S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2011
v	No. 299442 Kent Circuit Court
RONALD GENE MCINTOSH, II, Defendant-Appellant.	LC No. 09-001003-FH

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of possession with intent to deliver less than five kilograms of marijuana, MCL 333.7401(2)(d)(*iii*), and resisting and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison sentences of 24 months to 15 years for the possession-with-intent-to-deliver conviction and 30 months to 15 years for the resisting-and-obstructing conviction. We affirm.

Both of defendant's arguments on appeal are premised on claims of ineffective assistance of counsel. "The determination whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). Because no *Ginther*[1] hearing was held, we review defendant's claims of ineffective assistance of counsel for mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

To prove ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness and that it is reasonably probable that the result of the proceedings would have been different but for counsel's alleged error. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Effective assistance of counsel is presumed, and the defendant bears a

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[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant first argues that his trial attorney rendered ineffective assistance of counsel by failing to file a motion to suppress evidence of the marijuana found in his possession. Defendant claims that the traffic stop that resulted in his arrest was an unreasonable search and seizure. We disagree. Both the United States Constitution and the Michigan Constitution guarantee the right of individuals to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. Defendant's argument focuses on whether the officer had an articulable reason to stop the vehicle in which he was a passenger. However, the officer testified that the reason for the traffic stop was a defective rear brake light, a traffic violation. See MCL 257.697; MCL 257.697b. Vehicle stops must "not be 'unreasonable' under the circumstances. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred." *Whren v United States*, 517 US 806, 810; 116 S Ct 1769; 135 L Ed 2d 89 (1996); see also *People v Kazmierczak*, 461 Mich 411, 420 n 8; 605 NW2d 667 (2000). We find that the traffic stop at issue in this case was permissible. *Id.* In addition, even if the officer's request for defendant to exit the vehicle was considered a second investigative stop, it was not improper because the officer smelled the aroma of marijuana emanating from the vehicle. *Id.* at 421-422; see also *People v Rizzo*, 243 Mich App 151, 156-158; 622 NW2d 319 (2000). When a "qualified person smells an odor sufficiently distinctive to identify contraband, the odor alone may provide probable cause to believe that contraband is present," *Kazmierczak*, 461 Mich at 421, and "a brief detention for questioning is permissible if based on a reasonable and articulable suspicion of criminal activity," *People v Burrell*, 417 Mich 439, 456-457; 339 NW2d 403 (1983). Accordingly, a motion to suppress would have been meritless in this case. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley (After Remand)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant also argues that his trial attorney rendered ineffective assistance of counsel by soliciting damaging admissions from defendant on direct examination. Again, we disagree. We note that two of the questions on which defendant relies in support of his argument were actually asked by the prosecutor—*not* by defense counsel. The exchange between defendant and his own attorney went as follows:

> *Q*. How long would that quantity of marijuana last you, if you can say?
>
> *A*. Not that long.
>
> *Q*. Well—
>
> *A*. If I'm smoking it by myself, it will last me a week but, if I'm with friends and stuff, roll up here and roll up until it's all good, and you start all over again.
>
> *Q*. Did you intend to smoke all the marijuana in that bag yourself?
>
> *A*. No, not myself, but I intended to smoke it.

Contrary to defendant's contention on appeal, it was defendant, himself, who first appeared to suggest that he had previously shared his marijuana with friends. Defense counsel's word "[w]ell" can hardly be characterized as eliciting the testimony that immediately followed it. Only after defendant offered this incriminating statement did defendant's attorney attempt to clarify that the marijuana was for personal use, and not delivery to others, by asking the additional question. "Decisions regarding . . . how to question witnesses are presumed to be matters of trial strategy[.]" *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). We will not second-guess counsel's decisions on matters of trial strategy with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). We perceive no ineffective assistance of counsel in this case.

To the extent that defendant requests that we remand this case for a *Ginther* hearing, we decline to do so. Defendant has failed to establish why these matters must be initially decided by the trial court and what additional evidence would be presented in support of his claims of ineffective assistance of counsel on remand. See MCR 7.211(C)(1)(a). We have found no ineffective assistance of counsel on the facts before us, and we fail to see how an evidentiary hearing would yield a different result.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer