

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOANNIS ATHANASIOS MAKRIS,

Defendant-Appellant.

UNPUBLISHED

January 26, 2001

No. 217563

Oakland Circuit Court

LC No. 98-160148-FH

Before: Saad, P.J., and Griffin and R.B. Burns,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant as a second habitual offender, MCL 769.10; MSA 28.1082, to six months to thirty years on the possession with intent to deliver cocaine conviction and a mandatory two years for the felony-firearm conviction, with thirty days credit for time served. We affirm.

Defendant says the trial court erred in failing to suppress the weapons recovered during the search of defendant's apartment as illegally seized. We disagree.

To preserve for appeal the issue of the propriety of a search, a defendant must make a motion before trial to suppress the evidence that was seized during the search. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000). Here, defendant made a motion before trial to dismiss the felony-firearm charge on the basis that defendant was not in possession of any firearms at the time of the search, and the trial court properly denied the motion. However, defendant failed to make a pretrial motion to suppress the firearms. Instead, during defendant's motion for a directed verdict, defendant made a two-prong motion: one for a directed verdict and one for the suppression of the weapons because there was an insufficient factual basis to attach any weapon to defendant based on the search warrant and testimony offered. The trial court denied the motion for a directed verdict, finding that it was a question of fact for the jury, but did not appear to make a ruling on the suppression motion. Because defendant failed to make a

* Circuit judge, sitting on the Court of Appeals by assignment.

pretrial motion to suppress the guns, and the trial court did not address the propriety of the search during a separate evidentiary hearing, there is no record to review on this question. Accordingly, this issue is not properly preserved for appellate review and we decline to consider the issue. *People v Wilder*, 51 Mich App 280, 285; 214 NW2d 749 (1974); *People v Lyttle*, 39 Mich App 544, 545; 198 NW2d 40 (1972).

Defendant further claims that he was deprived the effective assistance of counsel. We disagree. Because no evidentiary hearing on this issue was held, our review is limited to mistakes apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

In order to establish a denial of effective assistance of counsel, a defendant must demonstrate that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999) (citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994)); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Effinger, supra*, 212 Mich App 69.

Defendant argues that he was denied the effective assistance of counsel when his trial counsel called to the stand both Galas and defendant, knowing that both would incriminate defendant and assure his conviction. However, a review of the entire record convinces us that defendant was not deprived of the effective assistance of counsel. First of all, "decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 661 NW2d 887 (1999). Defendant has failed to overcome the presumption that counsel's decision to call Galas and defendant as witnesses was trial strategy.

Here, defendant made incriminating statements to the police during his interview. The strategy behind putting defendant on the stand may have been, in part, to explain those statements and to give him the opportunity to deny his involvement in the controlled buys that served as the basis for the search warrant. Defendant denied talking to the confidential informant and defendant claimed that he did not know what the informant wanted. Defendant testified that he mixed cocaine with Anasitol for his own personal use. Defendant also testified about his involvement in working with police agencies arranging drug purchases, possibly to explain the presence of some of the other items of evidence and to explain the reason why he kept guns in the apartment for protection. Defendant also explained that his reason for having an electronic scale was because he had used it when he owned a restaurant. From the record, it appears that there was reasonable strategy in having defendant testify.

The decision to call Galas may have also been strategic. Galas testified that he, not defendant, brought the confidential informant to the apartment to sell him drugs. Galas also testified that defendant was not present when the informant came to the apartment and was not involved in the transaction. Galas also attempted to explain that the alleged drug ledgers found in the closet were not drug sale records, but rather, a record of money that he and defendant were

saving in the envelopes in order to pay bills. Galas also testified that the cocaine found in the apartment could have been his; this was an obvious attempt to create reasonable doubt as to whether defendant possessed drugs. It is apparent that Galas took the stand in an attempt to help defendant and corroborate his story because Galas incriminated himself and gave helpful testimony for defendant. Any incriminating testimony Galas gave regarding defendant was incidental to the strategic purpose behind calling him as a witness and defendant's trial counsel may not have known that Galas would end up being such a poor and incredible witness.

Furthermore, defendant has failed to show that trial counsel's representation so prejudiced him that, but for trial counsel's alleged error in calling the two defense witnesses, the result of the trial would have been different. The prosecution presented overwhelming evidence of defendant's guilt on both charges. Even in the absence of defendant's and Galas' incriminating testimony, it is highly unlikely that defendant would have been acquitted. The numerous items seized from defendant's apartment, as well as defendant's admissions to the police, effectively secured his convictions. As a result, defendant has failed to establish that his trial counsel's alleged deficient performance so prejudiced him that it affected the outcome of the trial.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Robert B. Burns