STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JEFFERY TODD ENO, Defendant-Appellant.	UNPUBLISHED December 15, 2009 No. 286216 Iosco Circuit Court LC No. 08-004017-FH

Before: Gleicher, P.J., and Fitzgerald and Wilder, JJ.

PER CURIAM.

A jury convicted defendant, of operating a motor vehicle while under the influence of a controlled substance, third offense, MCL 257.625(1) and (9)(c), and driving on a suspended operator's license, second offense, MCL 257.904(1) and (3)(b). The trial court sentenced defendant to serve concurrent terms of imprisonment of 16 to 60 months for the operating under the influence conviction, and one year for the operating without a license conviction. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The prosecutor presented evidence that early in the morning of December 1, 2007, police officers observed defendant driving erratically, initiated a traffic stop, and detected signs of alcohol intoxication. Defendant refused to cooperate with field sobriety tests, and so the police obtained a warrant to have his blood drawn. The blood tested at an alcohol level of 0.25 percent.[1]

On appeal, defendant argues that the prosecuting attorney violated his due process rights by withholding certain evidence until just before trial began, and alternatively that defense counsel's performance was deficient.

I. Due Process

[1] 0.25 percent is well over the statutorily proscribed "0.08 grams or more per 100 milliliters of blood . . . ." MCL 257.625(1)(b).

A citizen's right to due process of law when facing adverse action at the hands of the state is guaranteed under both the federal and state constitutions. US Const, Am XIV, § 1; Const 1963, art 1, § 17. Accordingly, the general rule is that, "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). Reversal is required where the "cumulative effect of all such evidence suppressed by the government . . . raises a reasonable probability that its disclosure would have produced a different result . . . ." *Kyles v Whitley*, 514 US 419, 421-422; 115 S Ct 1555; 131 L Ed 2d 490 (1995). "[T]he prosecutor remains responsible for gauging that effect regardless of any failure by the police to bring favorable evidence to the prosecutor's attention." *Id.* at 421. Whether requested by the defense or not, "favorable evidence is material, and constitutional error results from its suppression by the government, 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Id.* at 514-515, quoting *United States v Bagley*, 473 US 667, 682; 105 S Ct 3375; 87 L Ed 2d 481 (1985).

A defendant seeking appellate relief on grounds of a *Brady* violation bears the burden of proving

> (1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Fox (After Remand)*, 232 Mich App 541, 549; 591 NW2d 384 (1998).]

In this case, defendant argues not that certain evidence was entirely withheld, but that it was not made available to the defense until just before or during trial. Defendant makes issue of irregularities attendant to the warrant that resulted in the blood draw, and the disclosure that a patrol car video of the confrontation between defendant and the police that the parties had thought might exist in fact did not.

The arresting police officer described drafting the affidavit for the warrant, obtaining the warrant from a magistrate, and taking defendant to a local hospital for the blood draw. Defense counsel objected to admission of the faxed warrant on the ground that although the warrant in one place listed its date as December 1, 2007, another part gave the date as November 18, 2007, and argued that there was no indication that the document was actually faxed to anyone. However, the arresting officer further testified that he did fax the affidavit for a warrant at approximately 2:00 a.m. on December 1, 2007, although he had no explanation for the lack of fax-machine tracers. The officer characterized the discrepancy in dates as a mere "clerical error". The trial court overruled the objection and admitted the warrant.

On cross-examination, the arresting officer agreed that the form he filled out in conjunction with sending the blood sample to the laboratory indicated that the blood was not drawn pursuant to a warrant.

The magistrate under whose authority the warrant was issued testified that she recalled authorizing the warrant for defendant's blood from her home by fax at approximately 2:20 a.m. on December 1, 2007, and added that her own fax machine was not set up to add any fax indications to the document, but offered no explanation for the November 18 date. The magistrate further testified that, when a search warrant is executed, the police normally tabulate the items seized, but that the tabulation for the instant warrant was incomplete or blank.

Defendant asserts that the evidence concerning the incorrect date on the search warrant, the incomplete or blank tabulation, and the medical form that indicated that there was no warrant was all disclosed only at the eve of trial, points out that the nonexistence of a patrol car video was disclosed only during the prosecution's presentation of proofs, and argues that those items and that information should have been disclosed sooner so the defense could have investigated the errors or better used them to attack the credibility of prosecution witnesses. Defendant characterizes the late disclosure as a due process violation requiring reversal. We disagree.

At trial, defense counsel requested no continuance and on appeal defendant does not specify how earlier disclosure would have allowed the defense to put that evidence to any better use. We further note that defense counsel effectively cross-examined prosecution witnesses over the irregularities attendant to both the warrant and the nonexistent patrol car video. Defendant thus fails to show that there is a reasonable probability the outcome of trial would have been different had the information and items at issue been disclosed earlier. We therefore reject this claim of error. *Fox, supra*.

II. Assistance of Counsel

Defendant alternatively casts his arguments concerning the warrant for the blood draw under the rubric of ineffective assistance of counsel, arguing that counsel's failure to demand more timely discovery, or investigate avenues for challenging the adverse witnesses' credibility more aggressively, including by seeking a continuance for that purpose, constituted performance so deficient as to fail to pass constitutional muster.[2] We disagree.

"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).

Because defendant did not move for a new trial or a *Ginther*[3] hearing below, our review of a claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

[2] See US Const, Am VI and XIV; Const 1963, art 1, § 20.

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

Again, we note that defendant made good use of the irregularities attendant to the warrant for the blood draw and the information that no patrol video was made, and note also that defendant fails to state precisely how defense counsel might have made better use of those opportunities had he been more aggressive about discovering them. Because we conclude above that defendant failed to show a reasonable probability that the outcome of the trial would have been different had the information and items at issue been disclosed earlier, we conclude here that defendant fails to show any exertions on counsel's part to obtain that discovery earlier, or investigate further, would have brought about a different result. See *Messenger, supra*.

Defendant additionally asserts that trial counsel had stated at sentencing that, had he received the documentation relating to the search warrant earlier, he would have sought to suppress the evidence relating to that warrant in light of the irregularities. However, review of the pages of the sentencing transcript cited in fact brings to light no talk of a lost suppression opportunity. Instead, those pages present defense counsel boasting of having a strong issue for appeal, and asking the trial court to put defendant on an appeal bond. Defendant does not assert that counsel was ineffective for failing to seek suppression of any evidence, and offers no argument or authority concerning what the merits of such a motion would have been. Given that the arresting officer and the magistrate who issued the warrant testified consistently about how the warrant was in fact issued, we deem it unlikely that any motion to suppress based on clerical oversights would have succeeded. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("Trial counsel is not required to advocate a meritless position.").

For these reasons, we conclude that defendant fails to show that he was convicted without the benefit of effective assistance of counsel.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ E. Thomas Fitzgerald
/s/ Kurtis T. Wilder