STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAWSON L. COLEMAN,

Defendant-Appellant.

UNPUBLISHED
June 18, 2002

No. 231299
Wayne Circuit Court
LC No. 98-002035

Before: Murphy, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of possession with intent to deliver 225 grams or more, but less than 650 grams of cocaine, MCL 33.7401(2)(a)(*ii*), and was thereafter sentenced to twenty to thirty years of imprisonment. He appeals as of right and we affirm.

I

Defendant first argues that trial counsel was ineffective for failing to raise an entrapment defense. Defendant did not raise an ineffective assistance of counsel argument below by way of a motion for a new trial or an evidentiary hearing. Our review, therefore, is limited to the existing record. *People v Sabin (On Second Remand),* 242 Mich App 656, 659; 620 NW2d 19 (2000). In order to prove a claim of ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness and that this deficient performance was so prejudicial that defendant was denied a fair trial. *People v Toma,* 462 Mich 281, 302; 613 NW2d 694 (2000).

Entrapment will be found if (1) the police engage in impermissible conduct that would induce an otherwise law-abiding person to commit a crime in similar circumstances, or (2) the police engage in conduct so reprehensible that it cannot be tolerated by the court. *People v McGee,* 247 Mich App 325, 344-345; 636 NW2d 531 (2001). The test for entrapment is objective and focuses on the propriety of the government's conduct rather than on the defendant's predisposition to commit the crime. *People v Hampton,* 237 Mich App 143, 156; 603 NW2d 270 (1999). Entrapment will not be found where the police simply present the defendant with the opportunity to commit the crime of which he was convicted. *McGee, supra* at 345.

Defendant contends that the following show that there was a viable entrapment defense: (1) the informant's charges were dismissed as a result of defendant's arrest; (2) the informant was unsupervised and allowed to select his target; and (3) the police determined the amount of cocaine to be purchased. Although the record supports the first allegation that the informant's charges were dismissed, the record does not support the other allegations. Here, the police supervised the informant by listening to the telephone conversation between the informant and defendant. The informant "selected" defendant as the target because the informant told the police that defendant was his supplier. Further, the police independently verified information given to them by the informant about defendant. Additionally, the record is unclear as to who determined the amount of cocaine to be purchased from defendant. One police officer testified that the police directed the informant to ask for nine ounces of cocaine based on the fact that the informant's prior largest buy from defendant had been nine ounces. Another police officer testified that the informant determined the amount because it was the amount that the informant had purchased in the past from defendant.

The evidence reveals that the informant in this case simply paged defendant, who returned the page within five minutes, and the informant asked to buy nine ounces of cocaine. The deal was set up with one telephone call and defendant responded without any further pressure. There is simply no evidence that an entrapment defense would have been availing, much less apparent as a defense based on the record before us. Consequently, defendant has failed to prove that defense counsel was ineffective because there is no indication that counsel was deficient by not raising an entrapment defense where the record does not support an entrapment defense.

II

Defendant next argues that his waiver of his right to a jury trial was invalid and violated his constitutional right to a jury trial because the waiver was made with the understanding that defendant would be tried by the trial judge who accepted the waiver, but the case was reassigned to a different trial judge for trial. Defendant contends that his waiver of his right to a jury trial was not made knowingly and understandingly because he was not informed that he could not withdraw his waiver if the case was transferred to a different judge, as in this case.

Initially, we note that defendant did not order the transcript of the waiver proceedings, thus, we do not have a record to fully review defendant's claim. The failure to provide this Court with the relevant transcript will constitute a waiver of the issue. *People v Anderson*, 209 Mich App 527, 535; 531 NW2d 780 (1995).

Further, defendant's contention that his waiver was not knowingly or understandingly made because it was obtained without a clear explanation that the could not withdraw his waiver if the case was transferred to a different judge is incorrect as a matter of law. MCR 6.402(B) directs only that the trial court must advise the defendant in open court of the constitutional right to a jury trial and that the defendant understands that right and voluntarily chooses to give up that right and be tried by the court. Additionally, a court may permit withdrawal of a waiver of a jury trial if the request is timely made and is not made for the purpose of delay or unless the waiver has been acted upon. *People v Wagner*, 114 Mich App 541, 558-559; 320 NW2d 251 (1982). Thus, defendant could have moved to withdraw his jury trial waiver, but he never did so.

Accordingly, defendant's waiver of his right to a jury trial was valid as it was knowingly and understandingly made.

III

Next, we address defendant's argument that the trial court erred in denying defendant's motion to suppress because there was neither probable cause nor reasonable suspicion for the warrantless search.

In the proceedings below, defendant challenged the legality of his arrest and the evidence of the cocaine that was seized. The trial court ruled that the police had probable cause to arrest defendant and that the cocaine was lawfully seized. A trial court's ruling regarding a motion to suppress is reviewed for clear error. *People v Sobczak-Obetts*, 463 Mich 687, 694; 625 NW2d 764 (2001). Questions of law regarding the suppression hearing are reviewed de novo. *Id.*

In the present case, defendant was arrested and the bag containing the cocaine was seized and searched without warrants. Defendant does not challenge the legality of his arrest on appeal. To the extent that defendant challenges the search and seizure of the bag containing the cocaine, the bag was clearly abandoned by defendant. The police officers testified that defendant exited his vehicle with a gray bag, walked to the front of a porch, and dropped or tossed the bag when the police officers ran up toward him. A person does not have a reasonable expectation of privacy to implicate the Fourth Amendment in property that has been abandoned. *People v Mamon*, 435 Mich 1, 6; 457 NW2d 623 (1990); *People v Zahn*, 234 Mich App 438, 448; 594 NW2d 120 (1999). Because the uncontroverted testimony of the police officers was that defendant dropped or tossed the bag away as they approached him, defendant abandoned the bag and the warrantless search and seizure of the bag did not violate the Fourth Amendment.

Further, the search of a person incident to a lawful arrest is permissible. *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). The permissible scope of a search incident to an arrest extends to the opening of containers found within the control area of the arrested person. *Id.* Because the trial court found that defendant's arrest was lawful and defendant does not challenge that ruling on appeal, the search of his person and the bag within the control area of defendant were lawful.

Accordingly, the trial court did not err in denying defendant's motion to suppress.

IV

Lastly, we address defendant's sentencing issues that he is entitled to resentencing because there are several substantial and compelling factors that mitigate his mandatory minimum sentence and that the trial court failed to consider sentence entrapment as a mitigating factor.

Defendant's conviction carries with it a statutorily mandated term of twenty to thirty years' imprisonment. MCL 333.7401(2)(a)(*ii*). The sentencing court may depart from the minimum term of imprisonment if the court finds on the record that there are substantial and compelling reasons to do so. MCL 333.7401(4). Only those factors that are objective and verifiable may be used by the court in determining whether substantial and compelling factors

exist. *People v Fields*, 448 Mich 58, 62; 528 NW2d 176 (1995). In evaluating whether substantial and compelling factors exist, the court should consider: (1) mitigating circumstances surrounding the offense; (2) the defendant's prior record; (3) the defendant's age; (4) the defendant's work history; and (5) the defendant's cooperation with law enforcement officials. *Id.* at 76-77. Whether a particular factor exists is a factual determination for the sentencing court that is reviewed for clear error. *Id.* at 77. The determination that a particular factor is objective and verifiable is reviewed as a question of law. *Id.* at 77-78. The sentencing court's determination that the objective and verifiable factors constitute substantial and compelling reasons to depart from the statutory minimum sentence is reviewed for an abuse of discretion. *Id.* at 78.

Defendant contends that the trial court failed to recognize several factors as substantial and compelling, including: (1) his age of fifty-seven years; (2) his accomplished work history; (3) his ill health; (4) his strong family ties and community support; and (5) that his prior convictions were old. At sentencing, the trial court stated that it had read defendant's sentencing memorandum and the presentence investigation report. The trial court specifically found that the there were no substantial and compelling reasons to warrant a downward departure.

The presentence investigation report indicates that defendant was fifty-seven years old at the time of sentencing, had one prior felony conviction, and three prior misdemeanor convictions. Defendant owned a construction company called Miracle Construction Company or Miracle Investments since 1979; however, according to the presentence report, when police officers executed a search warrant there shortly after defendant was arrested in this case, they found quite a lot of drug paraphernalia and 248 grams of cocaine, indicating that defendant may have been using his business office to sell drugs even if it was also used for legitimate business purposes. Further, defendant described his physical condition as "good" in the presentence report, although he does have some health problems. There were also letters sent to the court on defendant's behalf, indicating family and community support.

While there may be some positive factors in defendant's behalf, the trial court's determination that there were not substantial and compelling factors to warrant a downward departure is not an abuse of discretion in this case. Overall, the factors listed by defendant are not so "exceptional" such that the court should have deviated from the mandatory minimum sentence. *People v Daniel*, 462 Mich 1, 7; 609 NW2d 557 (2000). Accordingly, the trial court did not abuse its discretion in determining that there were not substantial and compelling reasons to justify a downward departure.

Defendant also contends that the trial court labored under a misconception of the law by not considering his claim of sentence entrapment. Sentencing entrapment occurs when the defendant, even though predisposed to commit a minor or lesser offense, is entrapped into committing a greater offense subject to greater punishment. *People v Ealy*, 222 Mich App 508, 510; 564 NW2d 168 (1997). At sentencing, defense counsel argued that sentencing entrapment occurred in this case because the police persuaded the informant to have defendant sell him more than the usual amount of cocaine.

The trial court was not laboring under a misconception of the law because there is no evidence of sentencing entrapment in this case and the trial court was clearly aware of defendant's claim. Defendant showed no hesitation to sell nine ounces of cocaine as requested

by the informant. There is no evidence that the police continued to increase purchases from defendant to ultimately enhance defendant's sentence.

Therefore, defendant's statutorily mandated sentence is valid and defendant has not shown that he is entitled to resentencing.

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly