STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2007
v	No. 273942 Berrien Circuit Court
ERIC WILLIAMS, Defendant-Appellant.	LC No. 2005-405916-FH

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv); maintaining a drug house, MCL 333.7405(d); and possession of marijuana, MCL 333.7403(2)(d). He was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of 2 to 20 years on the cocaine conviction and 12 to 24 months on the drug house conviction. He was ordered to pay a fine and costs for the marijuana conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied the effective assistance of counsel because his attorney did not move to suppress evidence based on a violation of the knock and announce rule, and did not object to the admission of this evidence on that ground. Defendant did not move for a new trial or an evidentiary hearing on this issue; thus, our review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Effective assistance of counsel is presumed, and the defendant bears the burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). We will not substitute our judgment for that of counsel regarding matters of trial strategy, or assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defense counsel brought a motion to suppress based on lack of consent, which was denied. The knock and announce statute, MCL 780.656, provides:

> The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and

> purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.

This statute speaks to circumstances in which an officer is charged with executing a warrant. The police were not executing a warrant in this case. Moreover, the statute is aimed at allowing a breaking to execute the warrant after admittance is refused following a "knock and announce." Since the court denied the motion to suppress, presumably based on a finding of consent to enter, there was no breaking. This statute does not require a knock and announce when consent to enter has been given. Counsel is not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005). Accordingly, failing to move to suppress on this basis, following the unsuccessful motion to suppress, did not amount to ineffective assistance of counsel.

Defendant next argues that the trial court erred in allowing prosecutorial misconduct, in the form of questions to defendant and arguments, pertaining to the fact that defendant was on parole. Defendant acknowledges that he first said to the deputy that he was on parole and might be returning to prison, and therefore asked for some marijuana "so I can smoke before I go back." He then said that he did not smoke marijuana, but was depressed so "I was like let me smoke some." He then said he was just playing, and that "basically I thought this was just a big joke." The prosecutor challenged defendant's assertion that he believed the situation was jovial given that defendant was on parole and the police had just found drugs in his home; the prosecutor questioned defendant's credibility since a parolee found with drugs would not generally interpret the situation as jovial. In *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007), this Court stated:

> Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context. . . . "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial. . . . Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel. . . . With these guiding principles in mind, we shall now examine the specific arguments raised by defendant. [Citations and footnote omitted].

When defendant claimed his request for marijuana was light-hearted, it was fair for the prosecutor to challenge his credibility. Thus, the evidence was relevant and admissible, and there was no prosecutorial misconduct.

Defendant next argues that his sentence of 2 to 20 years for possession with intent to deliver less than 50 grams of cocaine was unconstitutional or erroneous for a variety of reasons. He mistakenly asserts that the maximum sentence was doubled to 40 years, when in fact he received a maximum 20-year sentence. Defendant further argues that the sentence was disproportionate and that the court should have considered various mitigating factors, that his allegedly unknown rehabilitative potential rendered the sentencing information inaccurate, and that the sentence was cruel and unusual. The recommended minimum range for defendant's

sentence on the possession with intent to deliver conviction was 5 to 34 months. The parties stipulated that the range for the maintaining a drug house conviction was 0 to 24 or 25 months. Thus defendant's minimum sentences of 24 months on the possession conviction and 12 months on the drug house conviction were within the guidelines range. The court said that this was a guidelines sentence. When a court expressly relies on the sentencing guidelines, its articulation of reasons for a sentence is sufficient. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). Moreover, when a minimum sentence is within the appropriate guidelines range, we must affirm absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Defendant does not identify a scoring error, and the absence of some information did not render the information available inaccurate. Thus, reversal is not permitted.

Defendant also claims a violation under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), apparently because he did not admit to all facts used to score the guidelines. However, *Blakely* applies only to maximum sentences, see *People v Drohan*, 475 Mich 140, 148, 155, 156; 715 NW2d 778 (2006), and thus is inapposite.

Finally, defendant asserts that he was entitled to credit for time served. He acknowledges that a parolee is entitled to credit for the sentence to be served on the parole violation, and not the crime committed while on parole. At sentencing, the court stated that these sentences would be consecutive to that to be served for the parole violation. Defendant has provided no documentation to suggest that he was not returned to prison on this parole violation. Accordingly, defendant has failed to establish the need for a remand.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder