STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2016
v	No. 328501 Kalamazoo Circuit Court
HYMAN DAMETRIOUS JOHNSON, Defendant-Appellant.	LC No. 2014-001686-FH

Before: SAWYER, P.J., and MARKEY and O'BRIEN, JJ.

PER CURIAM.

Defendant, Hyman Dametrious Johnson, was convicted by a jury of one count of delivering and manufacturing less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), one count of delivering and manufacturing less than 50 grams of heroin, MCL 333.7401(2)(a)(*iv*), one count of receiving and concealing a stolen firearm, MCL 750.535b, two counts of possession of a firearm during the commission of a felony, MCL 750.227b, one count of felon in possession of a firearm, MCL 750.224f, one count of maintaining a drug house, MCL 333.7405(d), and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, and as a second-offense controlled-substance offender under the Public Health Code, MCL 333.7413, to five to 40 years in prison for the manufacturing convictions and as a fourth-offense habitual offender to 18 months to 15 years in prison for the receiving and concealing, felon in possession, and maintaining a drug house convictions, two years in prison for the felony firearm convictions, and 57 days in jail for the possession conviction. We affirm in part but remand for resentencing.

On appeal, defendant argues that resentencing with respect to his delivering and manufacturing convictions is required because the trial court erroneously increased his minimum sentencing range by considering his status as a fourth-offense habitual offender under MCL 769.12, as well as a second-offense controlled-substance offender under MCL 333.7413. The prosecution concedes the same on appeal, and we agree. Accordingly, we remand this matter for resentencing with respect to defendant's delivering and manufacturing convictions. See *People v Fetterley*, 229 Mich App 511, 540-541; 583 NW2d 199 (1998).

Defendant also raises three additional arguments in a pro se brief filed pursuant to Administrative Order 2004-6, Standard 4. First, defendant argues that he was deprived of his constitutional right to the effective assistance of counsel. Second, defendant argues that the trial

court failed to provide defense counsel with a sufficient opportunity to review the presentence investigation report. Third defendant argues that he was deprived of his constitutional right to due process because he was not afforded notice or a hearing with respect to changes made to the judgment of sentence. We disagree in all three respects.

First, defendant's ineffective-assistance claim presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error. *People v Lopez*, 305 Mich App 686, 693-694; 854 NW2d 205. Questions of law, including constitutional determinations, are reviewed de novo. *Id*. When an ineffective-assistance claim is not properly preserved for appellate review, this Court's review is limited to mistakes apparent on the record. *Id*. In order to succeed on an ineffective-assistance claim, a defendant must prove that defense counsel's performance fell below an objective standard of reasonableness as well as that, but for defense counsel's shortcomings, a different result of the proceedings was reasonably probable. *People v Armstrong*, 490 Mich 281, 290; 806 NW2d 676 (2011). There is a strong presumption that counsel's performance constituted effective assistance of counsel, *LeBlanc*, 465 Mich at 578, and it is the defendant's burden to prove otherwise on appeal, which includes the burden to establish the factual predicate for his claim, *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Applying those rules to defendant's arguments on appeal, we discern no errors requiring relief. Defendant first claims that reversal is required because defense counsel failed to challenge discrepancies between the investigator's statements in an affidavit submitted with a search warrant and the investigator's preliminary-examination testimony. The affidavit is not in the record. Thus, by failing to establish the factual predicate for his claim, defendant has failed to satisfy his burden on appeal. *Hoag*, 460 Mich at 6. Indeed, without the affidavit, we simply cannot provide meaningful review in this regard. Defendant additionally argues that defense counsel was ineffective in failing to adequately investigate, failing to adequately provide and challenge evidence, and failing to make compelling arguments at trial. These arguments, which are made in the vaguest sense, are abandoned and not supported by the record. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant also claims that reversal is required because defense counsel's license to practice law was suspended at some point during the proceedings in this matter. Again, however, there is nothing in the record to support this assertion; thus, defendant has failed to satisfy his burden. *Id*. Furthermore, the dispositive issue is an attorney's effectiveness, not the status of his or her license, and defendant makes no arguments regarding defense counsel's effectiveness other than those that we have already rejected. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996).

Second, defendant's argument with respect to the presentence investigation report implicates MCR 6.425(B), which provides as follows: "The court must provide copies of the presentence report to the prosecutor, and the defendant's lawyer, or the defendant if not represented by a lawyer, at a reasonable time, but not less than two days, before the day of sentencing." According to defendant, the report was provided to defense counsel ten minutes, not at least two days, before sentencing. However, there is nothing in the record to support this claim, and it is his, not our, burden to provide the factual basis for his claim. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000).

Third, defendant's argument with respect to corrections made on the judgment of sentence implicates MCR 6.435, which authorizes the trial court to correct clerical mistakes in a judgment of sentence on its own initiative. No notice or hearing is required. Furthermore, defendant does not identify, much less take issue with the accuracy of, any of the allegedly improper corrections. In fact, the only correction we are able to identify involves his address. Thus, we find no error requiring relief.

Affirmed in part and remanded for resentencing with respect to defendant's delivering or manufacturing convictions. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Colleen A. O'Brien