

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICKEY JOSE RUIZ,

Defendant-Appellant.

UNPUBLISHED

November 30, 1999

No. 211441

Ingham Circuit Court

LC No. 98-072985-FH

Before: Sawyer, P.J., and Hood and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant Nickey Jose Ruiz of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court sentenced Ruiz as a second habitual controlled substance offender, MCL 333.7413(2); MSA 14.15(7413)(2), to ten to forty years' imprisonment. We affirm.

I. Ineffective Assistance Of Counsel

A. Standard Of Review

Because Ruiz did not move for a *Ginther* hearing¹ or a new trial on the basis of ineffective assistance of counsel, this Court's review is limited to review mistakes that are apparent on the record below. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

B. Jury Instruction On Addict Informer

Ruiz contends that he received ineffective assistance of counsel at trial because defense counsel should have requested a jury instruction on the credibility of an addict informer, CJI2d 5.7. We disagree.

For a defendant to successfully establish a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) counsel's representation prejudiced the defendant in a way that deprived him of a fair trial. *People v*

Pickens, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Stated another way, this second prong requires a defendant to show that, but for his counsel's error; there was a reasonable probability that he would have been acquitted, and that the trial was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 695; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). There is a strong presumption that effective assistance has been provided, and that counsel's decisions were a matter of trial strategy. *Stanaway*, *supra* at 687.

On this record, Ruiz received effective assistance of counsel. Defense counsel brought out at trial that the informer was an addict with two prior convictions, had criminal charges pending against him, and had a monetary motivation to lie. Also, in the context of a witness credibility cautionary instruction, the trial court told the jury to weigh the informer's credibility. Although it was not an effective assistance of counsel case, our Supreme Court held in *People v Atkins*, 397 Mich 163; 243 NW2d 292 (1976), that an addict informer cautionary instruction is unnecessary when the informer's credibility is fully placed before the jury. This reasoning applies well to the facts of this case. Under these circumstances, we are satisfied that defense counsel's performance did not fall below an objective standard of reasonableness and that defendant was not deprived of a fair trial.

C. Investigation And Production Of Evidence

Ruiz also contends that he received ineffective assistance of counsel because defense counsel failed to investigate or produce evidence that corroborated his innocence. We disagree. As previously noted, this Court's review is limited to mistakes apparent on the record. Here, the record is devoid of any documentation that defense counsel failed to investigate this evidence or that he found it irrelevant to the defense strategy. Thus, Ruiz has failed to overcome the strong presumption that defense counsel's decision was of sound trial strategy. *Stanaway*, *supra* at 687.

II. Sentencing

A. Standard Of Review

This Court reviews sentencing matters for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990).

B. Exercise Of Discretion

Ruiz contends that the trial judge failed to recognize and properly exercise his discretion when he decided to increase Ruiz's maximum sentence from twenty to forty years under the habitual controlled substance offender statute, MCL 333.7413(2); MSA 14.15(7413)(2). Once again, we disagree. At sentencing, the trial judge stated:

Well, Mr. Ruiz, it's my view, sir, that looking at the record you've amassed here that I'm amazed that – you've done the things you've done. And I, quite candidly, have no alternatives for you other than what I reviewed [in] this file[] and reflected on myself.

So, its 120 to 480 months with the Michigan Department of Corrections with credit for 45 days.

By looking at the plain language of the trial judge's statement, there is no clear evidence that he believed that he lacked discretion; therefore, the presumption that a trial judge knows the law must prevail. *People v Alexander*, 234 Mich App 665, 674-675; 599 NW2d 749 (1999). The trial judge merely stated that because of Ruiz's prior criminal history – not because the trial judge believed he lacked discretion – he had no other choice but to sentence Ruiz to a lengthy prison term.

Affirmed.

/s/ David H. Sawyer

/s/ Harold Hood

/s/ William C. Whitbeck

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