

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD EUGENE PHASON,

Defendant-Appellant.

UNPUBLISHED

June 21, 2005

No. 252598

Kalamazoo Circuit Court

LC No. 02-001698-FH

Before: O’Connell, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial and conviction of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to serve two years’ imprisonment for felony-firearm, consecutive to four years’ probation for the marijuana conviction (the first three months of which was to be served in jail). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant asserts that his trial counsel was ineffective for failing to move to suppress the marijuana, firearm, and other evidence obtained from his home because police searched his home without a warrant and without his consent. We disagree. “In reviewing a defendant’s claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel’s performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel’s defective performance.” *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). We presume that a defendant’s assistance was effective, and defendant bears the heavy burden of overcoming the presumption. *Id.* Defendant must demonstrate a reasonable probability that his counsel’s ineffective assistance rendered the proceedings fundamentally unfair or unreliable and adversely altered their outcome. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

There is no dispute that the police officers conducted their search of defendant’s house without a warrant, but the warrant requirement is subject to several exceptions, one of which is “a search conducted pursuant to consent.” *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). To qualify under the exception, consent to search must be voluntary, and coercion or duress by police will ordinarily negate voluntariness. *Id.*; *People v Reed*, 393 Mich 342, 362; 224 NW2d 867 (1975). According to police testimony, two uniformed officers knocked on defendant’s door and were greeted first by a juvenile, then by defendant. The

officers informed defendant that they were investigating allegations of cocaine and heroin trafficking. The officers recounted that defendant denied dealing drugs from the home, but admitted to smoking marijuana and having a handgun on the premises. Defendant led the police to those items. One officer testified that, while visually confirming that there was a handgun under a bed, he observed a wad of bills, a digital scale, and several coin wrappers in a small plastic bag nearby. Defendant, however, testified that the police insinuated their way into the house's foyer, and then asserted a general right to search despite his refusal to give them consent. Therefore, the issue of defendant's consent boils down to a question of credibility. Defendant's argument that the trial court would have credited his account over that of the two police witnesses amounts to mere speculation, especially since a jury rejected defendant's version of events. Because defendant fails to show that a motion to suppress would have changed the outcome of the proceedings, his claim of ineffective assistance fails. *Messenger, supra*.

Affirmed.

/s/ Peter D. O'Connell

/s/ Bill Schuette

/s/ Stephen L. Borrello