

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JEFFERY L. HUDSON,

Defendant-Appellant.

UNPUBLISHED

December 13, 2002

No. 236344

Wayne Circuit Court

LC No. 00-012543

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of possession with intent to deliver less than fifty grams of heroin, MCL 333.7401(2)(a)(iv). Defendant was sentenced to eighteen months to twenty years in prison for the conviction. We affirm defendant's conviction but remand for resentencing.

I. Facts

The prosecution presented evidence that on October 24, 2000, a City of Detroit Police Department Narcotics Section raid team was assigned to execute a search warrant at a house in Detroit where drug trafficking was suspected of occurring. According to the search warrant, drug transactions were suspected to occur when people would walk up to the house, pass money through a window, and receive a small object. As the police raid van pulled up to the premises to execute the search warrant, defendant was seen descending the front steps of the house. Defendant was detained on the steps as the search warrant was executed, and a pat down search of defendant was conducted for weapons, but no weapons were found. The house was secured and narcotics were discovered inside. Defendant was then placed under arrest for loitering in a place of an illegal occupation. Defendant was thoroughly searched at this time, and \$303 and a plastic bag containing two hundred packs of heroin in a white paper wrap were recovered from defendant's right front pants pocket.

Defendant testified to a different chain of events, claiming that he was sitting in his parked car across the street and one house over from the house that was subject to the search when the police opened the door of his car and threw him into the middle of the street. Defendant claims he was then handcuffed, that both he and his car were searched, and that the officers then took him into the house. Defendant denied that he had been in the house or on the porch of the house before he was taken there by police. Defendant also denied ever being

informed that he was being placed under arrest for loitering and that two hundred packs of heroin were found on his person.

At the conclusion of the testimony, the trial court found defendant guilty of possession of the heroin with intent to deliver it. The trial court expressly found that defendant's testimony lacked any credibility. Defendant was sentenced to imprisonment for eighteen months to twenty years.

II. Analysis

On appeal, defendant argues that he was denied the effective assistance of counsel because defense counsel failed to move for suppression of the heroin recovered as evidence on the ground that the officers lacked probable cause to arrest and search defendant. We disagree.

Because defendant did not move below for a new trial or a *Ginther*¹ hearing, this Court's review is limited to mistakes apparent on the record. *People v Milstead*, 250 Mich App 391, 400 n 5; 648 NW2d 648 (2002); *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). "To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Snider, supra* at 423-424, citing *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). "In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy." *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In this case, the prosecution introduced evidence that defendant was arrested for loitering in a place of an illegal occupation after narcotics were discovered during the execution of the search warrant. The discovery of narcotics in the house provided more than sufficient probable cause to arrest the defendant for loitering. *People v Arterberry*, 431 Mich 381, 383; 429 NW2d 574 (1988); *People v Morris*, 66 Mich App 514; 239 NW2d 649 (1976). The search of defendant's person, therefore, was incident to his arrest and also appropriate. *People v Eaton*, 241 Mich App 459, 461-462; 617 NW2d 363 (2000); *Arterberry, supra* at 384. As such, a motion to suppress the evidence was not supported by the evidence, and would have made no difference in the outcome of the proceedings. Defendant suffered no prejudice as the result of defense counsel's decision to challenge the search by way of cross examination of the witnesses during the bench trial, rather than by filing a futile motion to suppress the evidence. "Counsel is not required to argue a meritless motion." *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). We find that defendant fails to overcome the presumption that defense counsel utilized appropriate trial strategy. *Tommolino, supra*.

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

Defendant also argues that he is entitled to be resentenced because the trial court departed from the legislative guidelines, MCL 769.34(4)(b), that apply to his conviction, without stating substantial and compelling reasons for doing so. The prosecutor concedes this point and we agree.

MCL 769.34(4)(b) provides:

(b) If the offense is a violation of section 7401(2)(a)(iv) . . . of the public health code, 1978 PA 368, MCL 333.7401 . . . and the upper limit of the recommended minimum sentence range is 18 months or less, the court shall impose a sentence of life probation absent a departure.

Here, it is undisputed that defendant's statutory sentencing guidelines range is zero to nine months. The upper limit of the recommended minimum sentence range, nine months, is less than eighteen months. Therefore, the sentencing court was statutorily obligated to impose a life probation sentence absent a departure. MCL 769.34(4)(b). Because the trial court did not articulate substantial and compelling reasons to depart from the statutory guidelines, we vacate defendant's sentence and remand for resentencing.

Affirmed in part and remanded for resentencing. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder