

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NEIL EMITT PRICE,

Defendant-Appellant.

UNPUBLISHED

August 20, 2002

No. 230012

Iosco Circuit Court

LC No. 00-004020-FH

Before: Judges Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver methamphetamine, MCL 333.7401(2)(b)(i), and sentenced as a fourth habitual offender to 3 to 12 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant was tried jointly with a co-defendant. The case against defendant was established with the assistance of a confidential informant who agreed to assist the police because he was facing felony charges after a raid on his home. The informant testified that the police targeted defendant, who was the informant's first cousin. The informant stated that defendant approached him in mid-February 2000 to buy some cocaine which defendant was going to purchase from an unknown source in Grand Rapids, but defendant was \$100 short. The police provided \$100 buy money, which the informant gave to defendant to purchase the cocaine with the understanding that the informant would receive a cut of the cocaine.

The next day the informant met with defendant and was wearing a wire. Defendant stated that he did not have the cocaine because it was "no good." Defendant offered to give the informant back his \$100 or he could use it to purchase methamphetamine that defendant was expecting in the mail from a female in Arizona. The informant said he would buy some methamphetamine. A police officer was listening to this conversation as it occurred and testified similarly.

On February 22, 2000, a controlled delivery of a package from Arizona, addressed to defendant, was made. Defendant had been calling the post office, inquiring about the package, and had left a contact number. When defendant was told his package had arrived, he picked it up, and was arrested as he existed the post office. The package contained four grams of methamphetamine. A subsequent search of a house at which defendant had stayed uncovered a

money wire transfer receipt to Arizona and a piece of paper with a name and Arizona phone number.

Defendant contended that he did not know there were drugs in the package, and thought that it contained a money order that he was expecting. Defendant argued throughout the trial that the informant had set him up. Defendant denied he ever approached the informant in order to sell drugs.

Defendant first argues that he was denied effective assistance of counsel. We disagree. Because there was no evidentiary hearing, this Court's review is limited to the existing record. *People v Portillo*, 241 Mich App 540, 543; 616 NW2d 707 (2000). Constitutional questions are reviewed de novo. *People v Herndon*, 246 Mich App 371, 382-383; 633 NW2d 376 (2001).

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, sec 20, is the right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Cronic, supra* at 657; *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant. *People v Reinhardt*, 167 Mich App 584, 591; 423 NW2d 275 (1988).

Defendant asserts that he was denied effective assistance of counsel when his trial counsel failed to notify him of certain pre-trial dates. Defendant filed several pre-trial motions which were set for a hearing on July 24, 2000. Defendant did not appear at this hearing. His counsel later admitted that it was because he had the wrong contact information for defendant, and thus, defendant was not aware of the hearing date. The next court date was the first day of defendant's jury trial. Before jury voir dire began several pre-trial matters were addressed, but defense counsel never asked that his outstanding motions be addressed. Defendant argues that he was denied of a substantial defense because one of these motions was a motion to dismiss based on entrapment.¹

¹ Defendant also mentions another hearing date at which he was not present, allegedly because his counsel did not inform him of the date. However, that hearing date was before the motion at issue was filed. Furthermore, defendant was not prejudiced because the hearing regarded a prosecution motion which was ultimately ruled on in defendant's favor.

While we agree that defense counsel's performance was deficient, we do not believe that defendant was prejudiced because the record does not support an entrapment defense. Entrapment occurs when (1) the police engage in impermissible conduct that would induce a person situated similarly to the defendant and otherwise law abiding to commit the crime, or (2) the police engage in conduct so reprehensible that it cannot be tolerated by the court. *People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999). 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. *Id.*

Regarding the first prong, whether impermissible police conduct exists, the court should consider actions which would induce criminal conduct, including: (1) appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime charged; (3) whether there was a long time lapse between the investigation and offense; (4) the existence of inducements that would make the criminal activity unusually attractive to a law-abiding person; (5) offers of excessive consideration or enticement; (6) guarantees that the acts were not illegal; (7) the existence and extent of government pressure; (8) the existence of sexual favors; (9) whether there were threats of arrest by the government agents; (10) the existence of government procedures that tend to escalate the defendant's criminal culpability; (11) police control over the informant; and (12) whether the investigation is targeted or untargeted. *People v Julliet*, 439 Mich 34, 56-57; 475 NW2d 786 (1991) (Brickley, J.); *People v Williams*, 196 Mich App 656, 661-662; 493 NW2d 507 (1992). The defendant has the burden of proving entrapment by a preponderance of the evidence. *Julliet, supra* at 61.

In this case, the informant testified that the police had targeted defendant and denied that any of his previous statements were to the contrary. The informant also testified that defendant initiated the contact asking the informant to buy drugs, contrary to defendant's contention that it was the informant who repeatedly approached defendant, seeking to buy drugs. A police officer also testified that he heard the conversation between the informant and defendant regarding the methamphetamine, which supported the informant's version of events. The informant further testified that defendant arranged for the methamphetamine to be mailed from Arizona, contrary to defendant's contention that he did not know that the package contained drugs. None of the other factors listed above were present in this case. We conclude that defendant would have failed to meet his burden of proof that the police's conduct, acting through the informant, was impermissible.

Regarding the second prong, reprehensible police conduct, this Court explained in *People v Fabiano*, 192 Mich App 523, 532; 482 NW2d 467 (1992), that "there is certain conduct by government that a civilized society simply will not tolerate, and the basic fairness that due process requires precludes continuation of the prosecution where the police have gone beyond the limit of acceptable conduct in ensnaring the defendant, without regard to causation."

We believe that the police's conduct could only be classified as reprehensible if defendant truly did not know the package contained drugs. The informant and the police officer's testimony support the prosecution's contention that defendant knew there was methamphetamine in the package. The co-defendant testified that he never heard defendant and the informant talk about drugs during any conversation which occurred in his presence, but admitted that he was not always listening to their conversations. Therefore, we conclude that defendant would not have been able to carry his burden.

Defendant also argues that he was denied effective assistance of counsel when his trial counsel failed to ensure that a defense witness followed the trial court's sequestration order. The witness admitted that he had been in the courtroom during a prior witness' testimony and was prohibited from testifying. All parties had agreed to the sequestration order. The witness had been called by the co-defendant, but was on defendant's witness list. Therefore, we agree with the trial court that both counsels were responsible for ensuring that the witness followed the sequestration order.

The witness was being presented to impeach the credibility of the informant, and his testimony only directly conflicted with that of the informant on one point. Defendant vigorously impeached the informant's credibility at every opportunity during the trial. Therefore, we conclude that defendant was not prejudiced by the absence of the witness' testimony. Because defendant was not prejudiced by his defense counsel's errors, we hold that he was not denied effective assistance of counsel.

Defendant's other appeal issue has no merit. Defendant argues that the police officer, who heard the radio transmission of the conversation between the informant and defendant, should not have been allowed to testify as to the substance of the conversation because he heard only 65 to 75 percent of it, the remainder being inaudible due to static. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant cites *People v Karmey*, 86 Mich App 626, 632; 273 NW2d 503 (1978), in which this Court discussed the foundational requirements for admission of a tape recording of questionable audibility, in support of his argument. However, this case is not applicable because no tape recording was offered. The police officer testified to that portion of the conversation which was audible to him, and the proper foundation as to voice identification was laid. Therefore, the trial court did not abuse its discretion in admitting the testimony.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski