STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 5, 2000
v	No. 209895 Recorder's Court
LEWIS HENRY MCCLAINE-BEY, Defendant-Appellant.	LC No. 88-000054

Before: Zahra, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Defendant was originally convicted in 1988 of second-degree murder, MCL 750.317; MSA 28.549, and sentenced to two hundred to four hundred years' imprisonment. He later filed an appeal as of right, but the appeal was untimely and, therefore, dismissed for lack of jurisdiction, without prejudice to defendant filing a motion for relief from judgment under MCR 6.500 *et seq.* Defendant thereafter filed a pro se motion for relief from the judgment, which the trial court denied on November 18, 1996, but without stating the reasons for its decision as required by MCR 6.508(E). On July 30, 1997, this Court remanded the case to the trial court for a statement of reasons for the decision.[1] In February 1998, defendant filed a delayed application for leave to appeal the November 18, 1996 order, which was dismissed by this Court because it was untimely. Our Supreme Court subsequently directed that the delayed application be considered timely in light of the unusual circumstances of the case and remanded for reconsideration of defendant's delayed application. See *People v McClaine-Bey*, 459 Mich 1002; 595 NW2d 826 (1999). On reconsideration, this Court granted defendant's delayed application. We now affirm.

To be entitled to relief from judgment, it was necessary that defendant demonstrate both good cause and actual prejudice as set forth in MCR 6.508(D)(3)(a) and (b). *People v Brown*, 196 Mich App 153, 157-158; 492 NW2d 770 (1992). Our Supreme Court stated in its June 2,

[1] There is no indication in the lower court record that the trial court provided a statement of reasons for its decision. Although the record contains an order dated January 20, 1998, in connection with a motion for relief from judgment, that order pertains to a different case, to wit: lower court no. 85-005937.

1999, order of remand, that the good cause requirement has been met. We are bound by this determination. See *People v Crall*, 444 Mich 463, 464 n 8; 510 NW2d 182 (1993). It is therefore unnecessary to address defendant's two issues concerning prior appellate counsel's failure to file a timely appeal, inasmuch as those issues are relevant only to the good cause requirement. See generally *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995). Hence, we limit our review to a determination whether defendant has shown any trial or sentencing errors that satisfy the "actual prejudice" requirement of MCR 6.508(D)(3)(b).

In regard to the alleged errors at trial, MCR 6.508(D)(3)(b) defines "actual prejudice" to mean:

> (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;
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> * * *
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> (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case[.]

In this case, the trial court failed to issue findings on the actual prejudice requirement pursuant to MCR 6.508(E). Rather than remand this matter for such findings, we have carefully reviewed the lower court record for evidence of actual prejudice. We are convinced that defendant cannot demonstrate actual prejudice. Therefore, remand is not necessary. *Brown, supra* at 159. Further, defendant has not demonstrated any basis for disturbing the trial court's denial of relief from judgment without an evidentiary hearing. MCR 6.504(B)(2) and MCR 6.508(B).

We first consider defendant's claim that evidence seized by police officers after entering his home should have been suppressed as the fruit of an unlawful warrantless entry and arrest. This issue was not timely raised in the trial court. It was first pursued by defense counsel at sentencing in conjunction with a motion for a new trial based on ineffective assistance of counsel due to counsel's failure to challenge the validity of the police entry. The trial court denied the motion, concluding that the police had sufficient information to justify entering the premises without a warrant.

Although defendant now claims that an evidentiary hearing should have been held to properly evaluate the validity of the warrantless entry into the house, the record indicates that defendant failed to file any proofs as permitted by 6.502(E), or otherwise demonstrate that his motion for relief from judgment could not be decided without an evidentiary hearing. MCR 6.504(B)(2). Because the claim of illegally obtained evidence was not timely raised in the trial court, defendant is not entitled to appellate relief absent a showing of plain error affecting his substantial rights. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); cf. *People v Blassingame*, 59 Mich App 327, 333-334; 229 NW2d 438 (1975).

No plain error is apparent from the circumstances surrounding the police entry into defendant's house. Both the exigent circumstances and emergency aid exceptions to the warrant

requirement justify entry into a dwelling to come to a person's aid. See *People v Cartwright*, 454 Mich 550, 558; 563 NW2d 208 (1997) (exigent circumstances), and *People v Davis*, 442 Mich 1, 11; 497 NW2d 910 (1993) (emergency aid doctrine).

For purposes of applying the exigent circumstances exception, the critical time for determining if an exigency exists is the moment of warrantless entry. *United States v Morgan*, 743 F2d 1158 (CA 6, 1984). Here, the police were informed by Debra Jones that defendant was inside the house, that he was armed with a gun, and that he was going to kill the victim. The police also determined from their own observations of the situation and activities outside the house that force would be necessary to gain entry and determine the victim's status. The police could not wait for a search warrant without running a substantial risk that the victim would be harmed in the interim; or, if he was already harmed, that he was in need of immediate aid. Hence, the warrantless entry was lawful. Cf. *People v Snider*, 239 Mich App 393, 410-411; 608 NW2d 502 (2000). Further, once the police entered the house and saw the victim's condition, the exigent circumstances warranted defendant's immediate arrest. *Id.* at 414.

Because no plain error has been shown by defendant in regard to the validity of the warrantless entry and arrest of defendant,[2] we find it unnecessary to determine if the exclusionary rule would have required the suppression of any evidence introduced at trial. Defendant's failure to show unlawful police conduct precludes any finding of actual prejudice. MCR 6.508(D)(3)(b)(i) and (iii).

We next consider defendant's claim for relief from the conviction based on an allegation that the prosecutor engaged in misconduct by withholding a search warrant document. Defendant did not raise this claim in his original motion for relief from judgment that was filed in the trial court. Further, while defendant claims in this appeal that he filed a supplemental motion before the trial court, the lower court record does not contain the supplemental motion. However, even if we were to treat defendant's argument as having been properly submitted to the trial court in a supplemental motion, we would not reverse because defendant cannot show actual prejudice. *Brown, supra* at 159. Neither of the discovery orders relied on by defendant in this appeal required that defense counsel be allowed to examine or be furnished with copies of search warrant documents. Further, defendant has not shown that the prosecutor's failure to furnish the documents constituted a deprivation of due process. See *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997); *People v Canter*, 197 Mich App 550, 568-569; 496 NW2d 336 (1992). Due process does not require a prosecutor to allow complete discovery of his or her files as a matter of practice. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).

Defendant next claims that he is entitled to relief from judgment because the search warrant for his home was invalid. Again, because defendant did not timely move to suppress evidence at trial on the basis of this issue, our inquiry is limited to determining whether defendant has shown plain error. *Carines, supra*. We find no merit to defendant's claim that an

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[2] Although the prosecutor argues that the emergency aid doctrine also justified the police entry, we need not consider this issue in light of our determination that the entry was justified under the exigent circumstances exception.

evidentiary hearing should have been held to consider whether the search warrant affidavit contained false information. It is plainly apparent that the challenged information, concerning whether police officers were standing by the house pending issuance of a search warrant, was not necessary to a finding of probable cause. See *People v Melotik*, 221 Mich App 190, 200; 561 NW2d 453 (1997), quoting *People v Stumpf*, 196 Mich App 218, 224; 492 NW2d 795 (1992). Thus, this issue does not warrant appellate relief.

Furthermore, even if some evidence was seized before the search warrant was issued, we agree with the prosecutor that any evidence observed by police officers in plain view, after the lawful entry based on exigent circumstances, could properly be seized without a warrant. *People v Champion*, 452 Mich 92, 101; 549 NW2d 849 (1996). Additionally, to the extent any seized evidence was not in plain view, because any such tainted evidence did not serve as the basis for the warrant, and because such evidence would inevitably have been discovered upon arrival of the search warrant, the exclusionary rule would not bar admission of that evidence. *People v Kroll*, 179 Mich App 423, 427-430; 446 NW2d 317 (1989).

In sum, defendant has failed to show that any evidence admitted at trial was subject to exclusion and, thus, cannot demonstrate actual prejudice. MCR 6.508(D)(3)(b)(i) and (iii).

Next, defendant asserts that he is entitled to relief from judgment because of alleged misconduct by the prosecutor during closing and rebuttal arguments at trial. Having reviewed the challenged remarks in context, we conclude that defendant cannot demonstrate actual prejudice as defined in MCR 6.508(D)(3)(i) and (iii). The challenged remarks were either proper comments on the evidence and defense theories, or were such that the trial court's subsequent instructions to the jury, that the statements and arguments of the attorneys are not evidence, were sufficient to dispell any prejudice. See *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995); *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995). Defendant was not denied a fair trial. *Id.* at 267.

Defendant also claims that trial counsel was ineffective. To establish ineffective assistance of counsel, defendant must demonstrate both deficient performance and prejudice. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). Here, defendant's ineffective assistance of counsel claim relates to the same evidentiary and prosecutorial misconduct matters that we have previously discussed. In light of our prior analysis, we conclude that defendant cannot demonstrate the requisite prejudice for relief from judgment. MCR 6.508(D)(3)(b)(i) and (iii). We similarly conclude that defendant has not shown that the cumulative effect of several errors establishes the requisite prejudice. *Bahoda, supra* at 292 n 64.

Defendant also argues that he is entitled to relief from his sentence. To be entitled to relief, it is necessary that defendant demonstrate that his sentence is invalid. MCR 6.508(D)(3)(b)(iv). Initially, we note that defendant has not filed a copy of the presentence report relevant to this case and, therefore, we could consider this issue waived. MCR 7.212(C)(7);

People v Rodriguez, 212 Mich App 351, 355; 538 NW2d 42 (1995).[3] Regardless, we are satisfied that defendant has not established an invalid sentence.

First, defendant has not shown that the length of the sentence exceeds statutory limits. While we agree that defendant's sentence is contrary to *People v Moore*, 432 Mich 311, 329; 439 NW2d 684 (1989), that decision was issued after defendant was sentenced and it did not apply retroactively to defendant's sentence. *People v Armentero*, 194 Mich App 540, 542; 487 NW2d 813 (1992). More significantly, however, the decision in *Moore*, insofar as it pertains to defendant's claim that his term of years sentence is invalid because it effectively constitutes a sentence of life imprisonment without parole, has been overruled. See *People v Lemons*, 454 Mich 234, 257-259; 562 NW2d 447 (1997), and *People v Kelly*, 213 Mich App 8, 15-16; 539 NW2d 538 (1995); see also *People v Phillips (After Second Remand)*, 227 Mich App 28, 31 n 2; 575 NW2d 784 (1997). Instead, we review the sentence to determine whether it constitutes an abuse of discretion under the principle of proportionality adopted in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), and expounded upon in *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994). *Lemons, supra* at 257.

In the case at bar, we note that the trial court considered defendant's sentence in light of *Milbourn, supra*, on March 15, 1991, when denying defendant's motion for resentencing. Having considered defendant's claim in light of the trial court's application of *Milbourn*, we conclude that defendant has not shown that his sentence violates the principle of proportionality. Because defendant's sentence satisfies the test of proportionality, we also reject defendant's claim that it is constitutionally infirm. Cf. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997); *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993). Accordingly, we uphold the trial court's decision denying defendant's request for relief from his sentence.

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ Gary R. McDonald

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[3] While defendant filed a presentence report with this Court on October 26, 2000, that report pertained to a subsequent assaulting a prison employee offense, lower court no. 96-078533. Defendant has not filed a copy of the presentence report relevant to the second-degree murder conviction.