

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TAVARUS DOGAN,

Defendant-Appellant.

UNPUBLISHED

December 14, 2001

No. 224293

Oakland Circuit Court

LC No. 99-166139-FH

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of possession with intent to deliver between 50 and 224 grams of cocaine, MCL 333.7401(2)(a)(iii), possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv), and third-degree fleeing and eluding, MCL 750.479a(3).¹ Defendant was sentenced to a term of ten to twenty years' imprisonment for the possession with intent to deliver between 50 and 224 grams of cocaine conviction; a term of one to twenty years' imprisonment for the possession with intent to deliver less than fifty grams of heroin conviction; and six months' imprisonment for the third-degree fleeing and eluding conviction. We affirm.

Defendant first argues that he was denied effective assistance of counsel. Specifically, defendant contends that his counsel failed to move to suppress evidence that was obtained pursuant to an illegal search. Because defendant did not request a Ginther² hearing, this Court's review is limited to errors apparent on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). An unpreserved constitutional error only warrants reversal when it was a plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 764, 774; 597 NW2d 130 (1999).

To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel

¹ Defendant pled guilty to operating a vehicle with a suspended license, MCL 257.904(1)(b), and was sentenced to six months' imprisonment for this offense. We note that this statute was amended by 1998 PA 342, effective October 1, 1999.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

and he must overcome the strong presumption that counsel's performance was not sound trial strategy; and (2) that this deficient performance prejudiced him to the extent that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant alleges that defense counsel's failure to challenge the legality of the search and seizure for lack of probable cause amounted to ineffective assistance of counsel. We disagree. We afford great deference to a magistrate's decision regarding probable cause and review it to determine if there was "a 'substantial basis for . . . conclud[ing]' that a search would uncover evidence of wrongdoing" *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000), quoting *Illinois v Gates*, 462 US 213, 236; 103 S Ct 2317; 76 L Ed 2d 527 (1983).

A valid search warrant must be supported by probable cause. MCL 780.651(1); *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). Probable cause exists when "all the facts and circumstances would lead a reasonable person to believe that the evidence of a crime or the contraband sought is in the place requested to be searched." *Id.* at 509, quoting *People v Brannon*, 194 Mich App 121, 132; 486 NW2d 83 (1992).

In this case, the probable cause determination involved statements made by an informant³ who aided the police in the investigation. When analyzing a probable cause determination based on an informant's information, the informant's credibility, the reliability of the information, the informant's basis of knowledge, and the independent verification of the information, become important factors to consider under the totality of the circumstances. *People v Levine*, 461 Mich 172, 179-180, 183, 185; 600 NW2d 622 (1999), citing *Gates, supra* at 230.

After reviewing the informant's statements, we find that a substantial basis existed for the magistrate's finding of probable cause that defendant sold drugs to the informant and resided at 19328 Telegraph. *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992). The informant provided the name, address and phone number of defendant. The informant further stated that he had purchased illegal narcotics from defendant for the past three years. Moreover, under the supervision of police, the informant arranged to purchase a substantial quantity of cocaine from defendant. Given the specificity of these facts, along with the informant's long-standing relationship with defendant and the corroboration by independent police investigation, we find that the informant's personal knowledge and reliability were adequately established to render the information sufficient to support probable cause. *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992). Furthermore, the affidavit satisfied MCL 780.653(a) because it contained affirmative allegations from which the magistrate could conclude that the informant spoke with personal knowledge.

Additionally, the affiant established a fair probability that evidence of criminal activity would be found at defendant's residence. *Levine, supra* at 185; *Russo, supra* at 604. Specifically, the affiant made several statements from his own experience indicating that drug traffickers often kept items associated with drugs in their homes. The affiant in this case had

³ The informant was originally arrested for selling narcotics. He later agreed to cooperate in the police investigation and provided information regarding his source of supply to officers.

twenty years' experience as a Detroit Police Officer in the Narcotics Division, received specialized training in drug law enforcement, and had personally made over one hundred controlled purchases of narcotics. We find that the affiant's extensive experience and training, together with the informant's statements and the controlled order implicating defendant in large-scale drug activity, provided a sufficient basis to establish probable cause that drugs and evidence of illegal drug trafficking would be found at defendant's residence. See *People v Darwich*, 226 Mich App 635, 638-639; 575 NW2d 44 (1997); *People v Nunez*, 242 Mich App 610, 614-615; 619 NW2d 550 (2000).

Viewing the affidavit in light of the totality of the circumstances and giving significant deference to the magistrate's finding of probable cause, we find a substantial basis for the magistrate's conclusion that a search would uncover evidence of illegal drug activity at defendant's residence. *Whitfield*, *supra* at 446. Thus, defense counsel's failure to move to suppress the evidence did not affect defendant's substantial rights. See *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

Defendant further alleges that defense counsel was ineffective for failing to challenge the legality of the search and seizure on the grounds that MCL 780.654⁴ was violated. Specifically, defendant claims that the evidence taken from 19328 Telegraph should have been suppressed because he was not provided a copy of the affidavit upon execution of the search warrant. We disagree. We review questions of law concerning a suppression issue de novo. *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001) (*Sobczak-Obetts II*).⁵

We first note that MCL 780.654 does not explicitly impose a requirement that the search warrant be left at the premises, but rather governs the content and form of a search warrant. *Sobczak-Obetts II*, *supra* at 707-708. It is MCL 780.655⁶ that designates the procedural

⁴ MCL 780.654 provides:

A search warrant shall be directed to the sheriff or any peace officer, commanding such officer to search the house, building or other location or place, where any property or other thing for which he is required to search is believed to be concealed. Each warrant shall designate and describe the house or building or other location to be searched and the property or thing to be seized. *The warrant shall also state the grounds or the probable or reasonable cause for its issuance, or in lieu thereof, a copy of the affidavit may be attached thereto.* [Emphasis added.]

⁵ We note that defendant's argument on appeal relies heavily upon this Court's opinion in *People v Sobczak-Obetts*, 238 Mich App 495; 606 NW2d 658 (1999) (*Sobczak-Obetts I*). Particularly, defendant claims that *Sobczak-Obetts I*, recognized the validity of *People v Moten*, 233 Mich 169; 206 NW 506 (1925), in cases where an affidavit containing probable cause for a search is not attached to the warrant. However, the Michigan Supreme Court recently rejected that argument in *Sobczak-Obetts II*.

⁶ MCL 780.655 provides, in pertinent part:

When an officer in the execution of a search warrant finds any property or seizes any of the other things for which a search warrant is allowed by this act, the

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requirements for the execution of an otherwise “facially valid” search warrant and requires that the affidavit be attached to the search warrant when it is executed.⁷ *Sobczak-Obetts II*, *supra* at 707-708. While defendant specifically alleges a violation of MCL 780.654, he fails to challenge the content of the search warrant, i.e., he fails to argue that the search warrant did not have a supporting affidavit attached when initially issued, or that the search warrant itself was invalid. *Sobczak-Obetts II*, *supra* at 707, n 15. Therefore, defendant’s real argument concerns the procedural requirements imposed under MCL 780.655.

This argument was raised in *Sobczak-Obetts II*. The Court in *Sobczak-Obetts II* held that while the failure to provide defendant with a copy of the affidavit technically violates MCL 780.655, the exclusionary rule does not apply to such procedural violations. The Court indicated that the requirements of MCL 780.655 are ministerial in nature and only arise after evidence is seized pursuant to a valid search warrant. *Sobczak-Obetts II*, *supra* at 710. Moreover, in the case at bar, the affidavit was not attached to the search warrant and provided to defendant upon its execution due to the fact that the affidavit was sealed pursuant to the magistrate’s order. Absent police misconduct, the deterrent purposes of the exclusionary rule are not advanced by suppression of the evidence. *Id.* at 703, 711-712. Because suppression of the evidence was unwarranted for this technical violation of MCL 780.655, defendant was not prejudiced by defense counsel’s failure to challenge the legality of the search. *Mitchell*, *supra* at 167.

Defendant finally claims that the trial court impermissibly considered defendant’s race in declining to depart from the mandatory minimum sentence. We disagree. Defendant failed to preserve this issue for our review because he did not provide this Court with a copy of the presentence investigation report. MCR 7.212(C)(7); *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995). Thus, this Court is precluded from review unless defendant shows plain error affecting his substantial rights. *Carines*, *supra* at 774.

The trial court requires a substantial and compelling reason to depart from the mandatory minimum sentences delineated by the Legislature. MCL 333.7401(4); MCL 769.34(3). Race is an impermissible consideration in making a sentencing decision. *People v Gjidoda*, 140 Mich App 294, 300-302; 364 NW2d 698 (1985); see also *People v Coles*, 417 Mich 523, 546; 339 NW2d 440 (1983), overruled in part on other grounds in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

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officer, in the presence of the person from whose possession or premises the property or thing was taken, if present, or in the presence of at least 1 other person, shall make a complete and accurate tabulation of the property and things so seized. *The officer taking property or other things under the warrant shall forthwith give to the person from whom or from whose premises the property was taken a copy of the warrant and shall give to the person a copy of the tabulation upon completion, or shall leave a copy of the warrant and tabulation at the place from which the property or thing was taken.* [Emphasis added.]

⁷ Although MCL 780.655 does not explicitly state that the affidavit supporting the search warrant be provided when executed, “where an affidavit is attached to the warrant as permitted by [MCL 780.654] in lieu of a statement of probable cause in the warrant itself, the affidavit is part of the ‘warrant’ referred to in [MCL 780.655].” *Sobczak-Obetts II*, *supra* at 696, n 8.

While the trial court made gratuitous comments at sentencing, the record does not indicate that the sentencing decision was based upon defendant's race. Rather, the trial court considered several factors in concluding that there were no substantial and compelling reasons to warrant departure from the mandatory minimum sentence. The trial court specifically noted the lack of mitigating circumstances in the case to lessen defendant's culpability and the fact that defendant's past criminal record although "minimal," was not "good." The trial court also considered defendant's previous involvement in drug activity, his young age, his lack of work history, and his community service. Based on these factors, the court properly concluded that departure from the mandatory minimum sentence was unwarranted. We find that defendant's sentence was based upon permissible considerations that were objectively verifiable and approved of by this Court. *People v Daniel*, 462 Mich 1, 6-7; 609 NW2d 557 (2000). Therefore, defendant has failed to show plain error and this Court is precluded from review of this issue. *Carines, supra* at 774.

Affirmed.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey