

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 11, 2013

v

KEITH MOORE,

No. 303750
Wayne Circuit Court
LC No. 10-011562-FH

Defendant-Appellant.

ON REMAND

Before: JANSEN, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

This case is back before us on remand from our Supreme Court. In our original opinion, we rejected defendant’s claim of ineffective assistance of counsel because there was no record evidence to support his claim. We specifically noted that defendant made no effort to expand the record by moving for remand. *People v Moore*, unpublished opinion per curiam of the Court of Appeals, issued June 14, 2012 (Docket No. 303750), slip op at 3. On February 6, 2013, our Supreme Court vacated our determination regarding ineffective assistance of counsel and remanded for reconsideration, noting that defendant’s Standard 4 brief “contained two requests for a remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973),” and that defendant attached four affidavits to his Standard 4 brief in support of his ineffective assistance of counsel claim.¹ *People v Moore*, 493 Mich 933; 825 NW2d 580 (2013). Upon further review of defendant’s claims, we conclude that remand for a *Ginther* hearing is necessary to develop a factual basis regarding one of defendant’s claims.²

¹ Our Supreme Court vacated the portion of the original opinion resolving defendant’s ineffective assistance of counsel claim set forth in his Standard 4 brief and remanded back to this Court for reconsideration of that issue only. The Supreme Court denied leave to appeal our opinion in all other respects.

² We note that defendant never filed a motion for remand with this Court, and that in his Standard 4 brief defendant did not include any request for remand in the statement of his issues presented; rather, in his prayer for relief in two sections of his brief defendant, without any

Whether to grant a motion to remand is within the discretion of this Court, and we consider whether the moving party has demonstrated that the issue is meritorious. *People v Hernandez*, 443 Mich 1, 14-15; 503 NW2d 629 (1993), abrogated on other grounds *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997). Remand is proper if a factual record is required for appellate consideration of the issue. MCR 7.211(C)(1)(a)(ii). The moving party must support any request for development of a factual record with an affidavit or other offer of proof. MCR 7.211(C)(1).

Defendant argued that defense counsel was ineffective because he failed to investigate and call defendant's siblings as witnesses and he failed to move to suppress the evidence on the basis of the sufficiency of the affidavit in support of the search warrant. In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

We first consider defendant's claim that the affidavit in support of the search warrant was insufficient and defense counsel should have moved to suppress the evidence. Defendant attached the affidavit and warrant to his Standard 4 brief.³ In the affidavit, the affiant attests that a confidential informant advised that on March 1, 2010, he had observed more than six ounces of cocaine inside the subject residence and saw defendant sell ounces of cocaine several times. Further, the affiant ascertained that Keith Moore was the taxpayer for the residence and that he had a prior conviction and a prior arrest for narcotics violations, and the affiant conducted surveillance on March 2, 2009, and twice observed "a black male 5'6" medium build" leave the residence and enter a vehicle parked in front of a neighboring house for approximately 2 to 3

citation to authority, asked that his convictions be reversed or that alternatively, we remand for a *Ginther* hearing. MCR 7.211(C)(1)(a)(ii) indicates that a defendant seeking a remand for "development of a factual record . . . required for appellate consideration" of an issue sought to be reviewed on appeal should file a motion to remand "[w]ithin the time provided for filing the appellate brief." In the present case, we granted a motion to extend the time for filing the Standard 4 brief, *People v Moore*, unpublished order of the Court of Appeals, entered February 29, 2012 (Docket No. 303750). However, as we noted in our original opinion, defendant did not file a motion to remand, timely or otherwise. A defendant may not expand the record on appeal. *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999). Where there has been no motion for a new trial or a *Ginther* hearing in the trial court, a claim of ineffective assistance of counsel is deemed waived except to the extent that it is supported by the record on appeal. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). However, we recognize that there is nothing in the court rules to suggest that a defendant may or may not simply request a remand in an appellate brief under MCR 7.212(C)(8). Nevertheless, MCR 7.216(A)(5) and (7) provides authority to remand for an evidentiary hearing without a motion from the defendant.

³ However, defendant's attachments were not part of the trial court record.

minutes and then return to the residence, and that based on the informant's information and the surveillance, the affiant believed the activity was consistent with narcotics sales.

Defendant argues that a single controlled purchase of contraband will not establish an "ongoing pattern of violation," that here there was not even a controlled buy, and that the affidavit did not establish "an ongoing pattern of violation" to support a conclusion that drugs would be found in the home at the time of the search. Moreover, he points out that the informant said sales were taking place in the home but the surveillance did not confirm this, and that there was no substantiation that the encounters observed during surveillance were narcotics transactions. He maintains that two suspected buys alone would not give rise to probable cause, and suggests that the affidavit was stale or did not lead to a reasonable conclusion that narcotics would be found at the residence at the time the warrant was executed.

A magistrate's determination of probable cause is not reviewed de novo; it "should be paid great deference by reviewing courts." *People v Keller*, 479 Mich 467, 474; 739 NW2d 505 (2007). "Probable cause exists when the facts and circumstances would allow a reasonable person to believe that the evidence of a crime or contraband sought is in the stated place." *People v Waclawski*, 286 Mich App 634, 698; 780 NW2d 321 (2009). Courts should consider whether the totality of the circumstances indicates that evidence or contraband will be found at a particular time and place. *Illinois v Gates*, 462 US 213, 238; 103 S Ct 2317; 76 L Ed 2d 527 (1983); *People v Hawkins*, 468 Mich 488, 502 n 11; 668 NW2d 602 (2003).

Under the totality of the circumstances analysis, the information provided in the affidavit is sufficient to allow a reasonable person to believe cocaine would be found at the location searched on the date the warrant was executed. Any motion by defense counsel to suppress the evidence on the basis that the search warrant was invalid would have failed. Defense counsel is not ineffective for failing to make a futile motion. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011). Accordingly, defendant has failed to demonstrate any merit to this claim of ineffective assistance of counsel.

We next consider defendant's claim that defense counsel was ineffective for failing to interview his siblings and call them as witnesses during trial. In support of his claim, defendant attached affidavits executed by Patrina, LaKeisha, and Kevin Moore to his Standard 4 brief.⁴ In the affidavits, Patrina, LaKeisha, and Kevin all attested that they were defendant's siblings, that they lived with each other at the home searched, which was owned by their parents, Keith and Denise Moore, and that they were present during the search. They further all averred that defendant does not live with them and was not present during the search. They described circumstances from which they maintain that the police violated the knock-and-announce rule when executing the search warrant. They also all averred that the cocaine was located in the kitchen when found during the search. To the contrary, the police testified that the cocaine was found in a bedroom that also contained items belonging to defendant.

⁴ Again, we note that these affidavits were not part of the trial court record.

Defendant argues that if defense counsel would have interviewed his siblings before trial, defense counsel could have had the evidence against him suppressed due to the fact that the police violated the knock-and-announce rule. Further, defendant maintains that if his siblings had testified during trial regarding the discrepancies between their memory of the search and the police testimony, their testimony would have established a reasonable doubt regarding whether he possessed the cocaine.

“In general, the failure to call a witness can constitute ineffective assistance of counsel only when it ‘deprives the defendant of a substantial defense.’” *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), quoting *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Marshall*, 298 Mich App 607; __ NW2d __ (2012), slip op at 2 (quotation marks and citation omitted). The failure to make a reasonable investigation can constitute ineffective assistance of counsel. *Id.*

First, we find defendant’s argument regarding the alleged violation of the knock-and-announce rule unavailing because under Michigan law, a knock-and-announce violation does not trigger the exclusionary rule when “the discovery of the evidence was independent of the officers’ failure to comply with the statutory ‘knock and announce’ requirement.” *People v Sobczak-Obetts*, 463 Mich 687, 709-710; 625 NW2d 764 (2001), citing *People v Stevens*, 460 Mich 626, 646-647; 597 NW2d 53 (1999). Moreover, the failure of the police to provide a warrant similarly does not require exclusion of evidence found pursuant to execution of that warrant. *Sobczak-Obetts*, 463 Mich at 710. These requirements are ministerial in nature and do not affect the validity of a warrant and, as long as discovery of the evidence did not depend on compliance with the requirements, their violation does not invalidate a search made pursuant to a warrant. The facts of this case, including the validity of the warrant, indicate the police would have discovered the same evidence regardless of whether they announced their presence and waited to enter or provided the occupants with a copy of the warrant. Accordingly, defendant’s presentation of testimony that the officers failed to follow these requirements would not have provided a substantial defense.

Next, we find potential merit to defendant’s argument that the siblings’ testimony would have tended to establish that the cocaine was not found in the bedroom closet next to a scale and mail addressed to defendant, but in the kitchen, and that this would have tended to refute the evidence of constructive possession.

The test for constructive possession is whether “the totality of the circumstances indicates a sufficient nexus between defendant and the contraband.” “Although not in actual possession, a person has constructive possession if he knowingly has the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons” [*People v Minch*, 493 Mich 87, 91-92; 825 NW2d 560 (2012), quoting *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002), and *People v Flick*, 487 Mich 1, 14; 790 NW2d 295 (2010).]

While finding the cocaine in the kitchen may still be sufficient to conclude defendant had constructive possession of the substance, we cannot conclude with certainty that the jury would

not have found a reasonable doubt regarding constructive possession after hearing defendants' siblings' testimony. Had the jury heard from the siblings that they lived in the house but defendant did not, and had the jury heard that the cocaine was found in the kitchen, not in a bedroom that appeared to be defendant's bedroom, the jury might have concluded that one of the others had dominion or control over the cocaine or that the prosecutor had not established that defendant was one of the people exercising dominion and control beyond a reasonable doubt. Under these circumstances, remand for a *Ginther* hearing, at which the siblings can be called as witnesses and counsel can explain why they were not interviewed or called, is warranted.

Therefore, we conclude that defendant has failed to demonstrate ineffective assistance of counsel in regard to all of his claims except the claim that counsel provided ineffective assistance by failing to investigate or call defendant's siblings as witnesses. We remand for a *Ginther* hearing regarding that claim.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra