STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 26, 2008
v	No. 276085 Wayne Circuit Court
WILLIAM BERRY, JR., Defendant-Appellant.	LC No. 06-009408-01

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

A jury convicted defendant William Berry, Jr. of possession with intent to deliver a controlled substance (cocaine) of less than 50 grams.[1] The trial court sentenced Berry to two years' probation, the first 90 days to be served in jail. Berry appeals as of right, and we affirm. We decide this case without oral argument under MCR 7.214(E).

I. Basic Facts And Procedural History

In early August 2006, Detroit Police officers executed a search warrant at a known drug house. As officers Raynard Reed and Anthony Gavel were moving to their assigned location behind the residence, they saw Berry standing at the back door participating in a narcotics transaction. Berry was standing inside the residence facing the back door's bar grate. Another man, Richard Mackie, was standing in the backyard, facing the back door's bar grate. The officers testified that they saw Berry holding a plastic bag containing cocaine and attempting to pass something through the grate to Mackie. Officer Reed was approximately 25 to 30 feet from the back door when he made this observation, and Officer Gavel was approximately two feet away from the back door at the time. Officer Reed said that he observed the transaction for "just a couple of seconds." After making eye contact with Officer Reed, Berry ran into the kitchen and sat down on a couch.

When Officers Reed and Gavel entered the residence, they saw Berry and another man, Winner Johnson, in the kitchen. The officers conducted a search of the kitchen, and Officer

[1] MCL 333.7401(2)(a)(*iv*).

Reed recovered a plastic sandwich bag containing "29 zip locks of cocaine and one loose rock" underneath a kitchen cabinet. The kitchen cabinet is approximately seven feet from the back door of the residence. Officer Reed testified that the packaging of the cocaine was commonly associated with narcotics sales and that it was the same bag he saw Berry previously holding.

Berry, however, testified that he had never seen the plastic bag before it was discovered in the kitchen. Further, Berry testified that he was taken to the residence by a man who was going to sell him bus passes, that he did not known the man's name, and that he had never been to the residence before. Berry testified that shortly after arriving at the residence, he heard the commotion outside and sat down on the couch. Berry also testified that it was Johnson who was standing by the back door. Berry did not remember anyone else being at the back door.

The parties stipulated that the substance in question was in fact cocaine in an amount appropriate for the charge. No other narcotics were found at the residence. Berry now appeals.

II. Ineffective Assistance Of Counsel

A. Standard Of Review

Berry claims that he received ineffective assistance of counsel because his counsel failed to move to have the plastic bag in which the cocaine was found fingerprinted, failed to try to locate a witness until the night before trial, and failed to obtain a copy of the discovery until the morning of trial. Because it is unpreserved, we will consider Berry's claim of ineffective assistance only to the extent that counsel's claimed mistakes are apparent on the record.[2]

B. Legal Standards

Criminal defendants have a constitutional right to effective assistance of counsel.[3] There is a strong presumption that counsel afforded reasonable professional assistance.[4] There is also a strong presumption that "the challenged action . . . might be considered sound trial strategy."[5] To overcome these presumptions, a defendant claiming ineffective assistance must show that counsel's assistance fell below an objective standard of reasonableness and that this conduct was prejudicial.[6] To show prejudice, the defendant must show that "but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different."[7] Reasonable probability is "'a probability sufficient to undermine confidence in the outcome.'"[8]

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[2] *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

[3] *Strickland v Washington*, 466 US 668, 685-686; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

[4] *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

[5] *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

[6] *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

[7] *Watkins, supra* at 30.

[8] *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001), quoting *Strickland, supra* at 694.

C. Applying The Standards

1. Berry's Affidavit

Regarding the failure to move to have the plastic bag fingerprinted, on appeal Berry submits his own affidavit stating that the fingerprint analysis would have shown that his fingerprints were not on the bag. However, this Court has already denied Berry's motion to remand for an evidentiary hearing.[9] Therefore, we will not consider this affidavit.[10]

2. Fingerprinting

In any event, we conclude that defense counsel's decision not to have the bag fingerprinted may well have been a matter of trial strategy, an area in which this Court will not substitute its judgment for that of counsel.[11] During trial, defense counsel was able to get the police officer who discovered the bag to admit that he never requested that the bag be fingerprinted. The officer explained on redirect examination, however, that it is unusual to have a plastic bag used in a drug transaction tested for fingerprints because it is difficult to get fingerprints off of a bag that is typically handled by many different people. "[I]f you tried to place every single plastic baggy that you came in contact with," the officer continued, "it would just do nothing but bog[] down the entire crime lab." The officer did not say that fingerprints could not be found on plastic bags. Rather, he indicated that it is not done as a matter of procedure because it would be time consuming to try and isolate a single person's prints. Defense counsel was able to establish that there was no fingerprint evidence ever taken from the bag. Counsel may have concluded that it would be a better strategy to leave this impression with the jury, as opposed to possibly establishing that Berry did touch the bag (and thus undermining his credibility) by having the bag tested for fingerprints.

3. Locating Witnesses

Regarding counsel's alleged failure to attempt to locate a witness until the night before trial, Berry again relies on his affidavit, which we do not consider. Even if we were to consider Berry's claim that an investigator attempting to locate the witness contacted Berry for the first and only time the night before trial, there is no information regarding who hired the investigator or how long the investigator had been looking for the witness. Also, the record does not indicate that the witness would have stated that the bag belonged to someone other than Berry. Again, counsel may have elected not to call this witness as a matter of trial strategy.[12] To exonerate

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[9] *People v Berry*, unpublished order of the Court of Appeals, entered October 11, 2007 (Docket No. 276085).

[10] *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), aff'd in part and rev'd in part on other grounds 462 Mich 415 (2000).

[11] *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

[12] *Id.*

Berry, the witness would likely have had to implicate himself, and counsel may have concluded that the risk of contrary testimony would have been too great.

4. Discovery

Regarding counsel's alleged failure to obtain a copy of the discovery until the day of trial, the record does not support this claim. Notably, there is no information in the record (or in Berry's affidavit) about what documents were in the discovery package or how earlier access to those documents would have benefited Berry at trial. The mere fact that a lawyer has a limited amount of time to prepare for trial is insufficient to establish ineffective assistance without inquiry into counsel's actual performance at trial.[13] Berry does not assert that counsel's trial performance was adversely affected by not having the discovery package until that morning. Therefore, Berry has failed to establish the requisite prejudice.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Alton T. Davis

[13] See *United States v Cronic*, 466 US 648, 661-662; 104 S Ct 2039; 80 L Ed 2d 657 (1984).