

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PETER DEVON LEE,

Defendant-Appellant.

UNPUBLISHED

June 8, 2004

No. 245371

Cass Circuit Court

LC No. 02-010159-FH

Before: Markey, P.J., and Wilder and Meter, JJ.

PER CURIAM.

A jury convicted defendant of possession of marijuana, MCL 333.7404(2)(d). The trial court sentenced defendant as a second controlled substances offender, MCL 333.7413(2), to two years' probation with sixty days in jail.¹ Defendant appeals by right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant claims only that trial counsel was ineffective in failing to timely move to suppress evidence. Specifically, defendant argues that counsel should have sought to suppress evidence from the search of the home on the ground that Caprice Jackson, the person who consented to the search, lacked actual or apparent authority to consent to the search and that any purported consent by Jackson was coerced.

In considering an ineffective assistance of counsel claim, we review a trial court's factual findings for clear error and its resolution of questions of constitutional law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). But our review is limited to errors apparent on the record because defendant did not raise this issue below. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001).

To obtain relief, defendant must show (1) that counsel's performance was deficient and (2) the existence of a reasonable probability that but for counsel's error the result of the

¹ The lower court file reflects that after defendant filed his claim of appeal, he pleaded guilty to violating his probation and was sentenced to 150 days in jail with credit for eighty-two days served.

proceeding would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Hence, to obtain relief based on counsel's failure to bring a timely suppression motion, defendant must establish a reasonable probability exists that such a motion would have successfully led to the suppression of evidence.

The existing record provides no basis for finding a reasonable probability that a suppression motion would have been successful. A search by police officers is constitutionally valid if it is conducted pursuant to consent by a third party who the officers reasonably believe to have common authority over the premises. *People v Goforth*, 222 Mich App 306, 315; 564 NW2d 526 (1997). The police officers testified without contradiction that Jackson was alone at the home at the relevant time, indicated that he lived there, and freely consented to the search. These circumstances supported a reasonable belief by the police that Jackson had sufficient authority over the premises to validly consent to a search. Thus, the record provides no support for a conclusion that the search was unconstitutional. Accordingly, defendant has not established that his conviction should be reversed based on his ineffective assistance of counsel claim.

Defendant alternatively requests that we remand for an evidentiary hearing on his ineffective assistance of counsel claim,² however, defendant is not entitled to a remand because he has failed to support his request with an affidavit or offer of proof as required by MCR 7.211(C)(1)(a)(ii). In particular, defendant has not presented an affidavit or offer of proof to provide a basis for challenging the police officers' description of the circumstances of the search. Thus, we reject defendant's request for a remand.

We affirm.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter

² This Court previously denied defendant's motion to remand "for failure to persuade the Court of the necessity of a remand at this time."