STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 1998
v	No. 196333 Kent Circuit Court
EARL LEE WALKER, Defendant-Appellant.	LC No. 93-064078 FH

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Defendant appeals by right his jury conviction of possession with intent to deliver fifty or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii). Defendant subsequently pleaded guilty to being a third offense habitual offender, MCL 769.11; MSA 29.1083, and was sentenced to fourteen to twenty-two years' imprisonment. We affirm.

I

Acting on a tip that two men were selling cocaine and staying somewhere in the 600 block of Adams Street in Grand Rapids, Grand Rapids police officer Richard Nawrocki and another officer drove to that location and saw defendant exit a house, get in a vehicle matching the description the officers had been given, and begin driving around town. Nawrocki knew that defendant was on parole, and learned that one of the conditions of his parole was that he not drive an automobile without the written permission of his parole officer. Nawrocki contacted Mike Hogan, the supervisor of the Grand Rapids office of the State Parole Division, who authorized a parole detainer of defendant. Nawrocki then obtained a picture of defendant and returned, with other officers, including Hogan, to the Adams street residence to investigate defendant's possible parole violation.

Defendant came to the door when Hogan knocked on it. Hogan identified himself and asked if Earl Walker was there and defendant said, "There's nobody named Earl here," and stepped back into the house. When another officer recognized defendant as being Earl Walker, the officers followed defendant into the house and arrested defendant. A search of defendant revealed twenty-seven grams of crack cocaine in his pants pocket, along with a pager and a large amount of cash.

Mavis Poindexter, who was inside the house when defendant was arrested, stated that she was the owner of the house and gave Nawrocki her oral and written consent to search the premises. Among the items seized pursuant to the search was a blue duffel bag discovered in the upstairs bedroom. The duffel bag contained several documents with defendant's name on them, a one-ounce hand scale, and a brown paper bag with approximately $1600 in cash. Directly beneath the duffel bag was a large plastic bag containing some clothing, including a pair of jeans with over ninety grams of cocaine in a pocket.

At trial, defense counsel acknowledged that defendant possessed the cocaine found in his pocket when the police searched him. However, counsel argued that defendant was not in possession of the cocaine found upstairs, stressing that many people had access to the upstairs room, and that there was no relationship between the duffel bag that belonged to defendant and the plastic bag containing the cocaine which was found underneath it.

The jury found defendant guilty of possession with intent to deliver more than fifty grams, but less than 225 grams, of cocaine. After being sentenced to twelve to twenty years' imprisonment, defendant pursued an appeal. The appeal was eventually dismissed, and defendant pleaded guilty to the charge of third offense habitual offender and was resentenced to fourteen to twenty-two years imprisonment. A second claim of appeal was filed, and this Court remanded the case for a *Ginther*[1] hearing regarding defendant's allegation that his trial counsel was ineffective because of a lack of preparation. *People v Walker*, unpublished order of the Court of Appeals, entered December 12, 1996 (Docket No. 196333). After the evidentiary hearing, the trial court determined that defendant had failed to meet his burden of establishing that counsel was ineffective. This appeal followed.

II

We first address defendant's claim that he was denied the effective assistance of counsel. Defendant argues that because of a lack of time for trial preparation, defense counsel's conduct at trial was completely deficient, effectively depriving him of counsel in violation of the Sixth Amendment. *United States v Cronic*, 466 US 648, 658-659; 104 S Ct 2039; 80 L Ed 2d 657 (1984). We disagree.

Defense counsel Fred Johnson was assigned as trial counsel in November 1993 and trial did not begin until February 1994. The record reveals that Johnson both prepared for trial and conducted himself as defendant's advocate during trial. He adequately cross-examined the prosecution's witnesses and presented an appropriate opening and closing argument. In sum, we find no basis to conclude that defendant suffered a functional or constructive denial of counsel.

We now turn to defendant's claim in light of the *Strickland*[2] test. Unlike the *Cronic* test, which addresses counsel's overall performance, the *Strickland* test addresses specific errors made by counsel:

> [T]he *Strickland* test applied in Michigan requires that a defendant claiming ineffective assistance based on defective performance has the burden of showing that counsel's

> performance fell below an objective standard of reasonableness and that there is a reasonable probability that but for the unprofessional errors the result of the proceeding would have been different. [*People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997).

Defendant claims that because counsel failed to obtain the preliminary examination transcript before trial, counsel was unable to use it to conduct critical impeachment of prosecution witnesses at trial. We find this argument unpersuasive, as the alleged discrepancies cited by defendant are insignificant and there is no reasonable probability that they made a difference to the outcome of his trial.

Defendant argues that counsel's failure to file a motion to suppress the cocaine found on defendant and upstairs in the house constitutes ineffective assistance. After a careful review of the record, we agree with the trial court that probable cause existed for defendant's arrest, and that the search of his person was appropriate incident to that arrest. MCL 791.239; MSA 28.2309; MCL 764.15(1)(g); MSA 28.784(1)(g); *People v Solomon*, 220 Mich App 527, 529-530; 560 NW2d 651 (1996).[3] Regarding the subsequent search of the home, during which the ninety grams of cocaine were discovered underneath defendant's duffel bag, we find that defendant has failed to establish that Poindexter's consent to search the home was involuntary. Because the record fails to support defendant's assertion that a motion to suppress would have been successful, we cannot conclude that defense counsel's performance in this regard fell below an objective standard of reasonableness or that the representation prejudiced defendant.

Defendant next asserts that counsel's lack of preparation resulted in counsel's failure to review connected police reports that, according to defendant, would have led to exculpatory evidence implicating another individual whom officers had seen dealing cocaine outside of Poindexter's house prior to defendant's arrest. At trial, defense counsel argued to the jury that the cocaine found upstairs did not belong to defendant and could have belonged to any number of people who were in the house that night and who may have gone upstairs. It is unlikely that any failure to suggest that the cocaine found under defendant's duffel bag belonged to this one specific person would have changed the outcome of the trial. Therefore, defendant's argument must fail.

Defendant also claims that defense counsel's failure to file a motion in limine to exclude a handgun constitutes ineffective assistance of counsel. At trial, the prosecutor offered into evidence a revolver (which appeared not to be in working order) that was found underneath the cushion of a couch during the search of Poindexter's home. A police officer testified that it was not known who owned the gun and that everyone present during the search had disavowed knowledge of it. The trial court sustained defense counsel's objection on relevancy grounds. Although a defense motion in limine likely would have been successful, and we cannot condone the prosecutor's attempt to admit the weapon into evidence, we cannot say that the jury's viewing of the inoperable gun before being told by the court that it was irrelevant was outcome determinative here. Accordingly, defendant's argument on this ground is without merit.

Defendant's final argument is that trial counsel was ineffective for failing to challenge a police officer juror for cause. We disagree, as the potential juror was excused peremptorily by the defense.

III

Defendant next complains that he was not properly arraigned. Specifically, defendant contends that his waiver of arraignment was signed before any information existed and that the waiver was filed by his first assigned counsel after substitute counsel had been appointed. Because defendant failed to raise this issue until after his conviction on the underlying charge, it has not been preserved for our review. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994).

Notwithstanding this, however, we find that defendant's waiver of arraignment became effective when the information was filed. See *People v Swayne*, 139 Mich App 258, 263-264; 361 NW2d 788 (1984).[4] Although defendant argues that he was not afforded sufficient notice of the supplemental charges against him, the record reveals that the supplemental information was filed over six weeks prior to trial. Defendant thus received sufficient notice of the supplemental charges to adequately prepare for trial and negotiate with the prosecutor, and cannot now claim otherwise. *People v Walters*, 109 Mich App 734, 738-739; 311 NW2d 461 (1981), rev'd on other grounds 412 Mich 879, 313 NW2d 283 (1981). In sum, we find no support for defendant's claim that he was denied his rights to due process and to the effective assistance of counsel on this basis.

IV

Defendant argues that there was insufficient evidence to sustain his conviction for possession with intent to deliver more than fifty but less than 225 grams of cocaine. The elements of this offense are as follows:

> (1) the defendant knowingly possessed a controlled substance; (2) the defendant intended to deliver this substance to someone else; (3) the substance possessed was cocaine and the defendant knew it was cocaine; and (4) the substance was in a mixture that weighed between 50 and 225 grams. [*People v Crawford*, 458 Mich. 376, 389; 582 NW2d 785 (1998).]

On appeal, as he did at trial, defendant concedes that he possessed the twenty-seven grams of cocaine found in his pocket when he was arrested. However, he argues that the prosecution presented insufficient evidence of constructive possession regarding the ninety-three grams of cocaine found upstairs in the bedroom of the house. We disagree.

As defendant correctly notes, a person's mere presence at a place where drugs are found is insufficient to find constructive possession. Some additional connection between the defendant and the contraband must be shown. *People v Wolfe*, 440 Mich 508, 520; 489 NW2d 748 (1992), mod on other grounds, 441 Mich 1201 (1992). In the present case, police found a blue duffel bag in the upstairs bedroom that contained $1,600 in cash, a one-ounce scale, and several pieces of defendant's identification. Directly underneath the duffel bag was a plastic bag containing a pair of blue jeans, size 34 x 34,[5] in the pockets of which was found the cocaine at issue. Evidence was also presented that defendant had changed clothes before the police arrived.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to allow the jury to conclude beyond a reasonable doubt that defendant constructively possessed the cocaine found underneath his duffel bag. Consequently, we conclude that sufficient evidence was presented to sustain defendant's conviction.

V

Defendant's final argument is that the lengthy delay between the time the information was filed charging defendant as an habitual offender and the time that the charge was ultimately resolved with a guilty plea violated the 180-day rule contained in MCL 780.131; MSA 28.969(1) and MCR 6.004(D). Assuming, without deciding, that the 180-day rule applies to defendant's habitual offender charge,[6] we find that it was not violated because the record reveals that the prosecutor and the court, with reasonable diligence and steady progress, moved defendant's habitual offender charge to trial.

The 180-day rule does not require that trial commence within 180 days. Rather, if apparent good-faith action is taken well within the 180-day period, and the prosecutor proceeds promptly toward readying the case for trial, the rule is satisfied. *People v Bell*, 209 Mich App 273, 278; 530 NW2d 167 (1995). Here, defendant's trial on the habitual offender charge was initially scheduled for June 20, 1994, well within the requisite period. It is without question that a great portion of the delay in bringing the supplemental charges to trial is attributable to defendant's appeal; the other significant delay resulted from defense counsel's withdrawal in October 1995 and the subsequent stipulation by the newly appointed counsel to adjourn trial. Our review of the record satisfies us that there was not a violation of the 180-day rule in this case. *People v Crawford*, 161 Mich App 77, 83-84; 409 NW2d 729 (1987).

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Janet T. Neff

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

[2] *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[3] Although defendant places great emphasis on the fact that he may have been an overnight guest in Poindexter's home, this Court does not. First, because the record is ambiguous on this matter, it is unclear whether defendant had a legitimate expectation of privacy in the home. *Minnesota v Carter*, ___ US ___; ___ S Ct ___; ___ L Ed 2d ___ (No. 97-1147, decided 12/1/98). Second, even if we were to assume that defendant did have a legitimate expectation of privacy in Poindexter's home, it is clear that the police officers acted reasonably in following defendant from the threshold of the front door into the home to effectuate his arrest. See *United States v Santana*, 427 US 38, 42-43; 96 S Ct 2406, 2409-2410; 49 L Ed 2d 300 (1976) (where police have probable cause, suspect may not thwart arrest by retreating into her home).

[4] That the waiver was filed by first assigned counsel is of no import, as defendant signed the waiver when first counsel still represented him, and second assigned counsel testified that generally he recommends that his clients waive arraignment unless they demand it.

[5] The jurors were presented with evidence regarding the size of the other men in the house that evening, and were able to observe defendant and determine whether the jeans would fit him.

[6] We note that the 180-day rule clearly does not apply to habitual offender charges brought under the current version of MCL 769.13; MSA 28.1085.