such an argument. *Straus v Governor*, 230 Mich App 222, 225-226; 583 NW2d 520 (1998), aff'd 459 Mich 526 (1999).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Gary R. McDonald
/s/ Martin M. Doctoroff