STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 14, 2009
v	No. 283454 Oakland Circuit Court
ANTHONY EVANS, Defendant-Appellant.	LC No. 2007-217312-FH

Before: Servitto, P.J., and O'Connell and Zahra, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of one count of possession with intent to deliver between 50 and 450 grams of cocaine, MCL 333.7401(2)(a)(*iii*), and one count of possession of marijuana, MCL 333.7403(2)(d). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 15 to 50 years' imprisonment for the possession with intent to deliver cocaine conviction and 133 days' incarceration for the possession of marijuana conviction, with 133 days' credit for time served. He appeals as of right. We affirm.

First, defendant argues that the affidavit in support of the search warrant executed in this case was legally insufficient. Because defendant failed to raise this issue before the trial court, it is unpreserved, and we will review it for plain error affecting defendant's substantial rights. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006); *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Defendant's argument is founded upon the contents of the affidavit offered in support of the application for a search warrant. Defendant never challenged the affidavit or the search warrant in the trial court, and the affidavit was never introduced as evidence in the trial court. Defendant may not expand the record on appeal. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000). Because the affidavit used to secure the warrant is not included in the lower court record, we consider defendant's arguments without reference to the purported affidavit he attaches on appeal.

"A search warrant should be upheld if a substantial basis exists to conclude that there is a fair probability that the items sought will be found in the stated place." *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664 (2008) (citations omitted). "The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her." MCL 780.653. When reviewing the magistrate's decision, the reviewing

court must determine "whether a reasonably cautious person could have concluded that there was a substantial basis for the finding of probable cause." *People v Head*, 211 Mich App 205, 208-209; 535 NW2d 563 (1995).

Defendant claims that the affidavit and warrant did not specifically identify that the lower-level apartment was the location of the search. However, two police officers testified that the warrant was only for the lower-level apartment. Officer Daniel Main testified that the police did not search the upper-level apartment because they did not have a warrant to do so. There is no other evidence in the record to support defendant's contention.[1]

Defendant also maintains that the affidavit and warrant were insufficient because they identified defendant merely as a "black male" rather than by name. "A search warrant must particularly describe the place to be searched and the persons or things to be seized." *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004); see also MCL 780.654(1). Again, because defendant did not challenge the warrant or the affidavit in the trial court, there is no record of the particularity described in either. Nevertheless, Main testified that he knew defendant by sight, that other officers involved in the execution of the warrant knew that defendant drove a gray Buick, and that the officers waited for defendant to come to the house before executing the search warrant. Main further testified that the police were able to link defendant to the items found in the apartment because they had observed him at the apartment and he was present when the warrant was executed. There is no indication that the warrant did not particularly describe defendant.

Defendant then argues that the affidavit did not provide adequate support for the reliability of the confidential informant who supplied information to establish probable cause. Specifically, defendant argues that the only indications of reliability were the assertions of Main, the affiant. We disagree. Probable cause may be based on information supplied by named or unnamed persons. *People v Michael Keller*, 479 Mich 467, 482; 739 NW2d 505 (2007); MCL 780.653. If the person is named, there should be indication that the informant has personal knowledge of the subject matter. *Keller*, *supra* at 482; MCL 780.653(1). If the person is unnamed, there should still be some indication that the informant is credible or the information is reliable. *Keller*, *supra* at 482; MCL 780.653(2).

Main provided support for the reliability of his informant. He testified at trial that he has extensive experience using informants to obtain search warrants in drug cases. There is no evidence on the record to establish that the support provided by Main was insufficient for the magistrate to conclude that the informant was reliable. See *People v Williams*, 240 Mich App 316; 319-320; 614 NW2d 647 (2000) (defendant must show by a preponderance of the evidence that affiant provided false information that was used to secure a warrant). Defendant failed to

[1] Although the affidavit and warrant are not included in the lower court record, we note that the copies of each document provided by defendant identify the property to be searched as the lower-level residence within the multi-family dwelling at this address.

demonstrate that the magistrate committed plain error with respect to the reliability of the affidavit used to secure the search warrant in this case.[2]

In his supplemental brief, defendant argues that the prosecutor improperly told the jury that he did not need to call the forensic toxicologist to attest to the chemical analysis of the drug evidence found in defendant's residence. However, review of this argument was waived when defense counsel expressly stipulated to the admission of the laboratory reports describing the drug evidence without testimony from a toxicologist. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

Defendant next argues in his supplemental brief that his constitutional right to a fair trial was impugned because he is African-American and his jury was composed entirely of white citizens. Because this issue is unpreserved, we again review it for plain error affecting defendant's substantial rights. *Carines, supra* at 763-764.

"The Sixth Amendment of the United States Constitution guarantees criminal defendants a trial by an impartial jury." *People v Smith*, 463 Mich 199, 213; 615 NW2d 1 (2000) (Cavanagh, J.). Further, "the American concept of a jury trial contemplates a jury drawn from a fair cross section of the community . . . ." *Id*. at 214 (internal quotation and citation omitted).

Defendant's argument is entirely conclusory and lacks support. Defendant contends that the mere fact that his jury was entirely white proves that the exclusion of non-white jurors was deliberate, but he presents no evidence of any exclusion. "The fair cross-section requirement, however, does not guarantee that any particular jury actually chosen must mirror the community." *Id*. (internal quotation and citation omitted). Instead, a defendant must demonstrate that the venire from which the jury was drawn was constituted in such a way that it systematically excluded a distinctive group of the community. *Id*. at 215. Defendant has not offered any evidence of such a systematic exclusion, and we find no other indication in the record to suggest such exclusion.

> It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. [*LME v ARS*, 261 Mich App 273, 286-287; 680 NW2d 902 (2004), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).]

Defendant has failed to establish a claim of error, and we need not address this issue further.

Finally, defendant argues in his supplemental brief that his counsel was ineffective for failing to challenge the foregoing alleged errors. We disagree. A party should raise a claim of ineffective assistance of counsel by a motion for a new trial or an evidentiary hearing. *People v*

[2] In a supplemental brief, defendant makes virtually the same argument in propria persona, alleging that the details of the affidavit were fabricated. Yet defendant offers no proof of this fabrication. Therefore, his argument lacks merit.

Ginther, 390 Mich 436, 443; 212 NW2d 922 (1973). Because defendant failed to move for a *Ginther* hearing, our review is limited to mistakes apparent on the record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998).

Whether defendant has been deprived of effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* Factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In reviewing a claim of ineffective assistance of counsel, "[t]his 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).

Because almost all defendant's arguments are eviscerated by the lack of any support in the record, defendant's only cognizable argument in this respect is that his counsel was ineffective for failing to file a motion to suppress the evidence resulting from the search warrant and, therefore, challenge the affidavit and warrant in the trial court. Nevertheless, our review remains limited to the available record. As noted above, defendant did not request a new trial, move for an evidentiary hearing, or even file a motion with this Court for a remand in order to do so. We find nothing in the trial transcript or elsewhere in the lower court record to indicate that defense counsel should have filed a motion to suppress the evidence acquired during execution of the search warrant. Moreover, on appeal, defendant does not provide any reason to conclude that his counsel should have suspected that the search warrant evidence was legally problematic in any way. Defendant merely states, without supporting or developing his argument, that his counsel should have sought an evidentiary hearing in order for defendant to prove his innocence. Again, defendant has failed to provide support for his argument, and we cannot conclude based on his mere allegations that his counsel was ineffective. Accordingly, we need not consider his argument further. See *Mitcham*, *supra* at 203.

Further, with respect to any other issue, we concluded above that defendant has not identified any cognizable errors on appeal. Thus, his counsel was not ineffective for failing to raise a challenge with regard to any of these issues. See *People v Riley* (*After Remand*), 468 Mich 135, 142; 659 NW2d 611 (2003) ("Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion.").

Affirmed.

/s/ Deborah A. Servitto
/s/ Peter D. O'Connell
/s/ Brian K. Zahra