

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ULEE PAYNE,

Defendant-Appellant.

UNPUBLISHED

November 28, 2000

No. 219727

Jackson Circuit Court

LC No. 98-090984-FH

Before: Doctoroff, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of delivery of more than 50 but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA 14.15(7401)(2)(a)(iii), and was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to a prison term of 15 to 40 years. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion in denying defendant's motion to adjourn, which defendant presented to the court immediately before the trial began. "In determining whether a trial court has abused its discretion in denying a criminal defendant's request for a continuance, we consider whether: (1) the defendant was asserting a constitutional right; (2) he had a legitimate reason for asserting that right; (3) he was not negligent in asserting it; (4) prior adjournments of trial were not at his request; and (5) on appeal, he has demonstrated prejudice resulting from the trial court's abuse of discretion." *People v Sinistaj*, 184 Mich App 191, 201; 457 NW2d 36 (1990). "An abuse of discretion occurs when the result was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias." *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999).

We agree, as defendant argues, that his constitutional rights to effective assistance of counsel, due process and confrontation were implicated. *People v Bell*, 155 Mich App 408, 413; 399 NW2d 542 (1986); *People v Suchy*, 143 Mich App 136, 142; 371 NW2d 502 (1985); *People v Taylor*, 110 Mich App 823, 832; 314 NW2d 498 (1981). Defendant claims that he had a legitimate reason for asserting these constitutional rights because of the delay in his new counsel's receipt of the file from previous counsel and the file's limited content. Defendant claims that his counsel needed more time to investigate, conduct discovery for additional information and prepare for trial.

The trial court rejected defendant's argument, concluding that an adjournment was not warranted because defendant's trial counsel was familiar with the case before being retained by defendant and because the facts in the case were relatively simple. The trial court also found the motion to be a dilatory tactic by defendant. The record reveals that defendant's trial attorney was present during at least part of the preliminary examination and was provided a transcript of the preliminary examination and that the prosecutor provided defendant with copies of all police reports, surveillance notes, and lab reports. The prosecution provided counsel the opportunity to view and listen to the videotape and audiotape of the drug transaction. Collectively, this information provided an adequate background for defendant's counsel to prepare for trial. The record does not support defendant's contention that defendant attempted to adjourn the trial before the day of trial. Considering these factors as a whole, we cannot conclude that the trial court abused its discretion in concluding that trial counsel had adequate time to prepare.

Defendant next argues that his conviction must be overturned because he was entrapped into committing the charged crime. Because defendant failed to timely raise this issue before the trial court, his claim is not preserved and is therefore waived. *People v Crall*, 444 Mich 463, 464-465; 510 NW2d 182 (1993); *People v Bailey*, 439 Mich 897; 478 Mich 480 (1991).

Defendant next argues that his conviction should be reversed because he received ineffective assistance from George Lyons, the attorney that represented him until two weeks before his trial, during preliminary matters. To warrant a new trial based on a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced him that he was denied a fair trial. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). To demonstrate prejudice, defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Hoag*, *supra* at 6; *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). We will not second-guess the presumption that a challenged action might be considered sound trial strategy. *Id.* at 331-332.

Having reviewed the record and defendant's arguments and subarguments regarding Lyon's assistance, we find defendant has not overcome the presumption of effective assistance of counsel.¹ Defendant's arguments are either unsupported by the record or are matters of trial strategy, which we will not second-guess. *Williams*, *supra*.

Next, defendant argues that his appellate counsel was ineffective because he failed to adequately address all meritorious issues on appeal, particularly issues defendant suggested to him. Indeed, defendant has presented six additional issues in propria persona in his supplemental briefs. We find it unnecessary to address this issue because the remedy for such a claim is a new

¹ To the extent that defendant argues that the prosecution withheld information from the defense, this argument is not properly presented for our review because defendant failed to raise this issue in the statement of questions presented. MCR 7.212(C)(5); *Grand Rapids Employees Independent Union v City of Grand Rapids*, 235 Mich App 398, 409-410; 597 NW2d 284 (1999).

appeal, which is unnecessary where, as in the present case, this Court addresses all of defendant's other claims of error. *People v Brown*, 119 Mich App 656, 660-661; 326 NW2d 834 (1982).

Defendant next argues that he was denied his constitutional right to a jury drawn from a venire representative of a fair cross section of the community in which the case is tried. Defendant, an African-American, states that his all-white jury was unrepresentative of the African-American community in Jackson County. However, because defendant failed to advance this challenge before the jury had been impaneled and sworn, defendant forfeited review of this issue. *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997); *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Nonetheless, defendant has failed to show purposeful or systematic exclusion of African-American citizens from the jury. *Hanna, supra*.

Defendant also argues that his due process rights were violated because the magistrate and the prosecutor proceeded on a complaint against defendant that was defective. Defendant argues that the nature of the defect was that both the prosecutor and the magistrate failed to sign or endorse the complaint. However, again, defendant failed to preserve this issue for review with a timely objection. *People v Smith*, 108 Mich App 338, 345; 310 NW2d 235 (1981). Thus, this issue is waived for appeal unless defendant can show that he was prejudiced by any alleged error. *Id.*

In this case, however, defendant has failed to show that any error occurred. Although defendant has attached a copy of his complaint to his supplemental brief on appeal that does not contain any signature from the prosecutor or the magistrate, the record contains the original complaint that includes signatures from both the magistrate and the prosecutor, as required under MCR 6.101(B) and 6.104(D). Further, contrary to defendant's argument, even if the complaint was defective and this defective complaint led to the issuance of an invalid arrest warrant, the court does not lose jurisdiction over defendant. *People v Burrill*, 391 Mich 124, 133; 214 NW2d 823 (1974).

Finally, defendant argues that the search warrant issued for a search of defendant's home was deficient because it lacked the authorization from a judge or magistrate. Again, defendant failed to preserve this issue for appellate review by challenging the validity of the search warrant at trial. *People v Gillam*, 93 Mich App 548, 551-552; 286 NW2d 890 (1979). However, because the validity of a search warrant raises a constitutional question of lawful search and seizure, defendant's failure to object did not necessarily preclude review by this court. *People v Grunbaum*, 170 Mich App 821, 826; 429 NW2d 239 (1988). We will review this issue if the evidence obtained from the invalid search was decisive to the outcome of the case. *Id.*; *People v Woodard*, 111 Mich App 528, 531; 314 NW2d 680 (1981). Here, we need not review this issue because even if the search warrant were invalid, no evidence obtained from this search was introduced at trial nor was it decisive to the outcome of defendant's case.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Joel P. Hoekstra
/s/ Jane E. Markey