STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 10, 2009
v	No. 285556 Wayne Circuit Court
GREG JOHNSON, Defendant-Appellant.	LC No. 06-009513-01

Before: O'Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

Defendant appeals by leave granted his bench trial conviction of possession with intent to deliver more than 50, but less than 450 grams of cocaine, MCL 333.7401(2)(a)(*iii*). Defendant was sentenced to two to 20 years' imprisonment. We affirm.

I. Factual Background

At the time of his arrest, defendant was driving a borrowed van. The police officers involved testified that, while on patrol, they observed the van to have a cracked windshield and that defendant was not wearing his seatbelt. The officers effectuated a stop and approached the vehicle. The officers both observed defendant struggling with the van's center console. Officer Connor observed a portion of a bag protruding from the console drawer, which he suspected to contain crack cocaine. When defendant was instructed to exit the vehicle, he made a swift motion behind his back. Officer Pesmark alerted Officer Connor that defendant had "pitched" a bag containing suspected narcotics. After defendant was handcuffed and placed in the police vehicle, Officer Pesmark recovered the bag of suspected narcotics that defendant threw. Officer Connor recovered a separate bag of suspected narcotics from the center console of defendant's vehicle.[1]

In contrast, defendant contends officers effectuated the stop based on the pretext that a shooting had occurred nearby involving a van similar to the one defendant was driving.

[1] Laboratory reports identifying the contents of the bags as controlled substances were stipulated to for admission at trial.

Defendant indicated that he had borrowed the van and was unaware that narcotics were inside. He denied handling or throwing any bags containing controlled substances while in the van.

II. Exculpatory Evidence

On appeal, defendant contends that he was denied a meaningful opportunity to present a complete defense. Specifically, defendant claims he was denied access to exculpatory evidence. We review such claims de novo. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007).

Defendant's argument on appeal on this issue is both convoluted and serves to mischaracterize his actual claim. Defendant purports to contend that the failure of police to preserve the van to prove the existence of the cracked windshield deprived him of access to potentially exculpatory evidence. In reality, defendant's contention comprises an improper collateral attack on the existence of probable cause for his arrest. See, *People v Ward*, 459 Mich 602, 607-608; 594 NW2d 47 (1999), amended by *People v Ward*, 460 Mich 1204 (1999), citing *People v Ingram*, 439 Mich 288, 291; 484 NW2d 241 (1992) (defining the term "collateral attack"). Defendant's argument is disingenuous given his failure to challenge an alternative, legitimate, basis for effectuation of the stop – his failure to wear a seatbelt.

III. Judicial Disqualification

Defendant also contends that he was denied a fair trial when the trial court failed to sua sponte disqualify itself from presiding over his bench trial.

Although initially scheduled for a jury trial, defendant voluntarily and affirmatively waived his right to a jury. Notably, the prosecutor requested the trial court conduct a separate evidentiary hearing, but defendant's counsel objected, indicating: "I don't see any need for that . . . but I certainly feel that the Court can take – can separate the dual functions adequately so that we wouldn't necessitate double testimony." Only after the trial court concluded the evidentiary hearing and ruled against defendant, finding his testimony to not be credible, did defense counsel present an oral motion for an alternative judge or a jury trial. The trial court denied the motion, finding that defendant knowingly waived a jury trial and understood that the results of the evidentiary hearing would be incorporated as part of the bench trial. Defendant took no further steps to pursue his request that the trial judge recuse himself from further participation in the proceedings. As such, this issue has effectively been waived. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

IV. Ineffective Assistance of Counsel

Defendant also contends that he was denied the effective assistance of counsel. Because defendant failed to file a motion seeking a new trial or a *Ginther*[2] hearing, our review of defendant's claim is limited to the facts contained in the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

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

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that there is a reasonable probability that, but for the deficient performance, the result of the trial would have been different. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007) (citation omitted). "[T]o demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id*. A determination regarding counsel's competence should not be made with the benefit of hindsight. *Id.*, citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant basically contends that counsel was ineffective for failing to substantiate defendant's version of the allegedly pretextual basis for the officers to effectuate a stop of his vehicle or to verify the existence of a cracked windshield and for failing to seek a recusal by the trial court. Defendant's contention regarding the lack of counsel's effort to investigate these matters is irrelevant, given defendant's failure to contest the propriety of the traffic stop based on his not wearing a seatbelt. In addition, with reference to his claim that counsel failed to seek recusal of the trial judge, defendant is clearly unfamiliar with the record in his own case. Defense counsel did seek an oral motion for disqualification. Hence, defendant's suggestion that the failure to seek recusal constituted ineffective assistance of counsel cannot be factually supported. His failure to pursue the oral request further did not fall below an objective standard of reasonableness.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens