STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED July 13, 2001
v	No. 228988 Wayne Circuit Court
RICHARD RIVERA, Defendant-Appellee.	LC No. 94-002448

Before: Sawyer, P.J., and Griffin and O'Connell, JJ.

PER CURIAM.

The prosecutor appeals by leave granted the trial court's order granting defendant relief from judgment pursuant to MCR 6.508. We reverse.

At approximately 8:00 p.m. on February 16, 1994, officers from the Detroit Police Department were preparing to execute a search warrant at 2514 Woodmere in Detroit. While conducting surveillance on the home, the police observed defendant, wearing a San Jose Sharks jacket, leave the home and get into a gray Lincoln Continental. The police proceeded to follow defendant to a nearby address on Waterman in Detroit. After five minutes defendant returned to his vehicle and drove back to the home on Woodmere. Ten minutes later, when the police knocked on the door of the Woodmere home to announce their presence, defendant was apprehended attempting to exit through the back door of the house. When the police searched the premises, they found a paper bag containing a kilo of cocaine underneath the San Jose Sharks jacket and two bags of marijuana in a bread basket in the kitchen.[1] In an upstairs bedroom the police also discovered miscellaneous paperwork in defendant's name, along with a list of names and amounts owing and a scale. Subsequent fingerprint analysis revealed defendant's fingerprint on the paper bag containing cocaine. At trial, the prosecutor also presented the testimony of Rafael Fernandez, who testified that in February 1994 defendant gave him $19,000 toward the purchase of a kilo of cocaine.[2] Fernandez further indicated that on February 16, 1994, he met

[1] Three other adults and a child were also in the home when police executed the search warrant. Defendant later acknowledged that the marijuana belonged to him.

[2] According to Fernandez, defendant was to pay him the remaining $6,000 toward the total purchase price of $25,000 at a later date.

defendant in an apartment complex on Waterman in Detroit where he gave defendant a kilo of cocaine.

On February 2, 1996, following a five-day trial, a jury convicted defendant of possession with intent to deliver over 650 grams of cocaine, MCL 333.7401(2)(a)(i), and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant to the mandatory term of life imprisonment for the possession with intent to deliver conviction and thirty days to one year imprisonment for the possession of marijuana conviction. This Court affirmed defendant's convictions and our Supreme Court denied leave to appeal. *People v Rivera*, unpublished opinion per curiam of the Court of Appeals, issued October 3, 1997 (Docket No. 193560), lv den 458 Mich 873 (1998). Defendant filed a motion for relief from judgment in 1999, which the trial court granted on July 20, 2000.

The thrust of the prosecutor's argument on appeal is that the trial court erred in granting defendant relief from judgment because defendant did not fulfill the good cause requirement set forth in MCR 6.508(D), which provides in pertinent part:

> The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
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> * * *
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> (3) *alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates*
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> *(a) good cause for failure to raise such grounds on appeal or in the prior motion, and*
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> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
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> (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal . . . . (emphasis supplied).

We review a trial court's grant of a motion for relief from judgment for an abuse of discretion. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001).[3] The trial court granted relief from judgment on the basis of her findings that the court presiding over defendant's trial erred in refusing to instruct the jury on the lesser included offense of possession of cocaine. The trial court further found that defendant received ineffective assistance of counsel

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[3] An abuse of discretion occurs when a decision is "so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997) (citation omitted).

because trial counsel did not request the instruction or object to its omission. Similarly, the court found that appellate counsel was ineffective for failing to raise the issue on appeal. The trial court also concluded that defendant's right against self-incrimination was violated by the admission of evidence concerning defendant's refusal to answer certain questions during questioning by the police, and made similar findings of ineffective assistance of counsel in this regard.

The prosecutor first contends that the trial court erred in basing its decision to grant relief from judgment on the omission of the simple possession instruction because defendant forfeited this issue by expressing his satisfaction with the jury instructions. The prosecutor further observes that defendant did not raise this issue on appeal. In contrast, defendant argues that the ineffective assistance of trial and appellate counsel excuses defendant's failure to raise the issue on appeal or in a prior motion.

As a preliminary matter, we agree with the prosecutor that defendant waived any challenge to the jury instructions when trial counsel expressed satisfaction with the instructions as given. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).[4] Trial counsel's waiver of any error therefore precluded defendant from raising the issue on appeal. *Id.* at 209. In the same vein, we do not share the trial court's view that trial counsel's waiver of the issue and appellate counsel's failure to raise the issue on appeal amounted to ineffective assistance of counsel. Consequently, the trial court erred in concluding that defendant had good cause for not raising the issue in the trial court and on appeal. Good cause as contemplated by MCR 6.508(D)(3)(a) may be established by proving the ineffective assistance of trial and appellate counsel. *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995) (Boyle, J.). Because a *Ginther*[5] hearing was not held on this issue[6] our review is limited to errors apparent from the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

Defendant does not dispute that this issue was not properly raised in the trial court or on appeal. Defendant claims (1) that appellate counsel was ineffective for failing to raise this issue on appeal, and (2) that trial counsel was ineffective for failing to request the disputed jury

[4] Notably, halfway through the trial court's instructions to the jury, when the jury had left the courtroom, the trial court inquired whether both sides were satisfied with the instructions as given. Trial counsel replied "I'm satisfied with the thoroughness, and indeed the manner of delivery, along with the effectiveness of your art of persuasion. It's going across quite well." At the conclusion of the instructions, trial counsel once again stated his satisfaction with the instructions as given.

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

[6] A review of the record reveals that after defendant filed a motion alleging ineffective assistance of counsel, this Court remanded for an evidentiary hearing on the issue whether counsel failed to properly raise the defense of entrapment at trial. *People v Rivera*, unpublished order of the Court of Appeals, entered February 12, 1997 (Docket No. 193560). However, because the trial court subsequently determined that the witness who testified against defendant was not working with the authorities at the time of defendant's arrest, the trial court declined to hold a hearing on the issue.

instruction. "To excuse this double procedural default defendant must 'show that [trial] counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced . . . defendant as to deprive him of a fair trial.' " *Reed, supra* at 390, quoting *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994); see also *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To satisfy the prejudice requirement, defendant must show a reasonable probability that, but for counsel's errors, the outcome of the proceedings would have been different. *Toma, supra* at 302-303.

In evaluating claims of ineffective assistance of counsel, we recognize the well-settled principle that counsel's actions are presumed to be the product of sound trial strategy. *Id.* at 302; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Nor will we second-guess counsel's performance with the benefit of hindsight. *Id.* at 76-77. This same deferential standard of review is applicable to claims alleging ineffective assistance of appellate counsel. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

In the present appeal, defendant has failed to overcome the presumption that trial counsel's failure to request an instruction on the lesser included offense was a legitimate strategic tactic. *Toma, supra* at 302. Initially, we note that counsel's decisions regarding instructions on lesser included offenses are generally considered matters of trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996); *People v Robinson*, 154 Mich App 92, 94; 397 NW2d 229 (1986). A key factor underlying the defense theory at trial was that defendant, although present in the home where the police executed the search warrant, did not possess the cocaine seized. Defendant further disclaimed any participation in the packaging or acquisition of the cocaine. On this record, it is clear that trial counsel's decision to not seek an instruction on the lesser included offense of possession of cocaine was strategically motivated, because such an instruction would have been at odds with defendant's theory of the case.[7]

Likewise, we are not persuaded that defendant was deprived of the effective assistance of appellate counsel. In our view, appellate counsel's failure to raise the jury instruction issue on appeal is not indicative of deficient performance given trial counsel's clear waiver of the issue in the lower court. *Carter, supra* at 209.[8] Further, appellate counsel may have correctly discerned that trial counsel's decision regarding the jury instruction was a matter of trial strategy. In any event, because defendant did not demonstrate good cause for failing to raise the jury instruction issue on appeal, the trial court abused its discretion in granting defendant relief from judgment on this basis.

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[7] In support of his motion for relief from judgment in the trial court, defendant appended the July 20, 1999 affidavit of his trial counsel. In the affidavit, executed three years after trial, trial counsel indicated that his failure to seek an instruction on the lesser included offense was not the product of trial strategy. The presentation of this affidavit is not dispositive in our inquiry however, because "[t]he reasonableness of counsel's performance is to be evaluated from counsel's perspective *at the time of the alleged error* and in light of all the circumstances. . . ." *Reed, supra* at 391, quoting *Kimmelman v Morrison*, 477 US 365, 381; 106 S Ct 2574; 91 L Ed 2d 305 (1986) (emphasis supplied).

[8] "[W]aiver extinguishes any error and precludes [the] defendant from raising it on appeal." *Carter, supra* at 209.

The prosecutor also contends that the trial court abused its discretion in holding that relief from judgment was warranted because evidence concerning defendant's invocation of his right to remain silent was admitted at trial. During the prosecutor's direct examination of the officer who questioned defendant after he was given his *Miranda*[9] rights, the following colloquy occurred:

> *Q.* [C]an you read for us, please, starting with the first question, the exact question and answer format as it was said, and as you took it down, of Mr. Rivera?
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> *A.* The first question I asked Mr. Rivera is: "What were you doing at 2514 Woodmere when the police arrived?" His answer is: "Smoking marijuana and drinking beer." Ques—do you want me to go straight through, Mr. Rollstin?
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> *Q.* Please do.
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> *A.* Question number two was: "Where do you live?" His answer was: "Two, zero, one, nine Cabot." Question number three: "Do you ever spend the night at 2514 Woodmere?" Answer: "Yes, quite frequently." The next question is: "Why did you run when you heard the police?" His answer: "I didn't run." Question: "How much cocaine did you have at 2514 Woodmere?" His answer: "I didn't know about any cocaine. To tell the truth, I'd rather put no comment." Next question: "You didn't see anybody enter 2514 Woodmere with cocaine?" His answer was: "No, sir." The next question: "Whose marijuana was found at 2514 Woodmere?" His answer: "It was mine." The next question: "Who drives the Lincoln rented from Budget?" His answer: "Connie was driving it. I believe she drove it over here." Question: "Do you sell cocaine?" Answer: "No, sir." Next question: "Why don't you live with your wife?" Answer: "I have no other statement to make."
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> *Q.* At that point, what did you do, in terms of making—or continuing to question Mr. Rivera?
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> *A.* I stopped asking questions at his request.[10]

Defendant does not dispute that he failed to preserve this issue by raising a timely objection, nor was it raised on direct appeal. However, defendant maintains that he has demonstrated good cause sufficient to excuse his failure to raise the issue on appeal because he was subject to ineffective assistance of counsel.

A defendant's post-*Miranda* silence is generally not admissible at trial "because it would violate the right to due process to so impeach a defendant who may have been relying on the

[9] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[10] Similarly, in his closing address to the jury, the prosecutor made reference to defendant's refusal to answer certain questions posed by the police officer.

governmental assurance that his silence would not be used against him." *People v Sholl*, 453 Mich 730, 737; 556 NW2d 851 (1996), citing *Doyle v Ohio*, 426 US 610, 617-618; 96 S Ct 2240; 49 L Ed 2d 91 (1976). Further, it is improper for the prosecutor to comment on the defendant's silence where, following *Miranda* warnings, the defendant answers several questions, but subsequently invokes his right to remain silent with regard to others. *People v McReavy*, 436 Mich 197, 219 n 23; 462 NW2d 1 (1990).

After a thorough review of the record, we are unable to conclude that trial counsel's performance in relation to the admission of this evidence was objectively unreasonable. Defendant once again has failed to overcome the presumption that counsel's actions are reasonably attributed to trial strategy. *Toma, supra* at 302. In a slightly different context, our Supreme Court has observed that trial counsel's decision regarding whether or not to raise an objection is considered "a quintessential example of trial strategy." *Reed, supra* at 400.

That trial counsel's decision to not object was a matter of trial strategy is best demonstrated by a review of his conduct in context. Specifically, during cross-examination of the police officer, trial counsel elicited testimony regarding defendant's refusal to answer specific questions posed by the police officer. Trial counsel therefore elicited the same information that was initially brought forth during direct examination of the police officer. It appears that trial counsel may have refrained from objecting to the admission of this evidence during direct examination because he planned to vigorously attack the police officer's recitation of defendant's statement on cross-examination.[11] Trial counsel may also have decided not to object to the prosecutor's reference to defendant's silence because he did not want to risk drawing the jury's attention to the matter. See *Reed, supra* at 400. Whatever trial counsel's motivation may have been, it is not for this Court to second-guess matters of trial strategy with the benefit of hindsight, even if a decision later proves to be incorrect. *Rockey, supra* at 76-77; *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).[12]

Moreover, we are not persuaded that appellate counsel's failure to raise this unpreserved issue on appeal amounted to ineffective assistance of counsel. Appellate counsel may have also correctly discerned that trial counsel's failure to object to the admission of the evidence was the product of trial strategy. Further, defendant has failed to rebut the presumption that "appellate counsel's decision regarding which claims to pursue was sound appellate strategy." *Hurst, supra* at 642; see also *Reed, supra* at 391 ("[A]ppellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance.") (citation omitted).

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[11] Trial counsel may also have concluded that the admission of testimony of defendant's invocation of his right to silence in reference to questioning about his marital living arrangements was not harmful, given that it was not a central issue at trial. See e.g. *Sholl, supra* at 738 n 5.

[12] See also *People v Hackett*, 460 Mich 202, 217-218; 596 NW2d 107 (1999) (holding that prosecutor's reference to the defendant's nonconstitutionally protected silence was harmless error where the defendant, during cross-examination, used the silence in a "rehabilitative way.").

Additionally, the trial court's grant of relief from judgment was improper because defendant did not meet his burden of demonstrating "actual prejudice from the alleged irregularities that support the claim for relief." MCR 6.508(D)(3)(b). As set forth in MCR 6.508(D)(3)(b)(i), actual prejudice "means that in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal." We are confident that no such "reasonably likely chance of acquittal" existed in the instant case in spite of the alleged errors. The prosecutor brought forth ample evidence to convince the jury of defendant's guilt. This evidence included the incriminating surveillance of defendant's activities by the police, Fernandez' testimony describing defendant's purchase of a kilo of cocaine, fingerprint analysis which revealed defendant's fingerprint on the package of cocaine, and the discovery of equipment typically used in the distribution of drugs with defendant's personal items. On this record, we are not persuaded that an acquittal of the charged offenses was reasonably likely based on the alleged errors.

Reversed

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Peter D. O'Connell