

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VINCENT WOODARD,

Defendant-Appellant.

UNPUBLISHED
December 2, 2003

No. 241581
Wayne Circuit Court
LC No. 01-010419-01

Before: Cooper, P.J., and Markey and Meter, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), delivery of marijuana, MCL 333.7403(2)(d), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender to concurrent prison terms of 51 months to 20 years for the cocaine conviction, one year for the marijuana conviction, and three to five years for the felon in possession conviction. He received the mandatory consecutive two-year term for the felony-firearm conviction. Defendant appeals by right. We affirm but remand for a determination of the proper credit for time served and correction of the judgment of sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

After conducting surveillance of a house for about twenty to thirty minutes and observing defendant participate in four apparent drug transactions, police raided the house. Police followed defendant to a southwest bedroom where he took a loaded .44 caliber revolver from his waistband and tossed it across the bed. On his person, police found twenty-three clear Ziploc baggies of cocaine, thirty-five blue Ziplocs of cocaine, a baggy with a chunk of cocaine, and a red Ziploc of marijuana. They found a tally book and a photograph of defendant on a dresser. The book appeared to record drug transactions. A transaction represented on a deposit receipt with defendant's name on it was found in the tally book and was also recorded. Defendant maintained that the case was fabricated and that the police had planted the receipt and photograph.

Defendant first argues that he was denied the effective assistance of counsel. To prevail on this claim, he must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the

proceedings were fundamentally unfair or unreliable. Also, he must overcome a strong presumption that counsel's tactics constituted sound trial strategy. *People v Rodgers*, 248 Mich App 702, 714-715; 645 NW2d 294 (2001).

Defendant asserts that his attorney should have hired a handwriting expert to establish that the writing in the tally book was different than the writing on the receipt. Defendant has not established that he would be able to find a handwriting expert to support this position. Based on the current record, it is reasonable to surmise, especially given the recording of the transaction on the receipt in the tally book, that counsel decided not to seek a handwriting expert because the handwriting in the tally book and the book itself were defendant's. There is not a sufficient record to overcome the presumption that counsel exercised reasonable professional judgment in deciding not to seek such an expert. See *Wiggins v Smith*, 539 US ____; 123 S Ct 2527, 2541; 156 L Ed 2d 471 (2003).

Defendant also argues that his attorney should have requested that the gun be tested for fingerprints. However, two police officers saw defendant toss the gun. Presumably because they could testify that defendant possessed the gun, they did not need fingerprints to establish as much and did not preserve the gun for fingerprinting. Given these circumstances, the absence of defendant's fingerprints would not have been persuasive while the presence of his prints would have been compelling evidence against him. Thus, the decision to forego seeking fingerprinting was a sound strategic decision.

Defendant next argues that the trial court erred in failing to inquire about the attorney-client relationship and grant a continuance on the day of trial when his counsel advised the judge that defendant wanted to fire her, hire private counsel and get an adjournment. Counsel did not represent that there had been a destruction of communication or a breakdown in the attorney-client relationship, which would have triggered the duty to inquire under *People v Bass*, 88 Mich App 793, 801-802; 279 NW2d 551 (1979). It appears that defendant's concern with counsel arose on the day of trial and related to a failure to request the gun for fingerprinting and a failure to get pictures of the house. At that point, it is very doubtful that counsel could have gotten a continuance for these purposes because it does not appear that they would have significantly helped the defense. Accordingly, we find no error warranting reversal.

We agree with defendant's last claim that the judgment of sentence and presentence investigation report should be corrected to accurately reflect the number of days defendant should be credited for time served. The prosecutor concurs, but information in the record is contradictory with respect to how much time defendant actually served in jail. Therefore, we remand the matter to the trial court to determine the amount of credit due.

We affirm but remand for a determination of the credit due defendant for time served and for correction of the judgment of sentence and the presentence investigation report. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Jane E. Markey
/s/ Patrick M. Meter