STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2011
v	No. 294578 Wayne Circuit Court
STEVEN LIONELL MARTIN, Defendant-Appellant.	LC No. 09-002539-FH

Before: K. F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to two years' probation for the drug conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

I. BASIC FACTS

Officers testified that they were investigating an armed robbery when a confidential informant advised them to go to a particular address, an abandoned house, where their suspect might be found. When officers arrived at the home, they noticed that the electricity had been tapped into illegally. The windows in the rear of the home were broken. One of the officers stood on a chair and looked through the front window. Other than a couch, table, and television, the home lacked furniture or appliances. The officer saw defendant and his co-defendant sitting on a couch and packaging what appeared to be marijuana. The officers decided to enter the home. The exterior door was unlocked and they kicked down an interior door to enter the room that the suspects were in. The suspects immediately fled to the back of the house and up the stairs. Two of the officers saw defendant reach into his waistband and pull out a weapon, which he threw to the floor. Three of the officers positively identified defendant as one of the suspects.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant's sole argument on appeal was that he was denied the effective assistance of counsel. Defendant argues that his trial counsel should have moved to admit his medical records to rebut the officers' testimony that they pursued defendant throughout the house. Defendant

also contends that trial counsel did not make even a cursory investigation into the status of the home and that his appellate counsel discovered that water was still on at the home. Defendant next argues that trial counsel should have moved to have the handgun or baggies checked for fingerprints. Finally, defendant argues that the police conducted an illegal warrantless search of the home and trial counsel should have requested an evidentiary hearing to suppress the evidence.

Although defendant did not raise the issue in the trial court, he did file a motion to remand for an evidentiary hearing, as required by *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973). This Court denied the motion. Therefore, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). He must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Odom*, 276 Mich App at 415. Decisions about what evidence to present are generally presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). The failure to present evidence constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The reviewing court "will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

A. MEDICAL RECORDS

Failure to introduce defendant's medical records into evidence was a matter of trial strategy and did not deprive defendant of a substantial defense. Defendant testified at trial. He indicated that he could not have run as the police officers described because of old gunshot wounds to his legs and a foot drop. Defendant testified that he provided his medical records to his attorney, but they were all from 2006 and none were current. Defendant also testified that he had surgery on his leg after the crime occurred in 2009. The trial court had the opportunity to listen to defendant's testimony as well as view defendant's scars from the former injuries. Defendant, therefore, presented evidence of his injury. Even if the outdated records were admitted and even if a physical therapist would have testified that defendant was significantly physically impaired after the crime was committed, the evidence would not have refuted entirely the officers' testimony that defendant fled from the front room of the home to the upstairs. Credibility determinations were for the judge as the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

B. FAILURE TO INVESTIGATE

Defendant cannot show that counsel's alleged failure to prepare prejudiced his case in any way. The failure to reasonably investigate the case can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, when claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Even if trial counsel had contacted the water department to confirm that the home still had water, the evidence would not have negated the officers' testimony that the home was clearly abandoned. The home was devoid of furniture, save for a couch and table where the marijuana was being placed into baggies, as well as a television set. The electricity was illegally obtained, and there were broken windows at the rear of the house. The kitchen had no appliances. Thus, even if there was still water supplied to the house, such information was not conclusive proof that the home was being occupied, particularly in light of defendant's admission that the house was abandoned.

Although defendant argues that trial counsel should have moved to have the handgun or baggies checked for fingerprints, he fails to demonstrate how he was prejudiced by the failure to do so. The burden of proof was on the prosecutor to show that defendant was in possession of the handgun and drugs. That no fingerprints were obtained was elicited during defense counsel's cross-examination of the officers. Thus, the judge was made aware of the absence of fingerprint evidence. Still, three of the four officers identified defendant as one of the suspects in the home. Additionally, two officers saw defendant reach into his waistband with his right hand and toss a gun to the floor. Even absent fingerprint evidence, the testimony established that defendant was in possession of the gun and the drugs.

C. MOTION TO SUPPRESS

Finally, defendant argues that trial counsel was ineffective for failing to move to suppress the evidence seized as a result of a warrantless search. Defendant did not have standing to raise this issue in the trial court, as he had no legitimate expectation of privacy. Whether a person has a legitimate expectation of privacy under the Fourth Amendment, US Const, Am IV, depends on the totality of the circumstances. *People v Zahn*, 234 Mich App 438, 446; 594 NW2d 120 (1999). An expectation of privacy is legitimate if "the individual has an actual, subjective expectation of privacy and that actual expectation is one that society recognizes as reasonable." *People v Smith*, 420 Mich 1, 27; 360 NW2d 841 (1984) (citation omitted).

An *owner* has no expectation of privacy in abandoned property and the search of such property is presumptively reasonable where the structure, by all objective manifestations, appears to be abandoned. *People v Taylor*, 253 Mich App 399, 409; 655 NW2d 291 (2002); *People v Rasmussen*, 191 Mich App 721, 725; 478 NW2d 752 (1991). Not only was defendant not the homeowner, there was no question that the home had been abandoned. The officers testified that the windows in the back of the home were broken. Save for a couch, table and television, there was no other furniture and no appliances. The home was receiving electricity illegally. There was illegal activity taking place in the home. Even defendant admitted that the home was abandoned during cross examination. He had lived in the neighborhood his entire life

and knew for a fact that no one lived there when he was allegedly house-sitting. Under the totality of the circumstances, it was clear that the property was abandoned.

Defendant argues that trial counsel should not have abandoned the motion to suppress after Shawn Brown, the supposed homeowner, failed to appear as a witness at the suppression hearing. Again, as mentioned above, defendant did not own the house and had no expectation of privacy therein. Even if it could be argued that he did, the totality of the circumstances shows that the house had been effectively abandoned, making the officers' warrantless search reasonable. In addition, defendant's testimony was implausible. He was not given a key to the premises and was not compensated for watching the house. Trial counsel acted reasonably in abandoning his motion to suppress because it was meritless. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Affirmed.

Kirsten Frank Kelly
Stephen L. Borrello
Amy Ronayne Krause