

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SYEED T. MONNAN,

Defendant-Appellant.

UNPUBLISHED
December 4, 2008

No. 276895
Macomb Circuit Court
LC No. 2005-005003-FH
2005-005004-FH

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted, challenging the trial court's order denying his postjudgment motion to withdraw his guilty pleas to two counts of delivery of a controlled substance (ecstasy), MCL 333.7401(2)(b)(i), and one count of possession of a firearm during the commission of a felony, MCL 750.227b. We affirm.

In LC No. 2005-005001-FH, LC No. 2005-005002-FH, and LC No. 2005-005003-FH, defendant was charged with one count each of delivery of a controlled substance (ecstasy). In LC No. 2005-005004-FH, defendant was charged with delivery of a controlled substance (ecstasy), possession with intent to deliver Vicodin, possession of marijuana, possession of a controlled substance analogue, possession of prescription forms, maintaining a drug house, possession of a Taser, and felony-firearm. Defense counsel secured a plea agreement whereby defendant pleaded guilty as charged in LC No. 2005-005003-FH and pleaded guilty to delivery of a controlled substance and felony-firearm in LC No. 2005-005004-FH in exchange for the dismissal of all other charges. The plea agreement also included a sentence agreement that called for concurrent minimum sentences of one year for each of the controlled substance convictions, to be served consecutively to the mandatory two-year term for felony-firearm. After the trial court accepted the pleas and sentenced defendant accordingly, defendant moved to withdraw his pleas. The trial court denied the motion. Defendant then filed a delayed application for leave to appeal. This Court initially denied the application,¹ but, on reconsideration, granted the application and, while retaining jurisdiction, remanded the case for a

¹ *People v Monnan*, unpublished order of the Court of Appeals, entered June 19, 2007 (Docket No. 276895).

*Ginther*² hearing.³ Following the hearing, the trial court again denied defendant's motion to withdraw his guilty pleas.

On appeal, defendant argues that the trial court erred in denying his motion to withdraw his plea in LC No. 2005-005004-FH because a factual basis for the felony-firearm charge was not established. We disagree.

A postjudgment motion to withdraw a guilty plea is reviewed for an abuse of discretion resulting in a miscarriage of justice. *People v Davidovich*, 238 Mich App 422, 425; 606 NW2d 387 (1999), *aff'd* 463 Mich 446 (2000).

"In reviewing the adequacy of the factual basis for a plea, this Court examines whether the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding." *People v Brownfield (After Remand)*, 216 Mich App 429, 431; 548 NW2d 248 (1996).

A factual basis to support a plea exists if an inculpatory inference can be drawn from what the defendant has admitted. This holds true even if an exculpatory inference could also be drawn and the defendant asserts that the latter is the correct inference. Even if the defendant denies an element of the crime, the court may properly accept the plea if an inculpatory inference can still be drawn from what the defendant says. [*People v Jones*, 190 Mich App 509, 511-512; 476 NW2d 646 (1991) (citations omitted).]

The elements of felony-firearm are that the defendant possessed a firearm during the commission or attempted commission of any felony other than those four enumerated in the pertinent statute. MCL 750.227b(1); *People v Mitchell*, 456 Mich 693, 698; 575 NW2d 283 (1998). The felony-firearm charge alleged that defendant possessed a pistol at the time he committed or attempted to commit possession with intent to deliver Vicodin. The elements of possession with intent to deliver Vicodin are that the defendant knowingly possessed Vicodin and intended to deliver the Vicodin to someone else. See MCL 333.7401(2)(b)(ii).

At the plea hearing, defendant stated that on August 17 and September 9, 2005, he sold ecstasy to an undercover officer knowing that it was illegal to do so. At the time of the September 9 sale, he also had Vicodin and a firearm at home in his bedroom. Defendant contends that the factual basis for the felony-firearm plea was insufficient because he did not plead guilty to the Vicodin offense, because the Vicodin had been legally prescribed, and because he did not have the firearm in his possession at the time he delivered the ecstasy or at the time the gun and the Vicodin were recovered.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³ *People v Monnan*, unpublished order of the Court of Appeals, entered August 7, 2007 (Docket No. 276895).

Because the felony-firearm charge was predicated on the felony offense of possession with intent to deliver Vicodin, not on the delivery of ecstasy, the fact that defendant was not armed when he delivered the ecstasy is irrelevant. Likewise, the fact that defendant did not plead guilty to possession with intent to deliver Vicodin is irrelevant because he need not be convicted of the underlying felony to be convicted of felony-firearm. *People v Jeff Davis*, 196 Mich App 597, 601; 493 NW2d 467 (1992), overruled in part on other grounds by *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997). Defendant admitted that the weapon belonged to him and was in his bedroom closet. At the time, he was in possession of Vicodin. He stated that his mother had a prescription for the drug and that he personally had a prescription for only “[s]ome of them[.]” Defendant’s admissions supported inculpatory inferences that he was not legally in possession of Vicodin, because not all of it was prescribed to him, and that he had constructive possession of a firearm at the time he possessed the Vicodin. Possession of the weapon is determined as of the time the defendant committed the underlying felony, not at the time the police searched his home or when the defendant was arrested. *People v Burgenmeyer*, 461 Mich 431, 438-439; 606 NW2d 645 (2000). Because inculpatory inferences sufficient to support a conviction of felony-firearm can be drawn from defendant’s admissions, the factual basis for the plea was adequate and the trial court did not abuse its discretion in denying defendant’s motion to withdraw his plea on this basis.

Defendant also argues that the trial court erred in denying his motion to withdraw his guilty plea in both cases because he was denied the effective assistance of counsel. Whether a defendant has been denied effective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court’s factual findings are reviewed for clear error, but this Court determines de novo whether the facts properly found by the trial court establish ineffective assistance of counsel. See *id.*

To establish a claim of ineffective assistance of counsel, a defendant “must first show that (1) his trial counsel’s performance fell below an objective standard of reasonableness under the prevailing professional norms and (2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008). A defendant must also show that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). “Counsel is presumed to have provided effective assistance, and the defendant must overcome a strong presumption that counsel’s assistance was sound trial strategy.” *Horn, supra* at 37-38 n 2.

When considering a claim of ineffective assistance of counsel in the context of a guilty plea, the court must determine whether the defendant tendered a voluntary and understanding plea. *People v Thew*, 201 Mich App 78, 89; 506 NW2d 547 (1993). “The question is not whether a court would, in retrospect, consider counsel’s advice to be right or wrong, but whether the advice was within the range of competence demanded of attorneys in criminal cases.” *Id.* at 89-90. “Defense counsel must explain to the defendant the range and consequences of available choices in sufficient detail to enable the defendant to make an intelligent and informed choice.” *People v Jackson*, 203 Mich App 607, 614; 513 NW2d 206 (1994). A guilty plea may be rendered involuntary due to ineffective assistance of counsel where defense counsel fails to explain the nature of the charges or discuss possible defenses to them. *Id.*

Defendant first argues that counsel was deficient for advising him to waive the preliminary examination, which would have enabled a record to be developed regarding “the legality of the prescription medications found in” defendant’s house and the circumstances under which the firearm was found, for use in a motion to quash the felony-firearm charge.

The purpose of a preliminary examination “is to determine whether a crime has been committed and, if so, whether there is probable cause to believe that the defendant committed it.” *People v Hunt*, 442 Mich 359, 362; 501 NW2d 151 (1993). The preliminary examination, unless waived, is a necessary prerequisite to the filing of an information charging the defendant with a felony. MCL 767.42(1). Once a defendant is bound over for trial, he can challenge the sufficiency of the evidence adduced at the preliminary examination in a pretrial motion to quash. Counsel’s decision whether to file such a pretrial motion is considered a matter of trial strategy. See, e.g., *People v Taylor*, 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).

According to defendant, trial counsel told him that if he waived the preliminary examination, half of the charges, including all the “major” charges, would be dropped. Defendant was charged with a host of felonies and misdemeanors, most of which were actually dismissed. Whether the offenses to which defendant pleaded guilty were “major” was a matter of opinion. Assuming that they were and that counsel’s advice could be considered deficient, defendant cannot show that he was prejudiced by counsel’s failure to conduct a preliminary examination for use in a subsequent motion to quash. Specifically, he failed to show that there was any basis for concluding that there was not probable cause to believe that he committed the offense of possession with intent to deliver Vicodin (the predicate felony for the felony-firearm charge). That some of the drug may have been legally prescribed to his mother did not authorize defendant to possess it. Further, that some of it may have been legally prescribed to defendant did not authorize defendant to deliver it to others. In addition, the fact that defendant possessed the gun at the time he possessed the Vicodin was sufficient to establish probable cause to believe that he committed the offense of felony-firearm, regardless of the fact that he did not possess the gun when he committed the other charged felonies, that he did not have ready access to the gun when he was arrested, or that the gun was inoperable. *Burgenmeyer, supra* at 438-439; *People v Peals*, 476 Mich 636, 638; 720 NW2d 196 (2006). Therefore, defendant has not shown that but for counsel’s error, there is a reasonable probability that the felony-firearm charge would have been dismissed before trial. In addition, defendant has not shown how counsel’s alleged deficient advice with respect to the waiver of the preliminary examination induced him to plead guilty, given that he knew that the felony-firearm charge was still pending and would not be dismissed as part of the plea agreement. Finally, regardless of the fact that the felony-firearm charge presented a “triable” issue, defendant has not shown that there is a reasonable probability that he would have been acquitted of the offense at trial and thus cannot show that he was prejudiced by counsel’s advice to accept the plea agreement.

Defendant next argues that counsel was deficient for advising him not to worry about the felony-firearm charge because inoperability of the weapon precluded a conviction. Assuming counsel made such a representation, his advice was improper because inoperability of a weapon is not a defense to felony-firearm. *People v Thompson*, 189 Mich App 85, 86; 472 NW2d 11

(1991). However, defendant admitted that before he accepted the plea agreement, a motion to quash the charge on that ground had been denied. He also admitted that counsel later told him that the prosecutor would not dismiss the felony-firearm charge and that the plea agreement called for him to plead guilty to that offense. Clearly, then, defendant could have rejected the plea agreement if he did not want to plead guilty to felony-firearm. Therefore, defendant cannot show that he was prejudiced by counsel's alleged erroneous advice.

Defendant also argues that counsel was deficient for failing to discuss possible trial strategy with him, particularly the defense of entrapment.

"A defendant is entitled to have his counsel investigate, prepare and assert all substantial defenses." *People v Hubbard*, 156 Mich App 712, 714; 402 NW2d 79 (1986). "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 conduct a reasonable investigation can constitute ineffective assistance of counsel. See *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

Defendant testified that counsel never discussed a possible entrapment defense with him or other trial strategies, such as which witnesses to call or how to gain an acquittal. However, because defendant elected to plead guilty pursuant to a plea agreement, there was no need to prepare a defense for trial. In addition, defendant was only in court for a pretrial hearing. If he wanted to proceed to trial, he did not have to enter a guilty plea; the case could have been set for trial and he could have discussed defenses and trial strategy with counsel before the trial date. That aside, defendant has failed to present any facts to show that he had a viable entrapment defense and thus he has not established a factual predicate for his claim of ineffective assistance of counsel, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), and has not shown that he was prejudiced by counsel's alleged error. Likewise, defendant has not identified other possible strategies that could have been employed at trial that might have resulted in the dismissal or acquittal of any of charges. Although defendant's legal expert testified that the charges could have been tried, there was no basis for concluding that there was a reasonable probability that defendant would have been acquitted of the charges had he proceeded to trial.

Defendant next argues that counsel was deficient for preliminarily agreeing to an illegal sentence as part of the plea agreement, one that would have permitted the sentences for the controlled substance convictions to run concurrently with the sentence for the felony-firearm conviction. Defendant does not explain why counsel should be deemed deficient for trying to obtain a more advantageous sentence. That aside, defendant has not shown that he was prejudiced, given that the illegal sentence was not part of the plea agreement that defendant ultimately agreed to accept and given that defendant knew that the sentence agreement called for concurrent one-year sentences for the controlled substance convictions, to be served consecutively to the mandatory two-year term for felony-firearm.

Defendant next argues that counsel was deficient for miscalculating the sentencing guidelines range for the controlled substance convictions. Although someone in counsel's office evidently had calculated the guidelines range at 51 to 85 months, a letter attached to defendant's appellate brief indicates that counsel determined that the minimum sentence range could vary from 15 to 25 months to 51 to 85 months, depending on how the variables were scored. Defendant's legal expert testified that the correct minimum sentence range was 24 to 40 months,

which was in fact the range calculated by the probation department at time of sentencing. Thus, the range ultimately calculated was within the ranges provided by defense counsel. Also, defendant never testified that counsel told him that the minimum sentence range for the controlled substance convictions was 51 to 85 months. Rather, he testified that counsel told him that he was facing a minimum sentence range of 84 to 120 months (seven to ten years) if convicted as charged at trial and that it was based on that representation that he decided to accept the plea agreement. Because defendant did not rely on the guidelines range of 51 to 85 months in deciding to accept the plea bargain, he was not prejudiced by any error with respect to that range. While defendant did testify that he relied on counsel's representation that he was facing a minimum sentence of seven to ten years if convicted as charged, counsel testified that he did not recall making such a statement. Counsel instead stated that his advice to defendant "was you're going to go away for a long time unless you cooperate. . . . anywhere from two years or longer." Moreover, although defendant's legal expert testified that a guidelines range of 24 to 40 months would have been appropriate even if defendant had gone to trial and been convicted on all charges, he admitted that guidelines can be scored differently by different people, and he stated, "I can see where he's got 81 months, that could be seven years on the high end of the guidelines. But, you know, I think that's a little bit inaccurate." He also admitted that, after trial, the judge could have, on the drug charges, "imposed consecutive sentencing, stacked everything, plus two [on the felony-firearm count]." The trial court, acting as the fact-finder, heard all this testimony and denied defendant's claim for relief. Given the record, we find no basis on which to disturb the court's ruling.

Defendant lastly argues that counsel was deficient for failing to argue for a downward departure from the sentencing guidelines range at sentencing. This alleged error related to proceedings after defendant tendered his plea and, therefore, could not have induced defendant to plead guilty. That aside, the plea agreement included a specific sentence recommendation, part of which involved sentences for the controlled substance convictions that were already below the guidelines range. Because defendant had agreed to a specific sentence as part of the plea agreement, counsel was not required to advocate a different sentence at the sentencing hearing.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray