

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD SANDERS, JR.,

Defendant-Appellant.

UNPUBLISHED

January 29, 2009

No. 282832

Kent Circuit Court

LC No. 07-006434-FH

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v), operating a vehicle under the influence of liquor, third offense, MCL 257.625, and operating a vehicle with a suspended license, second offense, MCL 257.904(1). We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arose from a traffic stop. Grand Rapids Police Officer William Kelly testified that he observed defendant go through an intersection without stopping for a stop sign. Defendant pulled off the road in front of a party store. Kelly parked behind defendant's car and asked defendant, who was walking toward the store, to stop. Kelly asked defendant for his driver's license, and defendant replied that he did not have one. Defendant indicated that his license was suspended. Kelly took defendant into custody and placed him in the back of Kelly's patrol car. While he was speaking with defendant, Kelly noticed that defendant was acting as if he were "under the influence of something" and then smelled alcohol on defendant's breath. During a search incident to the arrest, Kelly discovered a small plastic baggie in a cup holder in the console of defendant's car. The baggie contained less than 25 grams of crack cocaine.

On appeal, defendant maintains that trial counsel provided ineffective assistance by failing to move to suppress on the ground that the initial stop was invalid, and to call defense witnesses who would have corroborated this position. Counsel raised this issue below, but the trial court found that no evidentiary hearing was necessary, and denied defendant's motion for a

new trial or a *Ginther*¹ hearing. Defendant contends on appeal that this issue warrants a remand to the trial court for a *Ginther* hearing or a reversal of his conviction.

We review a trial court's decision whether to hold an evidentiary hearing for an abuse of discretion. See *People v Mischley*, 164 Mich App 478, 481-482; 417 NW2d 537 (1987). A defendant may be granted an evidentiary hearing if the record has not been sufficiently developed and defendant can show evidence of a factual dispute which might, if further developed, possibly be resolved in his favor. See *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). A trial court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.* Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant must show that counsel's performance was unreasonable under prevailing norms and that the challenged action was not sound strategy. *People v Pickens*, 446 Mich 298, 330, 338; 521 NW2d 797 (1994). Decisions as to whether to call witnesses or present evidence are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant has failed to provide adequate support for a claim of ineffective assistance, and has not shown that an evidentiary hearing is necessary to establish his claim. "The burden of establishing the factual predicate" for a claim of ineffective assistance falls on the defendant. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has presented nothing to support a claim that trial counsel provided ineffective assistance in deciding not to move to suppress the evidence or to call additional witnesses. Defendant's argument rests on a claim that he did not run the stop sign, and that therefore the stop was improperly pretextual. However, trial counsel explained at trial that he decided not to bring a motion to suppress after he viewed the officer's videotape and police reports because he thought the motion would not be successful. Defense counsel is not ineffective for failing to make a futile motion. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001). While defendant maintained during his motion for a new trial that his two sons were present nearby during the stop and would have testified that he did not run the stop sign, he did not present the trial court with any support for this assertion. Nor has defendant attached any offer of proof or any affidavits sworn by the proposed witnesses on appeal. He has failed to demonstrate that the witnesses would have indeed offered exculpatory testimony. Under these circumstances, defendant has failed to rebut the presumption of sound trial strategy accorded trial counsel's decision to not to call the witnesses, or to move to suppress the evidence discovered as a result of the stop. Nor has he shown that a further remand is

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

necessary to develop an additional record to support his position.

Affirmed.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra