

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES E. WHITTAKER,

Defendant-Appellant.

UNPUBLISHED

March 12, 2002

No. 208360

Oakland Circuit Court

LC No. 97-150209 FH

ON REMAND

Before: Sawyer, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession with intent to deliver 50 to 225 grams of cocaine, MCL 333.7401(2)(a)(iii). In our previous opinion, we reversed defendant's conviction on the ground that the trial court reversibly erred in admitting evidence regarding defendant's 1992 conviction on a drug-related offense. *People v Whittaker*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 1999 (Docket No. 208360). We remanded for a new trial and directed the trial court to conduct an in camera hearing regarding defendant's request for production of an informant. *Id.* In lieu of granting the prosecution leave to appeal, our Supreme Court reversed our judgment and remanded this case to our Court for consideration of the issue whether an in camera hearing regarding defendant's request for production of the informant was still required and for consideration of defendant's ineffective assistance of counsel claim. *People v Whittaker*, 465 Mich 422; 635 NW2d 687 (2001).

Defendant argues that the trial court erred in denying his motion to compel the prosecutor to identify and produce a confidential informant relied on in the affidavit in support of the search warrant pertaining to defendant's residence. We disagree. We review the trial court's decision regarding production of an informant to determine if it was clearly erroneous. See *People v Lucas*, 188 Mich App 554, 572-573; 470 NW2d 460 (1991). A finding is clearly erroneous if this Court is left with a firm conviction that a mistake was made. *People v Connolly*, 232 Mich App 425, 429; 591 NW2d 340 (1998).

Generally, the prosecution is not required to disclose the identity of confidential informants. *People v Sammons*, 191 Mich App 351, 368; 478 NW2d 901 (1991); see, also, *People v Laird*, 102 Mich 135, 138; 60 NW 457 (1894). However, when the defendant demonstrates a possible need for the informant's testimony, the trial court should require production of the informant and conduct a hearing outside the presence of the defendant. See

People v Underwood, 447 Mich 695, 704; 526 NW2d 903 (1994), quoting *Roviaro v United States*, 353 US 53; 77 S Ct 623; 1 L Ed 2d 639 (1957); *People v Johnson*, 83 Mich App 1, 11; 268 NW2d 259 (1978); *People v Stander*, 73 Mich App 617, 622-623; 251 NW2d 258 (1976).

In this case, the affidavit in support of the search warrant referenced a controlled purchase of cocaine conducted at defendant's residence by the investigating officer using a confidential informant. The affidavit indicated that the cocaine was purchased by the informant from someone known as "Mack Whittaker" and included a physical description of the seller. Defendant argues that he does not fit the description of the person who sold the informant the cocaine and that he was not known as "Mack Whittaker." Defendant claims that the informant's testimony, who had face-to-face contact with the cocaine seller, could have "exonerated" him "completely of the controlled substance act violation he was charged with."

However, defendant was not charged with delivery of cocaine as a consequence of the controlled purchase involving the informant. Instead, defendant was charged and convicted of possession with intent to deliver cocaine following the execution of a search warrant at his residence. The search was conducted two days after the controlled purchase and resulted in the police confiscating thirty-two baggies of crack cocaine, that defendant implicitly and explicitly admitted were his, and a significant amount of cash found under a sheet on a bed where defendant was sitting. The informant was not present during the execution of the search warrant and the information provided by the informant was only used to support a search warrant of defendant's residence. See *Johnson, supra*. Under the circumstances of this case, the trial court's conclusion that defendant failed to demonstrate a possible need for disclosure of the identity or production of the confidential informant was not clearly erroneous.

Next, defendant argues that he was denied the effective assistance of counsel because his attorney did not move to suppress the evidence obtained from the execution of a search warrant that was not supported by probable cause. We disagree. Because a *Ginther*¹ hearing was not conducted, this Court's review is limited to errors apparent on the record. *People v Lee*, 243 Mich App 163, 183; 622 NW2d 71 (2000).

To establish a claim of ineffective assistance of counsel, a defendant must affirmatively show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Effective assistance of counsel is presumed and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

A search warrant may not be issued unless probable cause exists to justify the search. *People v Sloan*, 450 Mich 160, 166-167; 538 NW2d 380 (1995), overruled on other grounds by *People v Wager*, 460 Mich 118, 123-124; 594 NW2d 487 (1999); *People v Kaslowski*, 239 Mich App 320, 323; 608 NW2d 539 (2000). Probable cause exists when the facts and circumstances would lead a reasonable person to conclude that the evidence of a crime or contraband sought is

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

in the place stated in the warrant. *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). When probable cause is averred in an affidavit, the affidavit must contain facts within the knowledge of the affiant. *Sloan, supra* at 168-169. The affiant's experience is relevant to the establishment of probable cause, and police officers are presumptively reliable. *Ulman, supra*. Further, probable cause may be founded on hearsay and the affidavit may include information supplied by an unnamed informant if the information was based on personal knowledge and either that the unnamed informant was credible or that the information was reliable. See MCL 780.653(b); *People v Echavarria*, 233 Mich App 356, 366-367; 592 NW2d 737 (1999).

In this case, the search warrant was supported by an affidavit that established probable cause. The affidavit provided detailed information regarding the presence of cocaine at defendant's residence that was provided to the affiant officer by a confidential informant. The affidavit provided sufficient facts illustrating the informant's personal knowledge of the information supplied and established that the informant was credible or that the information was reliable, MCL 780.653(b), in that: the informant voluntarily provided the information, had a history of providing accurate information leading to the issuance of numerous search warrants and several arrests, had never provided the affiant with false or misleading information, and had participated in a successful controlled purchase at defendant's residence, while under police surveillance, within forty-eight hours of the request for the search warrant. See *Echavarria, supra* at 367; *People v Poole*, 218 Mich App 702, 706-707; 555 NW2d 485 (1996). Consequently, a motion to suppress the evidence obtained from the execution of this valid search warrant would have been frivolous; therefore, defendant failed to establish that he was denied the effective assistance of counsel. See *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Jane E. Markey