STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 14, 2008
v	No. 275659 Kent Circuit Court
TERRANCE JEROME LOVE, Defendant-Appellant.	LC Nos. 05-003885-FH 05-003886-FH

Before: Talbot, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of delivery of less than 50 grams of cocaine, second offense, MCL 333.7401(2)(a)(iv) and MCL 333.7413(2), for which he was sentenced to three years' probation, with the first ten months to be served in jail. He appeals as of right. We affirm.

Defendant's convictions arise from two separate narcotics transactions initiated by an undercover police officer, Matthew Rooks, who received the cell phone number of a person known only as "T." Defendant was separately charged with each offense, and the charges were consolidated for trial.

On each occasion, Rooks called T to order cocaine. He then met with a man at a prearranged location and purchased cocaine. Through further investigation, Rooks learned that the cell phone number he received was registered to a man named Brown. He located a photograph of Brown and determined that he was not the man from whom he purchased the cocaine. Rooks located various photographs of defendant, whom he recognized as the man who sold him the cocaine.

Defendant's sole issue on appeal is that defense counsel was ineffective for failing to seek suppression of Rooks's identification testimony and for failing to request separate trials on the two charges.

Because defendant did not raise this claim below in a motion for a new trial or an evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

> To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003) (citations omitted).]

The decision whether to file pretrial motions is a matter of trial strategy. *People v Traylor*, 245 Mich App 460, 463; 628 NW2d 120 (2001). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). "Defendant is entitled to relief only in those instances where his attorney's omission deprived defendant of a substantial defense." *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

"An identification procedure that is unnecessarily suggestive and conducive to irreparable misidentification constitutes a denial of due process." *People v Kevin Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). Improper suggestiveness may arise where the witness is told that the right person has been apprehended. *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). An identification procedure may also be improperly suggestive if the witness is shown only one person or is shown a group of people in which one person is singled out in some way. *Id.* "The relevant inquiry . . . is not whether the lineup photograph was suggestive, but whether it was unduly suggestive in light of all of the circumstances surrounding the identification." *People v Kurylczyk*, 443 Mich 289, 306; 505 NW2d 528 (1993).

The testimony at trial indicated that Rooks looked through many photographs, either of persons affiliated with the Fuller Street address or just those named Crofton. There is nothing in the record to indicate that there was anything unduly suggestive in the Terrance Crofton or Terrance Love photographs compared to those of the other persons whose photographs were viewed and defendant has offered no explanation for his conclusory statement that looking through various photographs of different people is unduly suggestive. Even assuming there was something proper in the use of the photographs to identify defendant, suppression is not required where a witness has an independent basis for his identification of the defendant. *People v Kachar*, 400 Mich 78, 91; 252 NW2d 807 (1977); *People McCray*, 245 Mich App 631, 639; 630 NW2d 633 (2001); *Williams, supra* at 542-543. The testimony here indicated that Rooks was able to view the dealer up close, within his own car, and that he took special care to observe the dealer's features for identification purposes. Thus, it is not reasonably likely that defendant would have prevailed on a motion to suppress. Trial counsel was not ineffective for failing to make a futile motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Two or more informations filed against a single defendant may be consolidated for trial. MCR 6.120(A). If, however, the offenses charged are not related as defined in the court rule, the court must sever them for separate trials on the defendant's motion. MCR 6.120(C). Charges are deemed to be related "if they are based on (a) the same conduct or transaction, or (b) a series

of connected acts, or (c) a series of acts constituting parts of a single scheme or plan." MCR 6.120(B)(1).

It has been held that temporally discrete individual drug sales initiated by the buyer are not related. *People v Tobey*, 401 Mich 141, 151-153; 257 NW2d 537 (1977). Therefore, defendant would have been entitled to severance had counsel made the appropriate motion. To obtain relief, however, defendant must show that but for counsel's failure to request severance, a different outcome was reasonably probable. *Watkins, supra.*

The sole issue at trial was one of identity, i.e., whether the crime was committed by defendant, as Rooks had testified, or whether it was committed by Brown, the person assigned the cell phone number Rooks had for T and who was known to be affiliated with the Fuller Street address. Rooks testified that he dealt with the same man on both occasions and had ample opportunity to observe him. Rooks, who did not know the man's name, further explained how he came to conclude that defendant was the person he had met. There was no argument made that because defendant committed one offense, he must have committed the other. Defendant's defense to both charges was the same, namely, that he had never met Rooks, did not know Brown or the other people associated with the dealer, and was at home when both offenses were alleged to have occurred. Under the circumstances, it is not reasonably probable that the result would have been different at separate trials. Because no prejudice has been shown, defendant is not entitled to relief.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra