STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2007
v	No. 273061 Oakland Circuit Court
JESUS HOB DURAN, Defendant-Appellant.	LC No. 2006-207255-FH

Before: Wilder, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right a jury conviction of conspiracy to deliver 45 or more kilograms of marijuana, MCL 750.157a and MCL 333.7401(2)(d)(1), and possession with intent to deliver 45 or more kilograms of marijuana, MCL 333.7401(2)(d)(1). We affirm.

I. Basic Facts

Defendant's convictions arise from his participation with codefendant Daniel Cardenas and others in trafficking marijuana from Texas to Southfield. As a result of information received, the Oakland-Macomb Interdiction Team task force set up surveillance at a hotel in Southfield on December 8, 2005. In the hotel parking lot was a silver Honda with a Texas license plate, a red SUV with a Texas license plate, and a U-Haul truck that had been rented in Texas. At one point, defendant and Veronica Martinez, defendant's girlfriend, left hotel room 119, got into the silver Honda, and left. Shortly thereafter, two men came out of room 119, got into the red SUV, and left. The police stopped the Honda for a traffic violation. In response to questions, defendant advised the police that he was in Michigan to see snow. An officer searched the car with defendant's consent, and released defendant with a warning.

Defendant and his girlfriend returned to the hotel and entered room 119. That evening, a Hummer drove into the parking lot with its lights off. It slowly circled near the U-Haul, stopped by the U-Haul, and left the lot. About 30 minutes later, the Hummer returned, drove by the U-Haul, drove out of the parking lot, and parked at an adjacent hotel. Occupants of the Hummer pointed toward the U-Haul. After about five to ten minutes, the Hummer returned to the U-Haul, codefendant Cardenas got out of the rear of the Hummer, and went toward the U-Haul. Defendant came out of the hotel room, had a conversation with codefendant Cardenas, and returned to the room. Codefendant Cardenas got into the U-Haul and drove it out of the lot. The Hummer closely followed the U-Haul as it traveled down I-696. At one point, the Hummer

pulled adjacent with the U-Haul, and the occupants of the Hummer beckoned toward the next exit.

After the vehicles exited the interstate and drove into a residential area, the police stopped both vehicles for traffic violations. A drug-sniffing canine alerted the police to the presence of drugs in the area of the rear door of the U-Haul. The police found the key for the padlock on the U-Haul's back door on the same key chain with the ignition key. Inside the U-Haul, the police found household and children's items, and a large mattress covering some boxes. Inside the boxes, the police found 197 pounds of marijuana packaged in large bricks.

The driver of the Hummer was Borche Todorovski. The two passengers, Jose Gonzalez and Hipolito Gonzalez, were from Texas. Inside the Hummer were several non-traceable prepaid phones, and Hipolito possessed tally sheets.

After the traffic stop, the police returned to the hotel and spoke with defendant. The arresting officer testified that, after waiving his rights, defendant stated that individuals in Texas loaded the marijuana and other items into the U-Haul, and he loaded his silver Honda in the U-Haul's car carrier and drove the U-Haul to Toledo to deliver the marijuana, but was redirected to Southfield. Once in Southfield, he was directed to the hotel where he parked the U-Haul and gave the key to a man named "Joe." Defendant claimed that he later saw a "white guy" whom he did not know walk up to the SUV. He explained that the marijuana had been purchased for $160 a pound, they were going to sell it for $1,600 a pound, and he was to be paid $8,000 on December 9, 2005. The officer indicated that defendant would not make a written statement.

Testimony from defendant's first trial was read into the record.[1] Defendant denied any knowledge of marijuana trafficking. Defendant indicated that he was a tattoo artist in Texas, was acquainted with an individual named Joe, and agreed to help Joe move his furniture from Texas to Michigan because Joe did not have a driver's license. Defendant loaded his silver Honda, and followed Joe's cousin Jose Garcia, who was driving a red SUV, to Toledo and then to Michigan. Once in Southfield, Garcia paid for two hotel rooms and defendant gave the key to the U-Haul to Joe. A white male, who was not codefendant Cardenas, later arrived for the U-Haul. Defendant claimed that he was paid only for his travel expenses. Defendant denied having any knowledge that marijuana was in the U-Haul or being present when the U-Haul was packed, and denied knowing any of the other charged coconspirators. Defendant also denied telling the police that he knew about the marijuana and that he refused to write a statement, but claimed that the police denied his request to make a written statement.

At this trial, defendant primarily reiterated his testimony from the first trial, again denying any knowledge of marijuana trafficking. However, defendant identified codefendant Cardenas as the person with whom he conversed at the hotel.

[1] Defendant was originally tried in May 2006, but the court declared a mistrial after the jury was unable to reach a verdict.

II. Ineffective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel at trial. We disagree. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id*. A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

A. Questioning of Detective Christopher Topacio

Defendant claims that defense counsel was ineffective for failing to ask Detective Christopher Topacio why the individuals in the red SUV, i.e., Joe and Garcia, were "allowed to go free" without questioning and why they were not possible suspects. Decisions about what questions to ask are matters of trial strategy, which this Court will not evaluate with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Although defense counsel did not ask the specific questions that defendant proposes, the jury was aware of why the occupants of the red SUV were not questioned by the police. Detective Topacio testified that when defendant's Honda and the red SUV originally left the hotel lot, there had not been a positive drug alert on the U-Haul and the entire narcotics unit was not there yet. Detective Topacio instructed Officer David McCormick to stop the Honda if it engaged in a traffic violation, noting that the "silver Honda left first [and] Officer McCormick followed the silver Honda." Officer McCormick thereafter stopped defendant's Honda after defendant committed two traffic violations. After Officer McCormick completed the traffic stop, Detective Topacio gave Officer McCormick the same instructions regarding the red SUV. However, Officer McCormick could not locate the red SUV, and it never returned to the hotel lot. Sergeant Terrence Mekoski, the officer in charge, explained that because of the lack of manpower and resources, they were unable to stop the red SUV.

Simply put, the explanation for why the occupants of the red SUV were not questioned was presented to the jury, and there is no reasonable probability that asking Detective Topacio the specific questions suggested by defendant would have changed the result of the proceedings. See *Effinger*, *supra*.

B. Failure to Call Agent Whal

Defendant further argues that defense counsel was ineffective for failing to call DEA Special Agent James Whal as a defense witness. Defendant contends that Agent Whal could

have corroborated his claim about what statements he made to Detective Topacio. "Ineffective assistance of counsel can take the form of a failure to call a witness or present other evidence only if the failure deprives the defendant of a substantial defense." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part by 453 Mich 902 (1996). A defense is substantial if it might have made a difference in the outcome of the trial. *Id*.

Here, defendant has not provided a witness affidavit disclosing the witness' proposed testimony or identified anything in the record indicating that Agent Whal would have provided testimony that would have been advantageous to the defense.[2] Defendant's mere assertion in his brief that the witness could have supported his defense is insufficient to warrant a new trial.[3] See *Effinger*, *supra*.

C. Failure to Review the PSIR

We also reject defendant's cursorily presented claim that defense counsel was ineffective for failing to review the PSIR. At the sentencing hearing, defense counsel stated, "I have read and looked at the presentence report." This statement directly belies defendant's claim that defense counsel failed to review the PSIR, and defendant has not provided any support for this claim. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

II. Sentence

A. *Blakely v Washington*

Defendant contends that he must be resentenced because the trial court's factual findings supporting its scoring of offense variable 14 (offender's role) of the sentencing guidelines were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006); *People v*

[2] We note that the record shows that, at the time of trial, Agent Whal had been transferred to a different state and was involved in a "special covert assignment." Further, Agent Whal was not initially at the hotel but came after Sergeant Mekoski called him. Detective Topacio testified that when he was taking defendant's statement, Agent Whal was in the same room for "[p]art of the time." When asked whether Agent Whal was with Detective Topacio when defendant made his statement, Sergeant Mekoski testified, "[Agent Whal] was in, in the area. I don't know if he was exactly present or doing the interviews with Topacio; I don't believe he was. I believe he was present at the hotel."

[3] We also note that defense counsel used the lack of any corroboration that defendant made an inculpatory statement to Detective Topacio to argue that the detective's testimony in that regard was not credible.

Claypool, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Consequently, defendant's argument is without merit.

B. Upward Departure

Defendant also argues that the trial court erred when it departed from the sentencing guidelines recommended sentence range of 19 to 38 months and sentenced him to four to fifteen years' imprisonment for his convictions. We disagree.

Under the sentencing guidelines statute, the trial court must ordinarily impose a minimum sentence within the calculated guidelines range. MCL 769.34(2) and (3); *People v Babcock*, 469 Mich 247, 272; 666 NW2d 231 (2003). A court may depart from the appropriate sentence range only if it "has a substantial and compelling reason for th[e] departure and states on the record the reasons for departure." MCL 769.34(3). A court may not depart from the guidelines range based on certain specified factors, including gender, race, ethnicity, national origin, or lack of employment, MCL 769.34(3)(a), nor may it base a departure on an offense or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight, MCL 769.34(3)(b).

Our Supreme Court has reiterated that the phrase "substantial and compelling" constitutes strong language intended to apply only in "exceptional cases." *Babcock*, *supra* at 257-258 (citation omitted). The reasons justifying departure should "keenly and irresistibly grab" the court's attention and be recognized as having "considerable worth" in determining the length of a sentence. *Id*. Only objective and verifiable factors may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *Id*. at 257, 273. This means that the facts considered must be actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision and must be capable of being confirmed. *People v Hill*, 192 Mich App 102, 112; 480 NW2d 913 (1991).

Whether a factor exists is reviewed for clear error on appeal. *Babcock*, *supra* at 265, 273. Whether a factor is objective and verifiable is subject to review de novo. *Id*. The trial court's determination that objective and verifiable factors constitute a substantial and compelling reason to depart from the minimum sentence range is reviewed for an abuse of discretion. *Id*. at 265, 274; see, also, *People v Armstrong*, 247 Mich App 423, 424; 636 NW2d 785 (2001). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Babcock*, *supra* at 274.

In this case, the trial court stated its reasons for departure on the record:

> I have carefully reviewed the Michigan Department of Correction Bureau of Probation presentence investigation report. Defendant is 24 years old. His prior record consists of one felony, two misdemeanors and a juvenile record. He has a 11th grade education and is unemployed. He has worked – he has a work record and has marketable job skills. The defendant has two concurrent felony convictions.

> The circumstances of this case indicated it was not an impulsive act. This Defendant's prior history indicates assaultive behavior. This Defendant has served a prison term in the state of Texas.
>
> The facts of this case indicate that the defendant was involved in a sophisticated conspiracy to deliver 200 pounds of marijuana from Texas to Michigan. The defendant was the driver of the U-Haul that drove the drugs from Texas to Michigan. He was to receive, according to the police, the sum of $8,000 for his participation in this drug charge. The marijuana was valued at $1,600 per pound, or $300,000 in total.
>
> The defendant was a key player in this drug deal. *Departure in this case is necessary, because of the very high amount of drugs involved, which are not sufficiently accounted for in the guidelines.* (emphasis added.)

Defendant argues that the trial court impermissibly relied on a factor already taken into account in the scoring of offense variable 15 of the guidelines. MCL 777.45(1)(e) provides that ten points are to be scored for OV 15 if the offense involved "45 kilograms or more of marijuana." This offense involved more than 89 kilograms of marijuana. Thus, the disparity between the threshold amount of marijuana required in OV 15 and the large quantity of marijuana involved in this offense was nearly double. Consequently, although ten points were scored for OV 15, the trial court did not err by finding that the offense characteristics that are unique to this drug trafficking offense were not adequately reflected in the guidelines.

In sum, the trial court relied on a factor that is objective and verifiable, and the court did not abuse its discretion by finding that this factor amounted to a substantial and compelling reason to depart from the sentencing guidelines range. For the same reasons, the extent of the departure, ten months, is proportionate to the seriousness of the circumstances surrounding the offense and the offender. See *Babcock, supra* at 264, 272. Defendant is not entitled to resentencing.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood