STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 2002
v	No. 233346 Oakland Circuit Court
KAREN M. SHOOK, Defendant-Appellant.	LC No. 92-122193-FH

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

The jury convicted defendant on May 20, 1993 of conspiracy to deliver 50 to 224 grams of cocaine, MCL 750.157(a) and delivery of 50 to 224 grams of cocaine, MCL 333.7401(2)(a)(iii). The trial court sentenced defendant to two terms of ten to twenty years in prison, the sentences to run concurrently. This Court affirmed defendant's convictions in a prior appeal, but remanded "for entry of an amended judgment of sentence indicating consecutive sentences . . . ." *People v Shook*, unpublished opinion per curiam of the Court of Appeals, decided December 1, 1995 (Docket Nos. 166665, 167337). In January 2001, the trial court denied defendant's motion for relief from judgment from which defendant now appeals as of right. We affirm.

I. Standard of Review and Applicable Law

Defendant argues that the trial court erred by denying her motion for relief from judgment. "A trial court's grant of relief from judgment is reviewed generally for an abuse of discretion." *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001). MCR 6.508 sets forth the procedural requirements to prevail on a motion for relief from judgment. Under 6.508(D):

> 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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> (1) seeks relief from a judgment of conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;

(2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision;

(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

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(iv) in the case of a challenge to the sentence, the sentence is invalid.

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

Here, the trial court denied defendant's motion for relief from judgment because defendant alleged "grounds for relief which were decided against the defendant in a prior appeal or proceeding . . . ." MCR 6.508(D)(2). Defendant filed a motion in the Supreme Court to add the same issues raised in her motion for relief from judgment and the Supreme Court granted the motion. However, in the same order, the Supreme Court denied defendant's application for leave to appeal. As defendant correctly observes, a denial of leave to appeal by the Supreme Court, without explanation, is generally not considered a decision on the merits and is not precedentially binding. *People v Phillips*, 227 Mich App 28, 35; 575 NW2d 784 (1998); MCR 7.321. Thus, the trial court erred to the extent that it denied defendant's motion based on the Supreme Court's denial of leave to appeal. However, it is well-settled that this Court may affirm if the trial court reaches the correct result, but for the wrong reason. *People v Brownridge (On Remand)*, 237 Mich App 210, 217; 602 NW2d 584 (1999), citing *People v Chavies*, 234 Mich App 274, 284; 593 NW2d 655 (1999). Clearly, defendant failed to establish her claim under MCR 6.508(D)(3)(a) and (b) and she is not entitled to relief from judgment for the reasons discussed below.

II. Entrapment

Defendant contends that her trial counsel's failure to file an entrapment motion constituted ineffective assistance of counsel. We disagree.

The issue of entrapment is waived if it is not raised prior to sentencing. *People v James Bailey No 1*, 439 Mich 897; 478 NW2d 480 (1991). Defendant did not raise her claim that counsel was ineffective for failing to raise the entrapment defense until well after sentencing and after her appeal in this Court was decided. Under MCR 6.508(D)(3), if an issue could have been raised in a prior appeal or motion, defendant is not entitled to relief. Defendant asserts that she did not raise the ineffective assistance claim because an evidentiary hearing was required. This does not constitute a reasonable justification for failing to file motion for a *Ginther*[1] hearing or for failing to raise this in her first appeal to this Court. If the issue could have been raised, the party seeking relief from judgment must show "good cause" for failing to raise the issue and "actual prejudice." MCR 6.508(D)(3)(a) and (b).

Defendant claims that the reason she failed to raise the issue earlier was that appellate counsel was ineffective. In *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995) (Boyle, J.), our Supreme Court stated that, under MCR 6.508, " '[c]ause' for excusing procedural default is established by proving ineffective assistance of appellate counsel, pursuant to the standard set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), or by showing that some external factor prevented counsel from previously raising the issue." Again, defendant has not shown that an "external factor" prevented her from raising the issue. Defendant has also failed to establish that appellate counsel was ineffective for failing to raise this issue earlier. In *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994), this Court observed:

> To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. Moreover, the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. Second, the deficiency must be prejudicial to the defendant. The same standards apply to a claim of ineffective assistance of appellate counsel. [Citations omitted.]

Here, appellate counsel raised several issues on appeal, but did not raise the issue of the ineffective assistance of counsel or move for a belated *Ginther* hearing regarding trial counsel's failure to file an entrapment motion. It is well-settled that the entrapment defense is an issue of law for the trial court. *People v Woods*, 241 Mich App 545, 554; 616 NW2d 211 (2000). The defense may be raised before or during trial. *People v D'Angelo*, 401 Mich 167, 177-178; 257 NW2d 655 (1977). As this Court recently set forth in *People v Milstead*, 250 Mich App 391, 396; 648 NW2d 648 (2002):

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

> Entrapment occurs 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 defendant bears the burden of proving entrapment by a preponderance of the evidence. *People v Pegenau*, 447 Mich 278, 294, 523 NW2d 325 (1994). The test for entrapment is objective and "focuses on the propriety of the government's conduct that resulted in the charges against the defendant 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 did nothing more than present the defendant with the opportunity to commit the crime of which he was convicted." *McGee, supra* at 345.

As our Court reiterated in *People v Williams*, 196 Mich App 656, 661-662; 493 NW2d 507 (1993), this Court considers the following factors in analyzing the government's conduct:

> (1) whether there existed any appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime with which he was charged; (3) whether there were any long time lapses between the investigation and the arrest; (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; (5) whether there were offers of excessive consideration or other enticement; (6) whether there was a guarantee that the acts alleged as crimes were not illegal; (7) whether, and to what extent, any government pressure existed; (8) whether there existed sexual favors; (9) whether there were any threats of arrest; (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant; (11) whether there was police control over any informant; and (12) whether the investigation is targeted. [Citing *People v Juillet*, 439 Mich 34, 56-57; 475 NW2d 786 (1991).]

Here, appellate counsel did not err by failing to raise this issue earlier because the record does not support an entrapment claim. Deputy Quisenberry testified that he met defendant on November 30, 1992, when he gave money to her sister to buy cocaine. That night, defendant handed the cocaine to Quisenberry, and told him to buy cocaine through her instead of her sister. Over the next several days, defendant repeatedly paged Quisenberry in an attempt to set up more drug buys. According to Quisenberry, defendant seemed to be not only coherent, but an experienced drug dealer. Defendant instructed Quisenberry where and when to meet and explained, in detail, how the transactions would occur and how much the drugs would cost. Quisenberry further testified that, when they communicated, it was defendant who contacted him by repeatedly paging him.

Defendant also testified on her own behalf at trial. She emphasized that, when Quisenberry met her, she was a heavy drug user and that she only participated in Quisenberry's drug purchases because he pressured her to do so and she needed to satisfy her need for more

drugs.[2] Defendant testified that Quisenberry also called her repeatedly, but also admitted that she paged him many times. Quisenberry testified that defendant was living in various locations, including in different hotel rooms, and that he had no way to contact her, except to respond to her pages. Defendant also stated that she resisted Quisenberry's attempts to buy drugs because Quisenberry asked for large quantities and she did not know where to obtain them. However, defendant later testified that she regularly bought quarter-ounce quantities of cocaine, several times an evening, and the record reflects that Quisenberry only asked to buy one-half ounce quantities for his first two purchases through defendant.

Taking defendant's assertions as true, defendant has failed to show that Quisenberry's conduct was "reprehensible" or that a normal, law-abiding citizen would have committed these crimes under similar circumstances. Quisenberry knew defendant for approximately three weeks, during which time she helped supply him drugs on four occasions. In this very short police investigation, no evidence indicates that Quisenberry and defendant were friends or that Quisenberry threatened defendant or offered her any inducements to participate.[3] Further, it appears that Quisenberry's calls to defendant occurred after defendant paged him and, if not, this alone is not enough to induce an otherwise law-abiding citizen to commit these offenses.

In sum, there was no basis for appellate counsel to move for a *Ginther* hearing or to otherwise explore on appeal why trial counsel failed to assert an entrapment defense because the record simply does not support that defense. Thus, contrary to defendant's argument, appellate counsel was not ineffective and defendant has, therefore, failed to establish "good cause" for failing to raise this issue earlier. Moreover, in addition to showing good cause, defendant was also required to demonstrate "actual prejudice" under MCR 6.508(D)(3)(b)(i), by showing that she had a reasonably likely chance of acquittal. Because the record shows that defendant's entrapment defense would have failed, she has not shown she was actually prejudiced by the alleged errors. Therefore, the trial court correctly denied defendant's motion for relief from judgment.

II. Sentence

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[2] Specifically, defendant asserted that two of Quisenberry's police informants repeatedly tried to contact her to set up drug purchases. However, defendant testified that she refused to submit to the informants' requests. Notwithstanding her assertions that she wanted nothing to do with them, defendant testified that the alleged informants stopped returning her phone calls, so she contacted Quisenberry to find out where they were. Thereafter, defendant admitted that she helped Quisenberry buy drugs because she thought she would get drugs to feed her own habit.

[3] Defendant asserts that Quisenberry took advantage of her friendship by drinking with her and by "accept[ing] the kind of confidences which suggest the highest degree of intimacy and trust . . . ." Defendant testified that, during their first half-hour meeting at a bar, Quisenberry bought a couple of rounds of drinks for a group of people. Further, Quisenberry testified that, during the same meeting, defendant showed him the needle tracks on her arms from drug use. Notwithstanding defendant's unusual disclosure during a first meeting, this evidence does not establish that Quisenberry and defendant were friends or that Quisenberry took advantage of defendant's friendship in his later drug buys.

Defendant argues that the trial court erred by denying her motion for relief from judgment because the trial court did not recognize its discretion to sentence her below the statutory minimum ten-year sentence for each offense.

It is well-settled that "a sentencing court may depart from a mandatory minimum sentence where substantial and compelling reasons exist justifying such a departure . . . ." *People v Ealy*, 222 Mich App 508, 512; 564 NW2d 168 (1997). However, "there is no legal requirement that a trial court state on the record that it understands it has discretion and is utilizing that discretion." *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001). "Rather, absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *Id.*

The sentencing transcript indicates that, after listening to defendant's attorney argue that there are substantial and compelling reasons for a downward departure in her case, the trial court specifically stated:

> The Court however does agree with the prosecuting attorney that the mandatory minimum sentence of ten years is constitutional and this Court under these factual situations has no alternative but to sentence to the mandatory minimum sentence . . . .

The trial court clearly stated that, *under the facts of this case*, it decided to sentence defendant to the mandatory minimum. By noting that the factual situation justified this conclusion, the trial court understood its discretion in rendering defendant's sentence. Moreover, nothing in the transcript constitutes "clear evidence" that the trial court did not understand the law in this regard. Accordingly, the trial court did not abuse its discretion by denying defendant's motion for relief from judgment on this issue.

Defendant further asserts that she was denied equal protection of the law because the trial court simply amended the judgment of sentence to indicate consecutive sentences instead of granting a full resentencing hearing. As noted, after concluding that the trial court erred by imposing concurrent, rather than consecutive sentences, this Court, in an unpublished opinion dated December 1, 1995, remanded the case "for entry of an amended judgment of sentence indicating consecutive sentences . . . ." *Shook, supra* Slip op, p 2. Thus, contrary to defendant's assertion, the trial court simply followed the directive of this Court. Defendant's recourse on this issue was to seek leave to appeal to the Supreme Court and we decline to revisit this issue in this appeal.

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Donald S. Owens