STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT GARY SOKOLOWSKI,

Defendant-Appellant.

UNPUBLISHED
July 18, 1997

No. 180996
Macomb Circuit Court
LC No. 94-000453

Before: Markey, P.J., and Reilly and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii), and maintaining premises for use or sale of a controlled substance, MCL 333.7405; MSA 14.15(7405), and MCL 333.7406; MSA 14.15(7406). Defendant was sentenced to twelve to forty-eight months' imprisonment for the possession with intent to deliver marijuana conviction and ninety days' imprisonment for the maintaining a premises for use or sale of a controlled substance conviction, to be served concurrently. Defendant appeals of right. We affirm in part, but remand for a determination whether defendant knowingly and voluntarily waived his right to trial by jury.

Detective Solowski[1] of the Sterling Heights Police Department received a tip from a confidential informant that defendant was operating an ongoing drug enterprise out of his house. Defendant's ownership of the residence was confirmed, and the police later executed a "trash rip" of defendant's garbage. Detective Solowski discovered plant material in defendant's garbage, which was field-tested and determined to be marijuana, along with mail addressed to defendant. Subsequently, Detective Solowski was again contacted by the informant, who notified him that defendant had "re-upped" his supply of marijuana.

On January 24, 1994, Detective Robert Smith of the Sterling Heights Police Department filed an affidavit for a search warrant. The affidavit stated that according to information provided by a confidential informant, as well as information acquired by a follow-up investigation, Detective Smith

believed that marijuana would be found within defendant's residence. On January 24, 1994, a search warrant for defendant's residence was issued by a district court judge.

On January 24, 1994, a search warrant was executed at defendant's residence. Defendant arrived while the officers were executing the search, and the police did not allow him to enter his residence. The police found approximately ten ounces of marijuana, scales, and approximately $2,100 in cash. Based on this evidence, defendant was arrested and charged with possession with intent to distribute marijuana, and maintaining a house used for the keeping and selling of marijuana.

On September 15, 1994, the trial court heard defendant's motion to quash the search warrant and denied the motion. A bench trial was held the same day. After hearing the testimony of Detectives Solowski and Gurnow of the Sterling Heights Police Department, as well as the testimony of Danuta and Phillip Sokolowski, defendant's wife and son, respectively, the trial court found defendant guilty of both possession with intent to deliver marijuana and maintaining a premises for use or sale of a controlled substance.

I

Defendant first argues that the trial court erred by failing to adequately establish that defendant's waiver of his right to a trial by jury was made voluntarily. We agree. This Court reviews the propriety of a defendant's waiver of a trial by jury de novo. *People v Reddick*, 187 Mich App 547, 550; 468 NW2d 278 (1991).

The right to a trial by jury is guaranteed by both the United States and Michigan Constitutions. US Const, Amend VI, XIV; Const 1963, art 1, sec 20. MCR 6.402(B) provides:

> 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.

Because the record is devoid of any statements or references to waiver of a trial by jury and thus fails to demonstrate that defendant knowingly and voluntarily waived that right, we must remand to the trial court for a determination whether defendant understood his right to a trial by jury and voluntarily waived that right. See *People v James*, 437 Mich 988; 469 NW2d 294 (1991). The court shall decide the matter within twenty-eight days of the release of this opinion. The court may conduct any proceedings it deems necessary to adequately address the issue, and shall fully state its findings on the record. If the court determines that defendant understood his right to a jury trial and voluntarily chose to give up that

right, the court shall enter an order so finding. If the court is unable to conclude that the waiver was understanding and voluntary, defendant's convictions must be set aside and defendant must be retried.

II

Defendant also argues that he is entitled to resentencing because the sentencing guidelines were incorrectly scored based on an inaccurate presentence investigation report (PSIR). Defendant unsuccessfully raised this issue below in a motion for resentencing and later filed a motion to remand in this Court which was also denied. We find no error requiring reversal.

Defendant's challenge to the guidelines scoring of OV 16, that there was not a showing of possession of substances having such dollar value or under circumstances as to indicate trafficking, does not state a cognizable claim for relief. *People v Mitchell*, 454 Mich 145, 176-177, 176 n 37; 560 NW2d 600 (1997). Defendant's challenge is directed to the court's calculation of the sentencing variable on the basis of its discretionary interpretation of the facts. There is no jurisdictional basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables. *Id.*

Defendant's challenge to PV 2 is, however, a challenge to the accuracy of underlying factual information. *Id.* at 176-177, and 176 n 37. Defendant correctly asserts that his 1989 guilty plea conviction for attempted discharge of a cs device,[2] MCL 750.224d; MSA 28.421(4), MCL 750.92; MSA 28.287, was not a felony, but a misdemeanor. Defendant's score for PRV 2 should thus have been zero, and not ten points. However, because defendant's PRV 5 score was correctly scored at fifteen points for two or three prior misdemeanor convictions (larceny in a building and attempted discharge of a cs gas device, a weapons-related conviction) defendant's recommended guidelines' range would still be zero to twelve months. Accordingly, any error in characterizing the misdemeanor as a felony was harmless. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

III

Defendant next argues that the trial court erred by failing to dismiss the case on double jeopardy grounds where defendant's civil forfeiture proceeding and criminal prosecution arose from the same offense. We disagree.

The United States Supreme Court in a recent decision, *United States v Ursery*, ___ US ___; 116 S Ct 2135; 135 L Ed 2d 549 (1996), noted that its cases involving review of civil forfeitures under the Double Jeopardy Clause adhered to a "remarkably consistent theme," i.e., in rem civil forfeiture is a remedial civil sanction, distinct from potentially punitive in personam civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause. *Ursery* was adopted by this Court in *People v Acoff*, 220 Mich App 396, 399; 559 NW2d 103 (1996), in which this Court held that the test to determine whether a civil forfeiture violates an individual's rights against double jeopardy is whether a defendant presents the clearest proof indicating that the forfeiture is so punitive in purpose or effect that it is equivalent to a criminal proceeding.

Defendant argued below in a motion to dismiss on double jeopardy grounds that in a civil forfeiture proceeding in Macomb Circuit Court, $2,130 dollars were forfeited to the City of Sterling Heights. *Ursery, supra*, which was decided after defendant filed his motion to dismiss below and after he filed his appellate brief, reversed two decisions defendant relied on which held that civil forfeitures always constitute "punishment" for double jeopardy purposes, *United States v Ursery*, 59 F3d 568 (CA 6, 1995), and *United States v $405,089.23 in United States Currency*, 33 F3d 1210 (CA 9, 1994). Defendant's claim fails under *Acoff, supra,* because he has not presented the "clearest proof" indicating that the forfeiture is "so punitive in purpose or effect" that it is equivalent to a criminal proceeding.

IV

Defendant next argues that the affidavit upon which the search warrant was issued was defective, and thus, the warrant was improperly issued. Consequently, defendant argues that the evidence procured from the search warrant must be suppressed, which leaves insufficient evidence to sustain his conviction. We disagree.

In reviewing a magistrate's decision to issue a search warrant, this Court must evaluate the search warrant and underlying affidavit in a common-sense and realistic manner in order to determine whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for the magistrate's finding of probable cause. *People v Poole*, 218 Mich App 702, 705; 555 NW2d 485 (1996).

A search warrant may not issue unless probable cause exists to justify the search. US Const, Amend IV; Const 1963, art 1, sec 11; MCL 780.651; MSA 28.1259(1); *People v Sloan*, 450 Mich 160, 166-167; 538 NW2d 380 (1995). MCL 780.653; MSA 28.1259(3), provides:

> The magistrate's finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:
>
> (a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
>
> (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

Defendant argues that the affidavit failed to affirmatively allege that the unnamed informant was credible or reliable. However, in response to the information provided by the informant, the police performed a "garbage rip" which yielded marijuana residue. The search warrant affidavit stated that the police, after receiving information from the confidential informant, conducted a garbage rip at defendant's residence and that marijuana plant material was found and tested by Detective Solowski. The affidavit further stated that after the garbage rip, the confidential informant contacted Solowski and told him defendant had replenished his marijuana supply and was attempting to sell it. Under these circumstances, we agree with the trial court that the police's investigation following the informant's tip, which produced corroborating evidence, constituted a sufficient basis by which the district court judge could determine that the informant was credible or reliable. *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992). We therefore conclude that there was a substantial basis for the magistrate to conclude the informant spoke with personal knowledge and was credible or reliable.

V

Defendant's final argument is that he was denied effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

This 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 Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Effective assistance is presumed and defendant has the burden of proving otherwise. *Stanaway*, *supra* at 687. Defendant filed a motion to remand for a *Ginther*[3] hearing in this Court, which was denied. Because no hearing was held, review of defendant's claim is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

We need not address defendant's argument that trial counsel's failure to act upon defendant's ineffective waiver of his right to a trial by jury constituted ineffective assistance of counsel because we are remanding to the trial court on the waiver issue.

Defendant also asserts that his trial counsel was ineffective because of the failure to assert the defense of insanity. However, the decision whether to assert the defense of insanity is a question of trial strategy, and thus, does not constitute ineffective assistance of counsel. *People v Newton (After Remand)*, 179 Mich App 484, 493; 446 NW2d 487 (1989); *People v Lotter*, 103 Mich App 386, 390; 302 NW2d 879 (1981). A 1989 judgment of not guilty by reason of insanity does not, in and of itself, support the assertion that defendant had a viable insanity defense to the instant charges.

Defendant next asserts that he was denied effective assistance because trial counsel failed to disclose the PSIR to defendant prior to sentencing. As discussed above, any error in the scoring of the guidelines was harmless, thus defendant has not shown that had counsel properly objected, the result would have been different. Therefore, this argument must fail. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995).

Defendant's final claim is that defendant's counsel who initially filed his claim of appeal was ineffective by failing to mitigate the harm to defendant by attempting to stay the time in which defendant would have to file the necessary appellate pleadings upon his withdrawal. The same test which is applied to a claim of ineffective assistance of trial counsel applies to a claim of ineffective assistance of appellate counsel. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Defendant has failed to identify any specific appellate pleadings which were precluded due to the withdrawal of his initial appellate counsel. Further, defendant's brief on appeal is properly before this Court. Accordingly, defendant has not suffered any prejudice as a result of his initial appellate counsel's withdrawal.

Affirmed in part, but remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Maureen Pulte Reilly
/s/ Helene N. White

[1] The detective's name is spelled "Solowski" in the trial transcript and the prosecution's appellate brief, and "Selewski" in the preliminary examination transcript and search warrant affidavit.

[2] Although plaintiff claims defendant was convicted of a different offense, the only document before the court indicates otherwise.

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