STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KALVIEN DAVIS,

Defendant-Appellant.

UNPUBLISHED
October 22, 2009

No. 287951
Wayne Circuit Court
LC No. 07-021193-FH

Before: Fort Hood, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of possession with intent to deliver 50 grams or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(*iii*), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*). The trial court sentenced defendant to serve concurrent sentences of imprisonment of six to 20 years for the cocaine conviction, and six months to four years for the marijuana conviction. We affirm.

The prosecutor's theory of the case was that, on the afternoon of October 5, 2007, police officers executed a search warrant at an address in Detroit, and there discovered quantities of cocaine and marijuana, and arrested defendant as he was leaving the premises.

On appeal, defendant argues that he was denied a fair trial by the trial court's failure to instruct the jury that possession with intent to deliver was a specific intent crime, and that his trial attorney was ineffective for failing to challenge, for lack of probable cause, the search warrant leading to his arrest.

I. Instructional Claim

Jury instructions that involve questions of law are reviewed de novo, but a trial court's determination whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

However, defendant admits that he did not raise his instructional issue at trial, and thus left it unpreserved. In fact, after instructing the jury, the trial court elicited from defense counsel that the latter was satisfied with the instructions as read. This Court has treated such acquiescence as an affirmative waiver, wholly extinguishing appellate objections. See *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002), citing *People v Carter*, 462 Mich 206,

215; 612 NW2d 144 (2000). We conclude that even review for plain error, as is appropriate for merely forfeited issues, see *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), brings to light no error warranting relief.

Jury instructions must cover each element of each offense charged, along with all material issues, defenses, and theories that have evidentiary support. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). "While delivery of a controlled substance is a general intent crime, possession with intent to deliver is a specific intent crime." *People v Mass*, 464 Mich 615, 633 n 21; 628 NW2d 540 (2001) (citations omitted).

In this case, in instructing the jury in connection with both offenses of which defendant was convicted, the trial court included that, to find defendant guilty, the jury must conclude beyond a reasonable doubt that defendant "intended to deliver" the illegal substance. We conclude that this covered the specific intent element of the crimes. A lay juror would not normally be empirically familiar with the distinction between general and specific intent, but would logically interpret "intended to deliver" as indicating specific intent. The court did not say "intended to carry," or "recklessly allowed the substance to change hands," or anything else that might have invited a general-intent interpretation. The wording "intended to deliver" could hardly denote anything less than a possessor's specific intent to transfer the illegal substance in question from his or her possession to that of another. Accordingly no plain error occurred, and so we reject this claim of error.

II. Assistance of Counsel

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Defendant admits that he made issue neither of defense counsel's performance, nor of the existence of probable cause to support the search warrant leading to his arrest, below, leaving those issues unpreserved. Because defendant did not move for a new trial or a *Ginther*[1] hearing below, our consideration of this issue is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

Defendant asserts that the affidavit offered to support the search warrant failed to establish probable cause to justify issuance of that warrant, and thus that all the evidence seized should have been barred from trial as the fruit of that poisonous tree. See *Wong Sun v United States*, 371 US 471, 487-488; 83 S Ct 407; 9 L Ed 2d 441 (1963). We disagree.

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Evidence obtained in the course of a violation of a suspect's rights under the Fourth Amendment of the United States Constitution is subject to suppression at trial. *People v Cartwright*, 454 Mich 550, 557-558; 563 NW2d 208 (1997). The Fourth Amendment guarantees that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation . . . ." US Const, Am IV. Appellate review of a magistrate's determination whether probable cause exists to support 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).

In this case, in the affidavit at issue, a member of the Narcotics Division of the Detroit Police Department attested that a credible and reliable source of information ("SOI"), who was well versed in the machinations of drug trafficking and had led to earlier seizures of narcotics and related contraband, attempted to conduct a controlled buy at the residence in question. The affiant details that the SOI was greeted by a seller, who was holding a bag of marijuana, and asked, "'what do you want[?]'" The affiant continues that the SOI replied, "a 10," to which the seller asked him to come back in the company of someone known to the seller. The SOI recounted smelling a strong odor of unburned marijuana. The affidavit continues that the affiant observed the residence for 30 or 40 minutes, and noticed four motor vehicles separately stop in front of it, each time with the driver walking to and entering the house through the side door, staying a short period, then leaving.

We conclude that these statements could well permit a reasonably cautious person to conclude that there was a substantial basis for a finding of probable cause. *Russo, supra*. Alternatively, even if the information in the affidavit fell short of establishing probable cause, we conclude that any deficiency was not so obvious that the police should be deemed to have been unreasonable in presuming its validity for purposes of pressing ahead with the search. See *People v Goldston*, 470 Mich 523, 531; 682 NW2d 479 (2004) (the police may rely on a magistrate's probable cause determination if it is objectively reasonable, but may not do so where the affidavit supporting the warrant is so lacking in indications of probable cause as to render reliance on it unreasonable). Because the police acted on good faith, the evidence they seized in executing the warrant would have been admissible for that reason.

For these reasons, had defense counsel sought to suppress the evidence seized on the ground that probable cause for the search warrant was lacking, the trial court would properly have rebuffed the challenge. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Accordingly, we reject defendant's claim of ineffective assistance of counsel.

Affirmed.

/s/ Karen M. Fort Hood
/s/ David H. Sawyer
/s/ Pat M. Donofrio