STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2008
v	No. 276123 Ogemaw Circuit Court
MARK ALEXANDER LACUSTA, Defendant-Appellant.	LC No. 06-002614-FH

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(3), and maintaining a drug house, MCL 333.7405(d), for which he was sentenced as a second habitual offender, MCL 769.11, to two years' probation with nine months in jail. Defendant appeals as of right. We affirm.

Defendant first argues the trial court abused its discretion by allowing the introduction of evidence under MRE 404(b), which showed that defendant had been arrested subsequently for possession of marijuana. We hold that even if an abuse of discretion occurred, the error does not warrant reversal.

Because the issue raised by defendant only involved a non-constitutional evidentiary issue, defendant "must demonstrate, 'after an examination of the entire cause,' that it 'is more probable than not that the error was outcome determinative.'" *People v Phillips*, 469 Mich 390, 396-397; 666 NW2d 657 (2003), quoting *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). We must examine the nature of the error and assess its effect in light of the strength and weight of the "untainted evidence." *Id*. at 397.

We conclude that the admission of the subsequent arrest was a harmless error under this standard. This holds true because there was more than sufficient evidence presented to convict defendant of these crimes. For instance, defendant admitted there was marijuana in his apartment and that the marijuana was located in a file cabinet in the bedroom. Defendant also stated that the marijuana was in "eight ounce packages." In addition, defendant admitted he had just "burned one" prior to the search of the apartment. Critically, during the search, a police trooper asked defendant if the marijuana was his and he admitted that he could only buy the marijuana "in eight ounce packages." In addition, police discovered a "pair of silver hand

scales" (which, the trooper testified, were commonly used to measure marijuana for sale) and five plastic sandwich baggies containing "one-eighth ounce" of marijuana each.

Also, at trial, the police informant testified that she "smoked weed" with defendant and purchased marijuana from defendant on March 15, 2006. She further testified that she purchased "[a]n eighth" from defendant "[i]n a baggie" like the sandwich baggies the police discovered, for $25.00 each. Further, she testified that it was not the first time she had purchased marijuana from defendant. She testified that she had purchased marijuana from defendant more than three times and that she purchased "[a]n eighth of weed" each time. Finally, the informant testified that she saw defendant sell marijuana to other people and that it was in exchange for money.

Therefore, in light of the weight and strength of the untainted evidence it appears likely that defendant would have been convicted even without admission of the other acts evidence. *Wilkens*, *supra* at 734. Thus, any alleged evidentiary error does not warrant reversal because the use of the subsequent arrest evidence was not outcome determinative.

Next, defendant argues his trial counsel performed ineffectively by failing to raise entrapment as a defense and by failing to seek suppression of the evidence obtained under the search warrant. We disagree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving trial counsel was ineffective. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Ineffective assistance of counsel is proven if a defendant can show that "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Defendant argues that because he was not predisposed to sell marijuana the police entrapped him by using defendant's "long-time friend" as part of a controlled marijuana purchase. Thus, defendant argues, his trial counsel was ineffective because he failed to raise an entrapment defense.

"[A] defendant is considered entrapped if either (1) the police engaged in impermissible conduct that would induce a law-abiding person to commit a crime in similar circumstances or (2) the police engaged in conduct so reprehensible that it cannot be tolerated." *People v Johnson*, 466 Mich 491, 498; 647 NW2d 480 (2002) (citations omitted). However, where law enforcement officials present nothing more than an opportunity to commit the crime, entrapment does not exist. *People v Butler*, 444 Mich 965, 966; 512 NW2d 583 (1994).

As previously discussed, there was strong evidence that defendant was predisposed to using and selling marijuana, and thus, was not a law-abiding individual. As a result, no entrapment existed by using the police informant to purchase marijuana from defendant because he was already predisposed to sell marijuana. Additionally, the conduct of the STING officers was not reprehensible for having a friend of defendant purchase the marijuana. Thus, it would have been futile for defendant's trial counsel to raise entrapment as a defense. Accordingly, defendant did not receive ineffective assistance of counsel on this issue. See *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

We likewise disagree with defendant's argument that he received ineffective assistance of counsel because the search warrant giving permission to search his apartment was not supported by probable cause and his counsel did not seek to suppress the information gained under the search warrant. Appellate scrutiny of a magistrate's decision on the sufficiency of an affidavit underlying a search warrant "requires the reviewing court to ask only whether a reasonably cautious person could have concluded that there was a 'substantial basis' for the finding of probable cause." *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). Further, because of the strong preference for searches conducted pursuant to a search warrant, a magistrate's decision regarding probable cause should be paid great deference. *Id*. at 604. Probable cause to issue a search warrant exists if there is a substantial basis for inferring a fair probability that evidence of a crime is in the stated place. *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000). Furthermore, the search warrant and underlying affidavit must be read in a commonsense and realistic manner to determine whether a reasonably cautious person could have concluded that there was a substantial basis for finding probable cause. *Russo, supra* at 604.

In this regard, there was a "substantial basis" for the magistrate's decision to grant the search warrant. There appears to have been a fair probability that contraband or evidence of a crime would be found at defendant's residence. The informant told a police trooper that defendant had marijuana at his residence, and stated that she personally observed the marijuana being packaged at the residence within the prior 24 hours. That the informant had previously provided information leading to the discovery of illicit drugs, and provided great specificity regarding the drugs, supported her reliability. *People v Stumpf*, 196 Mich App 218, 220-222; 492 NW2d 795 (1992).

Thus, reading the affidavit in a "commonsense and realistic manner" and giving "great deference" to the magistrate's decision, there was a substantial basis for the magistrate's conclusion that there was a "fair probability that evidence of a crime is in the stated place." *Kazmierczak, supra* at 418. Accordingly, defendant did not receive ineffective assistance of counsel because seeking to suppress lawfully obtained evidence would have been futile. *Mack, supra* at 130.

Affirmed.

/s/ Alton T. Davis
/s/ Christopher M. Murray
/s/ Jane M. Beckering