

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARIC LAMONT HOLLOWAY,

Defendant-Appellant.

UNPUBLISHED

March 7, 1997

No. 192122

Jackson Circuit Court

LC No. 95-73106-FH

Before: MacKenzie, P.J., and Holbrook, Jr., and T.P. Pickard,* JJ.

PER CURIAM.

Defendant was convicted by a jury of delivering less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). As defendant's second felony conviction, the trial court sentenced defendant as an habitual offender pursuant to MCL 769.10; MSA 28.1082 to serve five to thirty years in prison, consecutive to a sentence from which defendant was on parole when he committed the current offense. Defendant appeals as of right and we affirm.

Defendant first asserts that the government engaged in reprehensible conduct amounting to entrapment. Specifically, defendant asserts that law enforcement officials exploited his drug addiction, used an informant who was seeking leniency in his own criminal matter, and that the undercover officer used cocaine in his presence. We find no clear error in the trial court's findings that defendant was not entrapped.

Contrary to defendant's argument, Michigan appellate courts have never held that mere exploitation of a defendant's drug addiction may constitute grounds for a claim of entrapment.

Addictions are at the root of the narcotic trade and are not a lawful excuse for crimes committed in their furtherance. Although courts have found that appeals to sympathy for an addict suffering withdrawal symptoms may indicate entrapment, *People v Graczyk*, 156 Mich App 632, 402 NW2d 60 (1986); *People v Duis*, 81 Mich App 698; 265 NW2d 794 (1978), we know of no other court that has suggested, nor would

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

we suggest, that an appeal to an addiction, as such, can be a defense amounting to entrapment. [*People v Juillet*, 439 Mich 34, 63; 475 NW2d 786 (1991) (Brickley, J).]

In any event, although evidence was presented that defendant was a drug addict, the evidence of the circumstances surrounding the charged incident did not indicate that law enforcement officials were aware of the addiction or that their conduct induced defendant to commit an offense that he was not otherwise willing to commit. *People v Fabiano*, 192 Mich App 523, 531; 482 NW2d 467 (1992); *Juillet*, *supra* at 54. Likewise, mere promises of leniency or the granting of a benefit to an informant is insufficient to sustain a claim of entrapment. *People v Jamieson*, 436 Mich 61, 84; 461 NW2d 884 (1990) (Brickley, J) (recognizing that informants are commonly drug offenders who have been promised leniency in return for cooperation). Moreover, we note that the informant in this case played a limited role in the transaction inasmuch as he merely introduced defendant to the undercover officer. Finally, because both the informant and the undercover officer denied that the officer smoked crack cocaine with defendant, we defer to the trial court's assessment of the credibility of the witnesses who appeared before it. MCR 2.613(C). Accordingly, given the nature and the substance of the evidence before it, we conclude that the trial court did not clearly err in determining that defendant was not entrapped.

Defendant next argues that he is entitled to a new trial because the trial court abused its discretion in denying his pretrial motion for substitution of appointed counsel. We disagree. An indigent criminal defendant is constitutionally guaranteed the right to counsel, but he is not entitled to have the attorney of his choice appointed simply by requesting a substitution of the attorney originally appointed to represent him. The decision regarding substitution of counsel is within the sound discretion of the trial court, upon a showing of good cause and that the substitution will not unreasonably disrupt the judicial process. *People v Cumbus*, 143 Mich App 115, 121; 371 NW2d 493 (1985); *People v Meyers (On Remand)*, 124 Mich App 148, 165; 335 NW2d 189 (1983). Upon a defendant's request for substitute counsel, the trial court should generally conduct some fact-finding to determine the merits of the defendant's claims. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *People v Ceteways*, 156 Mich App 108, 119; 401 NW2d 327 (1986). Here, we agree with defendant that the court abused its discretion in failing to conduct any fact-finding into defendant's claims that his counsel was not representing him effectively. However, "[a] judge's failure to explore a defendant's claim that his assigned lawyer should be replaced does not necessarily require that a conviction following such error be set aside." *Ginther*, *supra* at 442. Instead, to prevail on his claim that he is entitled to a new trial, defendant must show that he suffered prejudice as a result of the court's refusal to substitute counsel. *Cumbus*, *supra* at 121; *People v Hernandez*, 84 Mich App 1, 8; 269 NW2d 322 (1978).

Although defendant has not raised a separate issue on appeal arguing ineffective assistance of counsel, the issue is subsumed within his entrapment argument. Defendant specifically argues that counsel was ineffective in not presenting evidence at the entrapment hearing regarding the informant's agreement with police for leniency and in failing to reargue entrapment at trial when the informant testified. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the result of the proceedings

would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Given that we have found no clear error in the trial court's finding that defendant was not entrapped, and that our review of the record indicates that counsel called witnesses for the defense, cross-examined each of the prosecution's witnesses, and objected on numerous occasions during trial, we conclude that defendant has failed to meet his heavy burden of proving that counsel's performance was deficient. See *Ginther, supra* at 436. Accordingly, because defendant's Sixth Amendment right to counsel was not violated, he has not shown entitlement to a new trial on this basis.

Lastly, defendant challenges the proportionality of his sentence as an habitual offender. Specifically, defendant argues that, given his drug addiction, minimal criminal record, and the minute amount of cocaine involved in the transaction, the trial court abused its discretion in sentencing defendant to serve five to thirty years in prison. We disagree. Our review of the record indicates that the trial court considered appropriate factors in imposing sentence and that the sentence is proportionate to the offender and the circumstances of the offense. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995); *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Donald E. Holbrook, Jr.
/s/ Timothy P. Pickard