STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2008
v	No. 273404 Oakland Circuit Court
RICKY GILBERT KIMBLE, Defendant-Appellant.	LC No. 2005-205502-FH

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant appeals by right following his bench trial convictions of possession with intent to deliver between 50 and 449 grams of cocaine, MCL 333.7401(2)(a)(*iii*), possession of marijuana, MCL 333.7403(2)(d), and possession of a weapon during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 24 months' to 20 years' imprisonment for possession with intent to deliver cocaine, 90 days for possession of marijuana, and a consecutive two year's imprisonment for the felony firearm conviction. We affirm.

Defendant first argues that police lacked probable cause to search his residence because the affidavit supporting the search warrant did not properly connect two prior drug buys to defendant's home. We disagree. "This Court's review of a lower court's factual findings in a suppression hearing is limited to clear error, and those findings will be affirmed unless we are left with a definite and firm conviction that a mistake was made. In addition, we review de novo the lower court's ultimate ruling with regard to the motion to suppress." *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002) (citations omitted). In reviewing a magistrate's decision to issue a search warrant, the court asks "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).

The affidavit in support of the search warrant was clearly sufficient on its face. The affiant asserted that he learned from a reliable confidential informant that a black male sold and delivered cocaine from defendant's residence. The affiant stated that on two occasions an unknown black male was observed leaving his home within minutes of receiving a telephone call from the confidential informant. The affiant indicated that he followed the suspect from the home to the location of the drug sale, and at no time did the suspect stop. The informant was searched before and after the transactions, and the substances purchased by the informant from the suspect tested positive for cocaine.

The items to be seized from defendant's residence were described by the affiant, in part, as follows:

> Cocaine, and any other illegally possessed controlled substances; any raw material, product, equipment or drug paraphernalia for the compounding, cutting, exporting, importing, manufacturing, packaging, processing, storage, use or weighing of any controlled substance . . . .

The affiant further indicated that these items are

> located at the following described place:
>
> All rooms, compartments, spaces and any attic or basement, attached garages, detached garages and all areas within the cartilage of the home; including shrubs, trees, gardens, greenery, wood piles, and dog pens accessible there from . . . .

Additionally, the affiant indicated "that the evidence to be searched for[ ] is small enough in size so as to enable it to be hidden or concealed on the occupant or occupants of the premises to be searched."

Based on the affidavit, a substantial basis existed for inferring that defendant possessed an inventory of drugs and that those drugs could be found inside defendant's residence. Defendant argues that the language in the affidavit referring to the habit of drug dealers to store drugs outside of the house means that the affidavit at best indicated that the drugs would be found there. However, that language is clearly inclusive, not exclusive. After setting forth on the first page of the affidavit that drugs would be found in the rooms, compartments, spaces, and garages of the home, the affiant notes that "contraband/narcotics" is "frequently" found hidden outside the home. Looking at the affidavit as a whole, the affiant's reference to the outside of the home was stating a belief that defendant's inventory could be found anywhere on the property, not just inside of the house. Thus, the issuing court properly included the interior of the home in the search warrant based on the affidavit, and the trial court correctly denied defendant's motion to suppress.

Defendant next argues that he was deprived the effective assistance of counsel when his trial counsel recommended a bench trial in front of the same judge who had previously heard and rejected defendant's three pre-trial motions to suppress evidence. Because defendant did not raise the issue below or seek a *Ginther*[1] hearing, this Court limits its "review to mistakes that are apparent from the record." *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007), lv granted 480 Mich 946 (2007).

Criminal defendants have a constitutional right to counsel. *Strickland v Washington*, 466 US 668, 685; 104 S Ct 2052; 80 L Ed 2d 674 (1984). There is a strong presumption that counsel

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

afforded "reasonable professional assistance." *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), mod on other grounds 468 Mich 233 (2003). There is also a strong presumption that "the challenged action . . . might be considered sound trial strategy." *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To overcome these presumptions, a defendant claiming ineffective assistance must show that counsel's assistance fell below an objective standard of reasonableness and that this conduct was prejudicial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). To show 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." *Watkins, supra* at 30. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant argues that counsel's recommendation that he seek a bench trial was unsound because the trial court previously ruled on multiple motions to suppress, and in so doing assessed the credibility of the testifying witness. In addition, defendant contends the trial court was also aware of his possession of a weapon and CCW permit before trial and defendant's admission regarding possession of a specified amount of cocaine. Specifically, defendant contends his trial counsel was ineffective in recommending a bench trial because, based on the prior knowledge and familiarity with the case, the trial court could not be impartial. Defendant cites to *People v Walker*, 24 Mich App 360, 361; 180 NW2d 193 (1970), aff'd 385 Mich 596 (1971) and *People v Ramsey*, 385 Mich 221; 187 NW2d 887 (1971) in support of his argument. In *Walker*, the trial judge questioned witnesses in a pretrial hearing when deciding a motion for continuance. *Walker, supra* at 361. In addition, the trial judge knew that the defendant failed a lie detector test. *Id.* This Court concluded that the trial judge should have been excluded from sitting as trier of fact because the judge did "not pass the test of impartiality once possessed of the type of information this record discloses that the trial judge possessed prior to trial." *Id.* at 362. In *Ramsey*, the Court held "that the trial court committed reversible error when he viewed the transcript of the testimony taken at the preliminary examination while sitting without a jury as the trier of the facts in the case, the transcript not being placed in evidence as provided by the statute." *Ramsey, supra* at 225 (referencing MCL 786.26).

Notably, defendant admits he chose to waive his right to a jury trial, which is affirmed by a review of the lower court record. Although the trial court did not personally inquire of defendant regarding his waiver of this right, defendant signed a jury waiver form and was questioned, under oath, by his attorney and affirmed his understanding and voluntary waiver of a trial by jury. "[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case," including whether to "waive a jury." *Jones v Barnes*, 463 US 745, 751; 103 S Ct 3308; 77 L Ed 2d 987 (1983).

Defendant does not specifically allege bias by the trial judge but, rather, contends that waiver of his right to a jury trial constituted ineffective assistance of counsel, because the trial court, sitting as the trier of fact, had already made determinations of credibility and was privy to certain facts or evidence. However, defendant was fully aware of the trial court's prior involvement in the case, including its credibility determinations, when he indicated under oath his desire to have a bench trial. Further, there is no indication that the lower court was privy to any evidence before trial that was not subsequently admitted during trial. Waiver of a jury trial is deemed trial strategy and this Court does not find that the decision to proceed with a bench

trial was so unsound to justify a new trial or that defendant was denied any of the rights afforded to him by the United States or Michigan Constitutions. This Court has previously stated, "A judge unlike a juror possesses an understanding of the law which allows him to ignore . . . [evidentiary] errors and to decide the case based solely on the evidence properly admitted at trial." *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001). Consequently, we reject defendant's assertion of ineffective assistance of counsel.

Finally, defendant affirmatively waived any challenge to factual inaccuracies in his presentence investigation report, thereby precluding appellate review. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Pat M. Donofrio