STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 2010
v	No. 293325 Benzie Circuit Court
DENNIS BRADFORD KING, Defendant-Appellant.	LC No. 07-002025-FC

Before: WHITBECK, P.J., and ZAHRA and FORT HOOD, JJ.

PER CURIAM.

Defendant entered a plea of no contest to a charge of possession with intent to deliver less than 50 grams of a mixture containing a controlled substance (cocaine), MCL 333.7401(2)(a)(iv). The plea was conditioned on defendant being able to raise an issue on appeal regarding the suppression of evidence. See *People v Reid*, 420 Mich 326, 331-332; 362 NW2d 655 (1984). Defendant was sentenced as a second habitual offender, MCL 769.10, to 40 months to 30 years in prison. Following the grant of a delayed application for leave to appeal, we affirm.

The police stopped defendant's truck because the license plate was not illuminated. The police determined that defendant was driving with a restricted license and that there was a warrant for his arrest relative to a nonsufficient funds check. Defendant was handcuffed and put in the patrol car. A search of defendant's truck revealed cocaine and drug paraphernalia

Based on *Arizona v Gant*, 556 US ___, 129 S Ct 1710, 173 L Ed 2d 485 (2009), defendant first argues that his motion to suppress the evidence obtained in the search should have been granted. If a ruling on a motion to suppress "involves an interpretation of the law or the application of a constitutional standard to uncontested facts," appellate review is de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001). More specifically, whether the exclusionary rule should be applied to a violation of the Fourth Amendment is a question of law reviewed de novo. *People v Custer*, 465 Mich 319, 326; 630 NW2d 870 (2001).

In *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981), the United States Supreme Court held that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile" as well as the "contents of any containers found within the passenger compartment." 453 US at 460. However, in *Gant*, the Court rejected this interpretation of *Belton*, and held that,

pursuant to *Chimel v California*, 395 US 752; 89 S Ct 2034; 23 L Ed 2d 685 (1969), police may "'search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search[,]'" [or] "if it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."' *People v Short*, ___ Mich App ___; ___ NW2d ___ (2010), slip op at 3,[1] quoting *Gant*, 129 S Ct at 1719, quoting *Thornton v United States*, 541 US 615, 632; 124 S Ct 2127; 158 L Ed 2d 905 (2004) (Scalia, J., concurring in judgment).

In *Short*, this Court stated:

> [W]hen [the officer] conducted the search, our courts adhered to the nearly universally accepted reading of *Belton* that an officer may search a vehicle incident to a lawful arrest. Law enforcement officers are entitled to, and indeed must, rely on court decisions that define appropriate police conduct and it is illogical to impose "the extreme sanction of exclusion" when a clear rule of conduct is later abrogated by the Supreme Court. [*United States v Leon*, 468 US 897, 916; 104 S Ct 3405; 82 L Ed 2d 677 (1984)]. Accordingly, though the well-settled interpretation of *Belton* was subsequently changed by *Gant*, because it was objectively reasonable for [the officer] to rely on that precedent, the good faith exception to the exclusionary rule applies and the trial court correctly denied defendant's motion to suppress. [*Short*, slip op at 7-8.]

Although the search of defendant's truck violated *Gant*, *Belton* was good law at the time. Accordingly, the good faith exception to the exclusionary rule applies in this case.

Defendant next argues that he received ineffective assistance of counsel because counsel failed to object to his sentence. Defendant failed to move for an evidentiary hearing below. Thus, review is precluded unless the record includes sufficient detail to support the claim. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

> Generally, to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). [*People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).]

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[1] Our Supreme Court granted defendant Short's application for leave to appeal on October 29, 2010.

At the plea hearing, both the prosecutor and the court stated that the maximum sentence for this crime was 20 years[2] but that, based on defendant's habitual offender status, it would be 30 years. There was no express agreement regarding the minimum sentence. However, the court indicated that sentencing would be based on "Michigan's habitual offender statute."

The sentencing guidelines range for defendant's minimum sentence was ten to 28 months. The court stated that the minimum sentence of 40 months was within the guidelines range. The court explained that as a prior drug offender, defendant was subject to the augmentation provision of the Controlled Substances Act, MCL 333.7413(2), which allowed for imprisonment for a term no more than twice the term otherwise authorized. Defendant argues that because he received an augmented minimum sentence, he was impermissibly sentenced in accord with controlled substances habitual offender act rather than the habitual offender act.

The habitual offender act, MCL 769.10, provides for a maximum sentence that is one and one-half times the maximum provided by statute, *unless* the offense was a major controlled substance offense. MCL 760.10(1)(c). If the offense is a major controlled substance offense, the maximum that would be allowed under MCL 769.10 would be the maximum permitted by MCL 333.7413(2), i.e., a doubled sentence. This statute allows for a doubling of the minimum range calculated by reference to the sentencing guidelines, as well as a doubling of the maximum sentence. *People v Lowe*, 484 Mich 718, 724; 773 NW2d 1 (2009). Thus, defendant received a minimum sentence that was consistent with MCL 769.10 and his plea agreement.[3] Since counsel was not required to make a meritless objection at sentencing, see *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995), counsel did not render ineffective assistance.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood

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[2] See MCL 333.7401(2)(a)(iv).

[3] We note that, but for the plea agreement, defendant could have been sentenced under MCL 769.10, by reference to MCL 333.7413(2), to a maximum of 40 years.