

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE MILTON HOLLOWAY,

Defendant-Appellant.

UNPUBLISHED

September 27, 1996

No. 179866

LC No. 94-050318

Before: Hoekstra, P.J., and M.J. Kelly and J.M. Graves,* Jr., JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of forty-nine counts of delivery of the controlled substances Phenobarbital, Phentermine, and Phenmetrazine, MCL 333.7401(2)(b); MSA 14.15(7401)(2)(b), and MCL 333.7401(2)(c); MSA 14.15(7401)(2)(c). Defendant was sentenced to a four-year term of probation with the first ninety days to be spent in the county jail. Defendant now appeals as of right, and we affirm, but remand for further proceedings in the trial court.

Defendant, an osteopathic physician, operated a weight treatment clinic. A police investigation of defendant's drug dispensing practices commenced after a pharmacy inspector noticed that defendant had ordered an unusually high number of drugs. Two female undercover police officers were sent to defendant's clinic posing as patients. Defendant accepted both as patients, although neither needed to lose weight. After an initial examination by defendant, the undercover officers were able to obtain prescription diet medication in quantities ranging from a four-week to a thirteen-week supply without being further examined by defendant. Also, one of defendant's employees testified that patients were not required to see defendant in order to receive their pills.

Defendant's first claim on appeal is that irrelevant and prejudicial evidence was admitted at trial

* Circuit judge, sitting on the Court of Appeals by assignment.

relating to the condition of defendant's pharmacy. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). An abuse of discretion will be found only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling. *Id.* Notably, evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v VanderVliet*, 444 Mich 52, 60-61; 508 NW2d 114 (1993).

The evidence at issue here involved the testimony of a supervisor for the Pharmacy Programs of the Bureau of Occupational and Professional Regulations, who was present when a search warrant was executed at defendant's office on March 17, 1994. In her testimony, the witness described her observations of the condition of defendant's pharmacy operation. Because the condition of defendant's pharmacy was directly relevant to the issue of how defendant dispensed drugs, which was an issue of consequence, we find no abuse of discretion in the trial court's decision to admit this evidence.

Defendant further asserts that this testimony violated MRE 609, in that it indicated that defendant had committed various uncharged crimes. MRE 609 is a rule governing impeachment by evidence of conviction of a crime. It has absolutely no applicability to the evidence challenged by defendant. To the extent this argument was intended to be based on MRE 404(b), the testimony does not violate this rule because it does not address the character of defendant. *VanderVliet, supra* at 65.

Next, we find without merit defendant's claim that the trial court increased his sentence beyond the term recommended in the presentence investigation report because defendant required the laboratory chemist to testify at trial. A review of the sentencing transcript reveals that the trial court did not consider defendant's refusal to stipulate at sentencing. Moreover, defendant's sentence of ninety days' confinement, a sentence on the low side of the 0-9 month guidelines range, is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has failed to present any unusual circumstances to overcome the presumption of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Defendant also claims that he was denied effective assistance of counsel. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). To determine whether defendant was denied effective assistance of counsel, we turn to the standard of *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), adopted by our Supreme Court in *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). A claim that a counsel's assistance was so ineffective as to require reversal of a conviction has two components. A defendant must first show that counsel's performance was deficient. That is, he must show that his counsel made errors so serious that counsel was not functioning as guaranteed by the Sixth Amendment. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995). In addition, a defendant must show that the

errors of counsel were so serious as to have denied the defendant a fair trial, that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 216.

Defendant first asserts that his trial attorney was ineffective for failing to interview witnesses before trial. This Court has noted that failure to interview witnesses alone does not establish ineffective assistance of counsel. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Defendant must prove that counsel's failure to interview resulted in counsel's ignorance of valuable evidence which would have substantially benefited him. *Id.*

At the evidentiary hearing, defense counsel testified that he had prepared numerous affidavit questionnaires which he reviewed with defendant before trial. He explained that together they selected the best witnesses from the questionnaires. Counsel testified that he did not need to interview these witnesses because he knew the gist of their testimony from the questionnaires.

Defendant further claims that counsel was ineffective for failing to pose particular questions to defense witnesses. Counsel's explanation for not asking these questions made sound strategic sense, and we will not second guess counsel's trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Regarding defendant's contention that counsel failed to prepare him for trial and that counsel was unprepared, counsel's testimony at the *Ginther* hearing supports the notion that his actions at trial were strategic in nature and, therefore, proper. *Barnett, supra.*

Next, defendant highlights the fact that defense counsel failed to review evidence at the state police post in East Lansing. Defendant has failed to show how counsel's failure to review this evidence prejudiced him or how its admission would have affected the outcome of the trial. *Stanaway, supra*, at 687.

Next, we turn to defendant's claim that the trial court's decision to preclude defendant's former trial counsel from testifying regarding the basis for an entrapment hearing was an abuse of discretion. We agree. When the facts warrant, an attorney's failure to file a dispositive motion can constitute ineffective assistance of counsel. See *People v Thomas*, 184 Mich App 480; 459 NW2d 65 (1990). *People v Davis*, 102 Mich App 403; 301 NW2d 871 (1980); *People v Brown*, 119 Mich App 656; 326 NW2d 834 (1982).

At the *Ginther* hearing in this case defendant attempted to establish the basis upon which the filing of an entrapment motion was indicated through the testimony of defendant's former counsel. The trial court refused to allow defendant's former counsel to testify regarding the purported basis for an entrapment motion. In the trial court's opinion, it was sufficient that former counsel be allowed to state that his strategy would have been to pursue entrapment, but that there was no need to hear the basis upon which entrapment may have been a viable defense. Accordingly, the trial court precluded

defendant from developing the basis for his claim of entrapment and the trial court did not determine whether there was any evidence to support the claim. Without such evidence there is no way to evaluate defendant's claim that his counsel was ineffective for failing to file an entrapment motion. Therefore, we find it necessary to remand the case to the trial court to allow defendant to develop the record concerning the basis for entrapment and to allow the trial court to determine whether a basis for the entrapment claim existed, and, accordingly, whether trial counsel was ineffective for failing to raise it. *Brown, supra* at 666.

Defendant's conviction is affirmed, but we remand for additional testimony. We retain jurisdiction. The remand hearing is hereby ordered to take place within 60 days.

/s/ Joel P. Hoekstra

/s/ James M. Graves, Jr.