STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH LEWIS COLBERT,

Defendant-Appellant.

UNPUBLISHED
August 20, 1996

No. 174716
LC No. 93-8780-FH

Before: McDonald, P.J. and Markman and C. W. Johnson,* JJ.

PER CURIAM.

Defendant appeals by right his 1994 bench trial conviction of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). We affirm.

Defendant, while on parole for a previous drug offense, sold two $20 rocks of cocaine to an undercover officer. His defense was that he was not in Bangor, where the offense occurred, on the day in question.

On appeal, defendant first claims that the trial court did not follow the waiver and record requirements for waiver of trial by jury. MCR 6.402(B) states:

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

Here, all these requirements were met at the final pretrial hearing. Defendant contends that his waiver was involuntary because it resulted from misleading statements by his counsel. A trial court is not required to inquire whether a waiver of jury trial is predicated on any promise of leniency or other misleading statements. *People v Margoes*, 141 Mich App 220, 223-224; 366 NW2d 254 (1985). Thus, we find no error in the acceptance of defendant's waiver of jury trial.

* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant next contends that he was denied the effective assistance of counsel. In order to justify reversal of an otherwise valid conviction on the basis of ineffective assistance of counsel, "a defendant must show that a counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303: 521 NW2d 797 (1994). Specifically, he claims 1) that his counsel was unprepared for trial and failed to call the alibi witnesses to testify; 2) that he persuaded defendant to waive his right to trial by using inappropriate scare tactics and erred in recommending a bench trial when the judge was aware of defendant's prior criminal history; and 3) that he elicited defendant's prior criminal history during direct examination of defendant. A defendant may not "harbor error as an appellate parachute" by predicating error on conduct of his counsel to which he specifically acquiesced at trial. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Here, on the record, defendant agreed that he and his counsel chose not to call the subpoenaed alibi witnesses. As discussed above, he waived his right to jury trial on the record. He testified regarding his past history of selling drugs in response to his counsel's question regarding why he did not want to live in Bangor, where the offense at issue occurred. This line of questioning did not *require* defendant to divulge his own prior drug dealings in Bangor; he could have responded that he stayed out of Bangor to avoid the drug culture there without divulging his prior participation therein. His counsel cannot be faulted for defendant's decision to detail this history. Accordingly, under *Barclay*, he may not now seek redress for courses of action he chose to take. Further, decisions regarding which witnesses to call, whether to waive a jury trial and what defense to offer are matters of trial strategy. This Court will not second-guess a defense counsel's strategy. *People v Newton (After Remand)*, 179 Mich App 484, 493; 446 NW2d 487 (1989). Accordingly, these claimed errors do not constitute ineffective assistance of counsel.

Finally, defendant contends that he was denied his right of allocution. MCR 6.425(D)(2)(c) states in pertinent part:

> At sentencing, the court, complying on the record, must:
>
> * * *
>
> (c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence . . . .

This rule "requires strict compliance and should be understood in all cases to require the trial court to inquire specifically of the defendant separately whether he or she wishes to address the court before the sentence is imposed." *People v Berry*, 409 Mich 774, 781; 298 NW2d 434 (1980). When the trial court fails to strictly comply with this rule, resentencing is required. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 453; 506 NW2d 542 (1993). Here, the court failed to give defendant an opportunity to address the court himself before imposition of his sentence. Accordingly, we will remand this matter for resentencing.

Affirmed but remanded for resentencing.

/s/ Gary R. McDonald
/s/ Stephen J. Markman
/s/ Charles W. Johnson