STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 3, 2008
v	No. 270714 Wayne Circuit Court
KEVIN JAMES, Defendant-Appellant.	LC No. 05-012271-01

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and sentenced to two years' probation. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Police officers stopped defendant's car for speeding. When Officer Graves spoke to defendant, she noticed the odor of raw marijuana emanating from the car. Her partner, Officer Channells, also smelled it. There was also an open bottle of beer in the car. The officers requested identification from defendant and the passenger, defendant's nephew Ernest Parker. The police officers determined that there were outstanding warrants for Parker. They ordered defendant and Parker out of the car and searched it. A black garbage bag with six gallon-size Ziploc bags containing 2,710.6 grams of marijuana was discovered on the back seat behind the passenger. The bag was open and its contents were visible from the top. The police confiscated $9,750 and some loose marijuana leaves from Parker and $4,976 from defendant. Parker claimed responsibility for the drugs in the vehicle.

Defendant testified that, as he was closing his car wash and detail business on Gratiot Avenue, Parker rode up in another vehicle and got out. He asked defendant for a ride to his girlfriend's house at Gratiot and Chene, which was approximately two to three miles away. Parker was carrying a black garbage bag tied in a knot, pants, and a jacket. Approximately five minutes after Parker arrived, defendant and Parker left. They were on Gratiot Avenue, a mile or two from the car wash, when the police stopped the car. Defendant denied knowing that there was marijuana in the car. He testified that the car window was open when he was driving, and he did not smell any marijuana. He testified that he knew the difference between burnt marijuana and raw marijuana and agreed that "[t]hat stuff reeks." Parker did not tell or imply

that there was marijuana in the car. Defendant explained that part of the money he had was the payroll money from the business.

Parker was not available to testify because he was hospitalized. The parties stipulated that he would testify that he claimed responsibility for the drugs at the time of his arrest, that it was his marijuana, and that he had pleaded guilty and was serving a sentence for possession with intent to deliver marijuana.

The trial court found that the officers' testimony was credible, that they could smell the marijuana, and that Parker owned the bag of marijuana. The court found that defendant's testimony explaining why he was transporting Parker and his inability to smell the marijuana was not credible. The court found that by knowingly driving Parker with the marijuana, defendant aided and abetted in the commission of a crime and found him guilty because he "knowingly possessed marijuana with the intention to deliver it to somebody else . . . ."

On appeal, defendant argues that he was denied the effective assistance of counsel. Defendant raised this issue in a motion for a new trial, and the trial court granted defendant's request for an evidentiary hearing to present the testimony of Parker. However, Parker died before the hearing took place. The court thereafter denied defendant's motion for a new trial.

To establish ineffective assistance of counsel, a defendant must show that his counsel's representation "fell below an objective standard of reasonableness" and "overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Defendant must also demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id.*, pp 302-303 (citations and internal quotation marks omitted). In the absence of an evidentiary hearing, this Court's review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Defendant argues that trial counsel failed to investigate and prepare for trial by failing to subpoena Parker. According to Parker's affidavits, he would have corroborated defendant's testimony concerning Parker's request for a ride, that he did not tell defendant about the marijuana in the closed and knotted garbage bag, and that he (Parker) could not detect the scent while it was in his possession or in the car. He told defendant's trial counsel that he would testify on defendant's behalf, but he was not subpoenaed. But for his hospitalization, he would have appeared and testified for defendant.

As is apparent from Parker's affidavits, his failure to testify at the trial was not the result of a mistake by trial counsel, but because of a heart condition that necessitated his hospitalization. Defendant contends that instead of agreeing to the stipulation concerning Parker's testimony, trial counsel could have asked the court to take Parker's testimony at the hospital or to adjourn trial until Parker was released from the hospital. However, the record does not indicate when or if Parker would have been able to testify. Therefore, defendant has not established that counsel's decision to stipulate to his testimony was below an objective standard of reasonableness. Moreover, the trial court, which sat as the trier of fact, considered the substance of the proposed testimony compared to the stipulation and concluded that there was no reasonable probability that the result of the trial would have been different. We likewise reject defendant's claim that he was prejudiced by the absence of Parker's testimony.

Defendant also argues that counsel should have offered the testimony of defendant's mother, Gladys Hodge. In her affidavit, she stated that she owned a car wash on Gratiot for which defendant was the manager. When she was not present, defendant was responsible for closing the car wash and "taking the unbanked receipts home because there is no drop box." On the date of the incident, defendant closed the car wash. According to Hodge's affidavit, trial counsel never interviewed her or asked her to be a witness, but she had been willing to testify for defendant. The trial court concluded that her proposed testimony that the money possessed by defendant was business proceeds was "simply cumulative" of defendant's testimony.

"The decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense." *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). "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). The failure to call supporting witnesses does not inherently amount to ineffective assistance of counsel. Nor does the cumulative nature of testimony that a defendant claims should have been presented preclude a determination that the absence of the testimony was prejudicial. See *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

The proposed testimony of defendant's mother does not create a reasonable probability that the result of the proceeding would have been different had she testified. Her affidavit does not indicate what portion of the $4,976 confiscated from defendant was attributable to the business. Moreover, in explaining the basis for the verdict, the trial court did not rely on the money in defendant's possession. Under the circumstances, defendant has not shown that counsel was ineffective for failing to call defendant's mother to testify.

Defendant argues that trial counsel was ineffective for failing to file a motion challenging the stop of the car "on Fourth Amendment grounds." Although his argument on this point is undeveloped, defendant seems to contend that counsel should have argued that the police did not have grounds to stop the car because he was not speeding. He cites *Kimmelman v Morrison*, 477 US 365, 384-386; 106 S Ct 2574; 91 L Ed 2d 305 (1986), for the proposition that failure to file a motion to suppress may support a claim of ineffective assistance of counsel. However, *Kimmelman* also states:

> Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice. [*Id*., p 375.]

Defendant has not shown that he had a meritorious Fourth Amendment claim in this case.

Defendant argues that counsel was ineffective for failing to attack the officers' credibility, particularly with respect to whether defendant's car nearly sideswiped them earlier in the day, as indicated at the preliminary examination. Defendant claims that this showed a "revenge motive for the stop" and gave them a motive to lie. According to defendant, the officers' credibility was essential to determining whether the scent of the marijuana was

noticeable, and trial counsel should not have conceded that they were credible in closing argument.

Trial counsel's choice of the defense theory and approach to the officers' testimony was a reasonable trial strategy. Counsel explored the "revenge motive" at the preliminary examination and evidently concluded that the theory was not persuasive. Instead, he attempted to reconcile defendant's claim that he did not smell the marijuana with the officers' account by noting that the average layperson may not have the same ability to recognize the odor, and that other than the smell, there was nothing that showed that defendant had knowledge of its presence or was linked to it. The unsuccessful result of the strategy does not establish that counsel was ineffective for choosing it. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant argues that trial counsel was ineffective for failing to move for a directed verdict on the basis that the prosecution failed to establish venue in its case in chief. However, as explained by the trial court in denying defendant's motion for a new trial, had trial counsel moved for a directed verdict, the court would have reopened the proofs to allow the prosecution to establish venue. See *People v Eger*, 299 Mich 49, 57-58; 299 NW 803 (1941). Defendant's testimony at trial and the officer's testimony at the preliminary examination indicate that venue would have been established, and therefore, the court would have denied the motion for a directed verdict. Defense counsel is not ineffective for failing to bring a motion that would have been futile. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997).

We conclude that defendant has not established that he was denied the effective assistance of counsel. In addition, we are not persuaded that an evidentiary hearing is necessary to resolve his claim.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette