

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY LEE HORTON,

Defendant-Appellant.

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UNPUBLISHED

December 10, 2002

No. 234035

Wayne Circuit Court

LC No. 00-004034-03

Before: Griffin, P.J., and White and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of possession with intent to deliver over 650 grams of cocaine, MCL 333.7401(2)(a)(i), and attempted possession of 225 or more, but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii) and MCL 750.92(2), for which he was sentenced to consecutive terms of forty to sixty years and two to five years, respectively. We affirm.

Defendant first contends that the trial court committed prejudicial error when it refused to grant his trial counsel's motion to withdraw. A trial court's decision regarding the substitution of counsel is reviewed for an abuse of discretion. *People v T aylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). Defendant was required to show good cause to justify the appointment of substitute counsel. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Id.*

Defendant asserts that the court failed to inquire adequately regarding the breakdown in the relationship between defendant and trial counsel. The record demonstrates, however, that the court elicited from defendant his reasons for requesting new counsel, and fully discussed his various complaints. Defendant complained that his counsel did not visit him frequently enough, had not obtained transcripts of an evidentiary hearing, refused to seek interlocutory review of the denial of his motion to suppress his statement, refused to move to suppress the search warrants because defendant lacked standing, and had not talked with defendant about a defense trial witness.<sup>1</sup> Defendant admitted that counsel had visited him three times and defendant makes no

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<sup>1</sup> With regard to this alleged witness, defendant did not identify the witness at the motion hearing and nothing has since been presented regarding this possible witness' identity. Defendant rested

(continued...)

showing on appeal that more pre-trial visits were necessary. Counsel stated that the transcripts of the evidentiary hearing were not available and that he did not intend to file an interlocutory appeal. The trial court indicated that it would not grant a stay for an appeal and this Court rarely grants interlocutory appeals by defendants regarding suppression of evidence issues; it is therefore unlikely that, had an interlocutory appeal been filed, defendant would have received any relief.

Additionally, we note that counsel moved to suppress defendant's statements to the police, an evidentiary hearing on this issue was conducted, and the trial court denied the motion; therefore, the issue was preserved for appellate review in the event of defendant's conviction and it was reasonable to decide that filing an interlocutory appeal would have been frivolous. Even if counsel had filed an interlocutory appeal and succeeded in getting defendant's statement to the police suppressed, the trial would still have gone forward because the prosecution was not dependent on defendant's incriminating statement. Moreover, defendant's appellate counsel has decided not to raise any issue challenging the admission of defendant's statement even though the issue was preserved for possible appellate review. This suggests that trial counsel's assessment of the unlikelihood of prevailing on this issue in an interlocutory appeal was correct.

With regard to counsel's refusal to move to quash the search warrant, we have concluded in our discussion below that defendant did not have standing to contest the search warrant for the packages, and defendant's arrest was valid. Counsel was not required to pursue frivolous motions. *Traylor, supra* at 463.

Finally, defendant acknowledges on appeal that the mere act of filing a grievance against trial counsel is insufficient to establish good cause; however, he nevertheless claims that the fact that he filed a grievance should be seen as a strong indication that there were irreconcilable differences between him and his counsel. We rejected a similar claim in *Traylor, supra* at 463, and the same analysis applies in this case. Defendant's grievance indicated that his only claim of dissatisfaction was counsel's failure to move to suppress his statement to the police. However, as noted, an evidentiary hearing regarding this issue had already been completed two months before defendant wrote his grievance letter. Thus, it was reasonable for the trial court to conclude that the filing of a grievance did not require that it permit defendant's counsel to withdraw.

During trial, defendant complained that his counsel refused to ask the witnesses questions that defendant wanted asked because counsel asserted the questions were irrelevant or collateral. The substance of defendant's proposed questions was not placed on the record. We therefore conclude that the trial court properly deferred to counsel's decision regarding the proper strategy to be followed in questioning the witnesses, *Traylor, supra* at 463, and that defendant has failed

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without presenting any witnesses, and appellate counsel has failed to provide any information regarding this witness – or even to present any argument or appellate issue concerning the witness. Defendant's reference to a possible witness was apparently resolved before trial, or, at the least, has been abandoned as a basis for his argument concerning the necessity of replacing his trial counsel. *People v Howard*, 226 Mich App 528, 537; 575 NW2d 16 (1997).

to demonstrate good cause to support his request for appointment of a new counsel. *Mack, supra*.

Defendant next contends that the trial court erred in failing to follow the sentencing guidelines and that his sentences are disproportionate. We disagree.

Defendant committed the offenses for which he was convicted on February 19, 2000, thus the legislative sentencing guidelines applied to his sentencing. MCL 769.34(1). However, the initial legislative sentencing guidelines did not apply to all criminal offenses, and possession with intent to deliver over 650 grams of cocaine, MCL 333.7401(2)(a)(i), was not a covered offense. Accordingly, there were no guidelines to score for that offense and the sentence is reviewed solely to determine if there has been an abuse of discretion – that is, whether the sentence is disproportionate. *People v Cervantes*, 448 Mich 620, 626-627; 532 NW2d 831 (1995); *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997); *People v Edgett*, 220 Mich App 686, 690; 560 NW2d 360 (1996). The “key test” of proportionality is whether the sentence reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). The sentencing court may consider “the severity and nature of the crime, the circumstances surrounding the criminal behavior, the defendant’s attitude toward his criminal behavior, the defendant’s social and personal history, and the defendant’s criminal history, including subsequent offenses.” *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000).

Defendant was forty-seven years old when he was sentenced and had an extensive criminal history. By his own admission, he had been involved with cocaine before. A total of over 1,400 grams of cocaine was involved. Testimony at trial established that this amount of cocaine could be directly processed into approximately 30,000 rocks of crack cocaine if the purity was maintained, or double that number or more if the cocaine was mixed with a cutting agent. Finally, defendant had involved his family in his drug-delivery scheme. The trial court properly considered these facts in determining the sentence. Given these facts, we conclude that defendant’s sentence for possession with intent to deliver over 650 grams of cocaine was proportionate to the seriousness of the circumstances surrounding the offense and the offender. Further, even accepting defendant’s argument that the guidelines for this offense should be applied retroactively, these facts provide substantial and compelling reasons for departure.

Defendant also claims his two- to five-year sentence for attempted possession of 225 or more, but less than 650, grams of cocaine was disproportionate because it exceeded the minimum sentence range of zero to seventeen months recommended by the sentencing guidelines. A court may exceed the sentencing guidelines for substantial and compelling reasons, MCL 769.34(3). The trial court’s minimum sentence of twenty-four months was an upward departure of seven months from the recommended range. We conclude that the trial court properly justified its minimal departure above the guidelines with substantial and compelling reasons, including the defendant’s previous criminal history and his use of family members to accomplish his drug deliveries.

Defendant next claims that his conviction was obtained through the use of illegally seized evidence. We disagree. First, the warrants were adequately supported by probable cause; second, defendant lacked standing to challenge the warrants, *People v Lombardo*, 216 Mich App 500, 505-510; 549 NW2d 596 (1996); *People v Zahn*, 234 Mich App 438, 446-448; 594 NW2d

120 (1999); and third, the circumstances surrounding the pursuit and arrest of defendant were supported by probable cause.

Finally, defendant argues that he was deprived of his right to the effective assistance of counsel by trial counsel's failure to research the law regarding standing adequately, counsel's failure to challenge the admission of his statement to the police, and failure to object to the prosecutor's improper use of that statement at trial. Because defendant failed to move for a new trial or an evidentiary hearing, our review is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-650; 620 NW2d 19 (2000). This Court reviews a claim of ineffective assistance to determine if the defendant has established that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that a reasonable probability exists that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298, 302-303, 314; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Trial counsel did attempt to suppress defendant's statement to the police, but he was unsuccessful. The trial court rejected defendant's objection to the admission of his statement because it credited the police officer's testimony that the statement was not made until after defendant received and waived his constitutional rights.<sup>2</sup> Regarding the search and seizure issue, we have determined that the issue lacked merit; thus, counsel was not ineffective for failing to pursue it. Lastly, the prosecutor properly used defendant's statement as substantive evidence, MRE 801(d)(2); *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002), and any objection to the use of the statement on the grounds that defendant did not testify would have been futile. Defendant has thus failed to show ineffective assistance of counsel.

Affirmed.

/s/ Richard Allen Griffin  
/s/ Helene N. White  
/s/ Christopher M. Murray

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<sup>2</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).