STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2006
v	No. 258101 Wayne Circuit Court
DONYELL GERARD JOHNSON, Defendant-Appellant.	LC No. 04-005339-01

Before: Murray, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for felon in possession of a firearm, MCL 750.224f, and carrying or possessing a firearm when committing or attempting to commit a felony, MCL 750.227b. Defendant was sentenced, as a second habitual offender, MCL 769.10, to two years' probation for his felon in possession of a firearm conviction, and to five years' imprisonment for his felony-firearm conviction. We affirm.

Defendant first argues that the prosecution's loss of the weapon confiscated from the scene of the crime denied defendant his right to present a defense. We disagree.

This Court reviews de novo a constitutional issue. *People v Toma*, 462 Mich 281, 310; 613 NW2d 694 (2000). The United States Supreme Court has held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). Further, this Court has held that, "[a]bsent the intentional suppression of evidence or a showing of bad faith, a loss of evidence that occurs before a defense request for its production does not require reversal." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1993). "The presence or absence of bad faith by the police for purposes of the Due Process Clause must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood*, *supra* at 56 n 1.

Defendant did not introduce any evidence of bad faith on the part of the police. At trial, Officer Young, the officer in charge of defendant's case, testified that he did not discover that the

confiscated gun was missing until the morning of defendant's trial. He testified that it was standard procedure to destroy evidence after a case was dismissed,[1] and that the property officer destroyed the confiscated gun because he was unaware that Officer Young had refiled the case against defendant. Although defendant characterizes the police's conduct as being "grossly negligent" in his statement of the issue on appeal, defendant makes no showing of bad faith on the part of the police or prosecution. Defendant bears the burden of showing bad faith conduct by the police—that they knew the gun had an exculpatory value to defendant and that they destroyed it after discovering its exculpatory value. *Youngblood*, *supra* at 56 n 1. Because defendant did not show the police acted in bad faith when they destroyed the gun, his Due Process rights were not violated. *Johnson*, *supra* at 365; *Youngblood*, *supra* at 58.

Defendant also argues that the trial court committed error requiring reversal when it denied his motion to suppress evidence of the confiscated gun. We disagree.

In evaluating a motion to suppress, this Court reviews a trial court's factual findings for clear error. *People v VanTubbergen*, 249 Mich App 354, 359-360; 642 NW2d 368 (2002). "To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

Both the state and federal constitutions guarantee protection against unreasonable searches and seizures. US Const, Am IV; Const 1963 art 1, § 11.

> Generally, a search conducted without a warrant is unreasonable unless there exists both probable cause and exigent circumstances establishing an exception to the warrant requirement. Probable cause to search exists when facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place. Whether probable cause exists depends on the information known to the officers at the time of the search. [*People v Jordan*, 187 Mich App 582, 586-587; 468 NW2d 294 (1991) (internal citations omitted).]

In order for the exigent-circumstance exception to apply, the police must have "probable cause to believe that an immediate search will produce specific evidence of a crime and that an immediate search without a warrant is necessary in order to (1) protect the officers or others, (2) prevent the loss or destruction of evidence, or (3) prevent the escape of an accused." *Id.* at 587.

Officer Joubert testified, during the preliminary examination, that on May 22, 2004, she was working with Officer Garcia when she was called to 14752 Mansfield to respond to a "Family Trouble, Assault, and Battery." Officer Joubert further testified that after she was let into the house by an aunt, she went up the stairwell and observed defendant standing in the doorway of a bedroom, and a woman standing inside of the bedroom. She observed that he was holding what appeared to be a handgun. Officer Joubert instructed him to drop whatever he had

[1] Defendant's case was dismissed the first time because the testifying officers were unavailable.

in his hands and he complied. She then placed him under arrest and confiscated the handgun from underneath a pile of clothing about one foot from the doorway. From this testimony, the trial court could have reasonably found that Joubert had probable cause to believe a crime had occurred, and that the search was necessary to protect herself, others present in the house, and the destruction of the weapon.

Moreover, at trial, Officer Garcia testified that as he and Officer Joubert approached defendant's house, someone's niece ran out into the driveway, screaming, and asked the officers to help her aunt. Officer Garcia continued to hear a male and female arguing from the upstairs portion of the house, and he called for more police vehicles. Officer Joubert heard a woman crying from the upstairs portion of the house. After entering the house, Officers Garcia and Joubert both saw defendant holding an object by his side that they thought was a gun. Officer Garcia testified that he "saw a dark object. You know, a black object, what appeared to be a handgun. I couldn't describe it exactly, which model it was or anything. But to me it appeared to be a handgun." Officer Joubert testified that the stairway was well lit and that she observed defendant holding something black in his left hand, which she believed was a handgun.

Officer Garcia drew his weapon because he feared for his life. He ordered defendant to drop his weapon and to get down to the ground. Officer Joubert also drew her weapon and ordered defendant to drop whatever he had in his hand. Defendant bent down slightly and threw the object which appeared to be a weapon into the bedroom where he was previously arguing, the room to his left. Officers Joubert and Garcia testified that they believed he was holding a weapon, and they had just heard screaming and arguing coming from inside the room in which he threw the object they believed to be a weapon.

Officers Joubert and Garcia went to defendant's house in response to a domestic violence call. Upon seeing defendant, Officer Joubert thought he had a weapon in his hand, and she saw defendant throw the object into a room where she heard screaming and crying. As such, Officer Joubert had probable cause to believe that an immediate search of the room would produce the gun, meeting the first prong of the exigent circumstances warrant exception. The fact that Officer Joubert heard screaming from the room also supports the finding that the search was necessary to protect herself and others. The number of people in the bedroom was unknown when Officer Joubert opened the door to look for what she believed was a weapon. The search also prevented the potential loss of evidence of the crimes defendant had committed. Officer Joubert acted to protect herself and others from what she believed was an unsecured weapon. Thus, the warrantless search did not violate defendant's constitutional protection against unreasonable searches and seizures because it met the exigent circumstance requirement. *Jordan, supra* at 587. Therefore, the trial court properly denied defendant's motion to suppress.

Finally, defendant claims his right to effective assistance of counsel was violated because his trial counsel failed to file a motion to dismiss based on delay of arrest. We disagree.

To preserve a claim of ineffective assistance of counsel, a criminal defendant must raise a motion for a new trial or an evidentiary hearing. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004). Defendant did not make a motion for a new trial or an evidentiary hearing. When reviewing an unpreserved claim of ineffective assistance of counsel, where an evidentiary hearing is not previously held, this Court's review is limited to the facts contained on the record. *People v Wilson,* 242 Mich App 350, 352; 619 NW2d 413 (2000). As a matter of

constitutional law, this Court reviews the record de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The Michigan Supreme Court rearticulated the standard for ineffective assistance of counsel in *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The Court adopted the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

On appeal, defendant argues that trial counsel's performance was deficient because of his failure to file a motion to dismiss based on the delay between the date of the incident, May 23, 2003, and the date the arrest warrant was issued, July 21, 2003. In order to determine whether a defendant's Due Process rights were violated by a delay in arrest, the defendant must first show "some prejudice" because of the delay. *People v Bisard*, 114 Mich App 784, 786; 319 NW2d 670 (1982). "Once a defendant has shown that *some* prejudice has occurred as a result of a delay, it is incumbent upon the prosecution to show (1) an explanation for the delay, (2) that the delay was not deliberate, and (3) that no undue prejudice attached to the defendant." *Id*. at 786-787.

Here, defendant has not demonstrated how he was in any way prejudiced by the delay. The lower court file does not indicate, nor does defendant suggest on appeal, that he ever requested that the gun be tested for fingerprints or any other sort of identification analysis. Defendant asserts that the fact that key evidence was lost prejudiced defendant, however, the destruction of the weapon actually may have benefited defendant because no physical evidence was produced at trial.

Defendant has not shown that his trial counsel's failure to file a motion to dismiss based on delay in arrest was an error "so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment," especially being mindful of the strong presumption that counsel's performance constituted sound trial strategy. *Strickland, supra* at 687, 690. Defendant's trial counsel filed a motion to suppress based on illegal search and seizure, he cross-examined witnesses, and brought a motion for a directed verdict which was successful regarding one of the three counts against defendant. Defendant does not rebut the presumption that his trial counsel's failure to file a motion to dismiss based on delay was sound trial strategy. Thus, his claim of ineffective assistance of counsel fails.

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly