

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KYU H. YUN,

Defendant-Appellant.

UNPUBLISHED

August 16, 2002

No. 229571

Wayne Circuit Court

LC No. 99-005763

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial conviction for possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). He was sentenced to two years' probation. We affirm.

Defendant was arrested during the execution of a search warrant at his home on May 11, 1999. On that date, the police entered the home and found defendant in a bedroom. Defendant appeared to be sleeping in the bed. When the officer entered and identified himself, defendant made a stretching motion and the police officer observed defendant holding a plastic baggie and money underneath the cover. Defendant dropped the bag and money at the side of the bed. After defendant was secured and turned over to other officers of the raid team, the officer returned to the bedroom and retrieved the plastic baggie containing cocaine. In the same bedroom, the officer also found a bag of bulk quantity marijuana and currency. The officer opined that narcotics in that quantity were used for sale and intended for distribution.

When defendant was taken into custody he was advised of his constitutional rights and made two statements to the police. Upon questioning, defendant admitted that he lived at the residence and that the marijuana that was confiscated belonged to him. Thereafter, defendant declined to answer any more questions. Defendant was charged with possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). Following a bench trial, defendant was convicted of possession with intent to deliver marijuana. This appeal followed.

On appeal, defendant raises only the issue of ineffective assistance of counsel. Defendant argues that he was denied the effective assistance of counsel based on three errors. During

defendant's *Ginther*¹ hearing, the testimony of both trial counsel and defendant was offered, providing us with a full record as to each of defendant's claims of ineffective assistance of counsel. See *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989), citing *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. *People v Torres*, 452 Mich 43, 50; 549 NW2d 540 (1996). In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*, 238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.* Furthermore, the defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, because this Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 445.

Defendant first claims that he was denied the effective assistance of counsel when his trial counsel failed to challenge the search warrant. We disagree. In this case, defense counsel had no basis on which to challenge the validity of the search warrant. Defendant alleged that he was out of town during the time the drug activity supporting the search warrant occurred. However, defendant provided counsel with no evidence to corroborate his position. "Defense counsel is not required to make frivolous or meritless motions." *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Thus, we find that trial counsel's performance in failing to file a motion to suppress the search warrant was not below an objective standard of reasonableness under prevailing professional norms. *Noble, supra*. Accordingly, defendant was not denied the effective assistance of counsel.

Defendant next argues that his counsel was ineffective in failing to challenge the alleged custodial statements. However, again defendant provided trial counsel with no basis for challenging the statements. Although defendant denied that he made the alleged statements to police, trial counsel testified that defendant indicated that indeed he did make such incriminating statements to police. Trial counsel further asserted that defendant "never denied the marijuana." Further, it was counsel's trial strategy to focus on acquitting defendant of the cocaine charge. The decisions regarding what evidence to present and whether to exclude evidence are presumed to be matters of trial strategy, which this Court will not second-guess. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *Rice, supra*; see also *People v Armstrong*, 100 Mich App 423, 426; 298 NW2d 752 (1980). Therefore, the failure to challenge the admissibility or credibility of defendant's custodial statements did not deprive defendant of the effective assistance of counsel.

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

Defendant last claims he was denied the effective assistance of counsel when his trial counsel admitted guilt on the charge of possession with intent to deliver marijuana. We conclude that trial counsel's performance was not deficient, nor was defendant prejudiced by it. During closing argument, defense counsel stated that the marijuana charge was problematic because of defendant's statements to the police, but requested the court "to consider a lesser included in the possession on the marijuana." Defense counsel does not render ineffective assistance of counsel by admitting guilt of a lesser offense. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994); *People v Kryztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). Rather, "it is only a complete concession of defendant's guilt which constitutes ineffective assistance of counsel." *Id.* Further, we are not persuaded that, but for trial counsel's performance in this regard, the result of the trial would have been different. *Noble, supra*. The police found a bag of marijuana in defendant's bedroom and defendant admitted to the police that the marijuana belonged to him. Therefore, defendant was not prejudiced by counsel's comments during closing argument and defendant was not deprived of the effective assistance of counsel.

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell