STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2010
v	No. 290945 Oakland Circuit Court
DALLAS LEE MADISON, Defendant-Appellant.	LC No. 2008-221795-FH

Before: O'CONNELL, P.J., and METER and OWENS, JJ.

PER CURIAM.

After a jury trial, defendant Dallas Lee Madison was convicted of one count of possession with intent to deliver a controlled substance (Vicodin), MCL 333.7401(2)(b)(*ii*); one count of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*); and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to concurrent terms of 2 to 84 months' imprisonment for the possession with intent to deliver Vicodin conviction and 2 to 48 months' imprisonment for the possession with intent to deliver marijuana conviction, and consecutively to concurrent terms of 2 years' imprisonment for the felony-firearm convictions, with 30 days' credit for time served. Defendant appeals as of right. We affirm.[1]

On appeal, defendant first argues that his trial counsel's failure to argue that his inculpatory statements to Oakland County Sheriff Detective Michael Pankey were inadmissible because the police engaged in the functional equivalent of questioning during the execution of the search warrant constituted ineffective assistance. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. 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." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error, and constitutional issues are reviewed de novo. *Id.*

[1] Defendant initially challenged his sentence as a separate issue on appeal. However, the parties later stipulated that this issue be withdrawn from consideration by this Court. Accordingly, we will not address this issue.

"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).

"'Regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it.'" *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008), quoting MCR 2.613(C). "We review a trial court's determination of credibility for clear error." *Id.*

A suspect's statements during custodial interrogation are inadmissible unless the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). "For purposes of *Miranda*, interrogation refers to express questioning or its 'functional equivalent.'" *People v Kowalski*, 230 Mich App 464, 479; 584 NW2d 613 (1998), quoting *Rhode Island v Innis*, 446 US 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980). "The 'functional equivalent' of interrogation includes 'any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.'" *Id.*, quoting *Innis*, 446 US at 301.

The parties do not dispute that defendant initially invoked his right to counsel when Pankey began to question him after he was arrested, and he was read his *Miranda* rights. Defendant indicated he wanted an attorney, and Pankey ceased questioning. Pankey walked back and forth between the kitchen, where defendant was seated, and the hallway area as other officers continued to search the apartment. A short time later, defendant "waved" Pankey over and told Pankey that he wanted to talk. Pankey reminded defendant of his *Miranda* rights, but defendant nonetheless indicated that he wanted to speak with Pankey. Defendant then noted on the *Miranda* form that he did not want an attorney. Pankey testified that defendant then gave inculpatory statements.

To the contrary, at trial defendant testified that after he invoked his right to counsel, Pankey approached him and indicated that if he did not talk, defendant and Douglas Pennell, the other occupant of the apartment, would go to jail, and that this caused defendant to change his mind and talk to Pankey. On appeal, defendant claims that the conduct of the police during the execution of the search warrant, in which they continued to search the apartment and discover evidence while defendant remained nearby, was the functional equivalent of interrogation.

We conclude that a challenge to the admission of defendant's inculpatory statements on grounds that the police engaged in the functional equivalent of questioning would have been unsuccessful. The record does not support that the police knew or should have known that it was reasonably likely that any of the police conduct that was taking place would provoke incriminating statements by defendant. The record reflects that the police officers merely continued to execute the search warrant, and were dressed in police gear and masks for protection. Although Pankey remained in the proximity of defendant, the record reflects that the apartment was tiny and there was limited room. There is no indication that Pankey stood over defendant in an intimidating manner. Pankey was the officer in charge of the case. Defendant cites no authority to support his assertion that the police engage in the functional equivalent of

interrogation if an officer does not leave the premises or remove a defendant from the area being searched. Moreover, there is no evidence in the record to support defendant's assertion that the police "paraded" before him any evidence that was recovered in the search.

Further, defendant's testimony indicates that he was initially able to invoke his right to counsel despite the fact that he was scared by the presence of the police officers searching the apartment. Further, when defendant indicated that he wanted to talk, Pankey again reminded him of his right to remain silent, and defendant noted on the *Miranda* form that he did not want an attorney. In addition, at both at the *Walker*[2] hearing and at trial, defendant claimed that he was coerced into making statements to Pankey because Pankey allegedly threatened that defendant and Pennell would go to jail if defendant did not talk, and not because police engaged in the functional equivalent of questioning when they executed the search warrant in defendant's presence. Thus, a challenge on the ground that the valid police search of the apartment is the functional equivalent of an interrogation is inconsistent with defendant's testimony. Counsel is not ineffective for failing to advance a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Next, defendant argues that his counsel was ineffective for failing to object when the prosecutor questioned why he did not come forward with his version of events until trial. "[W]hen a defendant chooses to exercise his right to remain silent, that silence may not be used against him at trial." *People v Avant*, 235 Mich App 499, 509; 597 NW2d 864 (1999). During direct examination, defendant testified that Pennell came into the bedroom where defendant had been sleeping and shoved the box of drugs into his hands just before the police entered the apartment. Defendant also testified that Pankey had threatened him that he and Pennell would go to jail unless defendant talked, and this threat coerced defendant into talking. Defendant informed Pankey that he did not live at the apartment and that the drugs were Pennell's, not his, but he did not tell Pankey that Pennell shoved the box of drugs into his hands just before police entered the apartment pursuant to a search warrant. This testimony contradicted Pankey's testimony that defendant reinitiated communication and then admitted to selling marijuana and Vicodin, even indicating how much he sold the pills for.

We find that defendant's right against self-incrimination was not violated in this case. Although defendant initially invoked his right to counsel, he subsequently changed his mind and decided to speak with Pankey, foregoing his *Miranda* rights, and the prosecutor's questioning regarding defendant's differing version of events given during the interview and at trial was permissible. The trial court's determination that defendant made inculpatory statements was supported by Pankey's testimony, and this conclusion was not clearly erroneous. *LeBlanc*, 465 Mich at 579. We defer to the trial court's opportunity to assess the credibility of Pankey and defendant, and its finding that Pankey was more credible was not clearly erroneous. *Dendel*, 481 Mich at 130. This case is similar to *Avant*, where the defendant gave one account of events to police at the scene, and then testified to a different version at trial, and the prosecutor was permitted to draw out this discrepancy. See *Avant*, 235 Mich App at 509 ("Where a defendant makes statements to the police after being given *Miranda* warnings, the defendant has not

[2] *People v Walker* (*On Rehearing*), 374 Mich 331; 132 NW2d 87 (1965).

remained silent, and the prosecutor may properly question and comment with regard to the defendant's failure to assert a defense subsequently claimed at trial."). Because the prosecutor did not violate defendant's rights by his questioning, trial counsel did not render ineffective assistance for failing to object to his proper questions. *Snider*, 239 Mich App at 425. Further, once a defendant waives his *Miranda* rights and speaks to police, he must affirmatively and unequivocally assert his right to remain silent. *People v Davis*, 191 Mich App 29, 35-36; 477 NW2d 438 (1991). See *People v Catey*, 135 Mich App 714, 722-723; 356 NW2d 241 (1984) (a defendant invokes his Fifth Amendment rights by "unequivocally" asserting that he desires to remain silent). The record is unclear whether defendant ever subsequently re-invoked his right to remain silent after he waived this right during the search and interview.

Defendant also challenges the prosecutor's closing argument that defendant failed to come forward between the search and trial. However, in the challenged passage, the prosecutor was actually referring to Pennell's failure to come forward with his version of the events, not defendant's failure. Counsel cannot be ineffective for failing to raise a meritless objection. *Snider*, 239 Mich App at 425.

Defendant also contends that his trial counsel provided deficient performance by failing to introduce evidence to rebut the prosecutor's charge that defendant's version of events was fabricated.

> "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy," which we will not second-guess with the benefit of hindsight. Furthermore, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. [*People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004), quoting *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).]

Defendant claims that his counsel should have admitted into evidence a letter written by Pennell, dated March 13, 2008, indicating that he gave defendant the box containing the drugs. Additionally, an affidavit by Sara Prose, a law student assisting the defense attorney with defendant's case, indicates that an otherwise unidentified man named Ed Brady accompanied defendant to a meeting with trial counsel where defendant and trial counsel discussed Pennell's confession, but trial counsel indicated that "he wanted to wait and bring it up towards the end as a smoking gun." On the record, defendant has failed to establish that his counsel's performance was deficient. MRE 801(d) states:

> (d) **Statements Which Are Not Hearsay.** A statement is not hearsay if—
>
> (1) *Prior Statement of Witness.* The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . .

Accordingly, the party offering a prior consistent statement must meet the following criteria to ensure the statement's admission:

> "(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose." [*People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000), lv den 463 Mich 920 (2000), quoting *United States v Bao*, 189 F3d 860, 864 (CA 9, 1999).]

Pennell's letter was purportedly written after the motive to falsify arose, i.e., two days after the raid and, based on the contents of the letter, after Pennell was aware that defendant was in trouble with the law as a result of the raid. Counsel was not ineffective for not attempting to admit inadmissible evidence. *Snider*, 239 Mich App at 425. Additionally, it is questionable whether the letter would have played a meaningful role in bolstering Pennell's testimony, given that the letter was not made under oath, notarized, or addressed to anyone, and given that the letter indicated that defendant planned to move in with Pennell and kept some personal items at the apartment. Prose's affidavit reflects that counsel was aware of Pennell's confession and was considering the most strategic way in which to use it. Thus, assuming the affidavit's contents are true, the fact that defense counsel presented Pennell's testimony and not the letter reflects a strategic decision. Defendant has not overcome the presumption that counsel's decision regarding what evidence to present was a matter of sound trial strategy. *Dixon*, 263 Mich App at 398.

Defendant also argues that his counsel failed to admit testimonial evidence that he told his mother, Sheila Madison, and Daniel Truhn after the raid that the drugs were not his and Pennell handed defendant the box with drugs before the police entered the apartment. Again, defendant's purported statements to Truhn and Sheila were given between the time of the raid and trial, and thus were not given before defendant had a motive to fabricate. *Jones*, 240 Mich App at 707. Again, counsel is not ineffective for not attempting to admit inadmissible evidence. *Snider*, 239 Mich App at 425. As defendant notes, their affidavits reflect that defense counsel was aware that Sheila and Truhn could present such testimony. Sheila and Truhn testified at trial, but defense counsel did not elicit this proposed testimony. Presumably, counsel's decision not to elicit the proposed testimony reflects a strategic choice, which this Court "will not second-guess with the benefit of hindsight." *Dixon*, 263 Mich App at 398. Further, defense counsel argued that the drugs belonged to Pennell, and defendant indicated that he told counsel his story the day after the raid. *Id.*

Finally, defendant argues that the trial court erred in denying his motion to produce and admit tape recordings involving a confidential informant and Pennell engaging in controlled drug transactions, which led to the issuance of the search warrant and raid of the apartment. Again, we disagree.

We review the trial court's decision to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). The trial court abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id.* The trial court's decisions regarding discovery matters are also reviewed for an abuse of discretion. *People v Davie* (*After Remand*), 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

We conclude that the trial court did not abuse its discretion by refusing to require production of or allow the admission of the tape recordings. The trial court held that the tapes were not relevant to whether defendant committed the charged offenses, and at best they showed that someone else might have committed a different crime at a different time. The trial court subsequently allowed defense counsel to elicit from Pennell that he was the only seller and possessor of the drugs. Evidence that Pennell sold marijuana to the confidential informant in the days preceding the execution of the search warrant would not tend to prove or disprove whether defendant possessed the Vicodin and marijuana with intent to deliver on March 11, 2008. MRE 401. Defendant was not charged with any crimes arising from the controlled buys. Although the controlled buys led to obtaining the search warrant, there was otherwise no connection between the controlled buys, the informant, and defendant. Further, the tapes would not have sufficiently connected Pennell with the crimes charged against defendant and they would not have proved or disproved a material fact in issue at trial. *Holmes v South Carolina*, 547 US 319, 324, 327-329; 126 S Ct 1727; 164 L Ed 2d 503 (2006).

In addition, defendant has failed to establish that withholding favorable material evidence violated his due process rights. The record does not indicate that the informant and the controlled buy evidence would raise a reasonable doubt about defendant's guilt for the charged offenses. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). Additionally, the record indicates that the requested materials were protected from disclosure. MCR 6.201(C)(1); *People v Sammons*, 191 Mich App 351, 368; 478 NW2d 901 (1991). The recordings would disclose the informant's confidential identity and could not be redacted. The record does not support a conclusion that the recordings would be helpful or essential to defendant's case given that the prosecutor affirmed that he would not introduce (and did not introduce) any information regarding the controlled buys or the confidential informant at trial. Moreover, defendant was able to present the defense that the drugs belonged to Pennell and that Pennell was the individual who sold drugs; thus, defendant was not deprived of his due process right to present a defense. A defendant's right to present a defense may be limited by the rule precluding irrelevant evidence. *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008).

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Donald S. Owens