

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JOE BILLY READY,

Defendant-Appellant.

---

UNPUBLISHED

March 20, 2003

No. 236784

Cass Circuit Court

LC No. 01-010048-FH

Before: Schuette, P.J., and Sawyer and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of manufacturing methamphetamine, MCL 333.7401(2)(b); operating or maintaining a methamphetamine laboratory in the presence of a minor, MCL 333.7401c(2)(b); and maintaining a drug house, MCL 333.7405(1)(d). He was sentenced to forty months' to seven years' imprisonment for violating MCL 333.7401(2)(b); forty months' to twenty years' imprisonment for violating MCL 333.7401c(2)(b); and 176 days incarceration for violating MCL 333.7401(2)(b), all to be served concurrently, with credit for 176 days. He now appeals his convictions and sentence. We affirm.

I. Facts and Proceedings

On February 15, 2001, a Michigan State Police narcotics investigation team responded to defendant's apartment on Hospital Street in Jefferson Township to follow up on reports from other residents in defendant's apartment complex that strong chemical smells were emanating from defendant's apartment. When the team sought entry to the apartment, Amanda Ready, defendant's wife, opened the door to the apartment. At that time, Lieutenant Michael Brown, standing just inside the apartment door, did not detect a chemical smell in the apartment. The officers then requested consent to enter the premises. Although she initially declined, Ms. Ready did permit the officers to inspect the premises to see if other individuals were in the apartment. When Detective Richard Hiscock was making this protective sweep, he smelled something that smelled like acetone, which can be one of the chemicals used in manufacturing methamphetamine. After concluding the visit to defendant's residence, Lieutenant Brown sought and obtained a warrant to search the premises.

The search warrant was executed on February 16, 2001. During the search of the premises the team discovered that defendant, his wife, and another adult, Kimberly Puls, lived in the apartment. At least two children, defendant and his wife's one-year-old son and Puls' two or

three-year-old daughter, also resided in the home. During the search, the officers seized items related to manufacturing and using methamphetamine, such as pseudoephedrine, methyl ethyl ketone, a bottle of iodide, a bag of red phosphorus, a sales receipt for the purchase of a gallon of acetone dated December 9, 2000, a sandwich bag containing a white powdery substance, folded pieces of magazine pages used to hold methamphetamine, needles, and a spoon with a white flaky substance on it. The officers discovered many of these items after removing misaligned ceiling tiles from the drop ceiling. The red phosphorus was found hidden in a potted plant.

Detective Hiscock also found a Pyrex dish in the bathroom of the residence that contained a substance that field tested positive for methamphetamine. He also field tested marijuana found by another detective at the apartment. Detective Frank Williams testified that the chemicals found in the residence were sufficient to produce methamphetamine and offered his expert opinion that a methamphetamine laboratory was being operated on the premises.

During the execution of the search warrant, Detective Trooper Randi Whitney read defendant his Miranda rights, and defendant agreed to be interviewed by her. Defendant told Detective Trooper Whitney that he first used methamphetamine when he was eleven years old and that he moved his family from Arizona to Michigan to get away from his methamphetamine problem. Defendant explained to Detective Trooper Whitney that he had been “clean” for about five months prior to February 15, 2001, and stated that after he moved to Michigan, he had not been able to make methamphetamine because he lacked the necessary ingredient red phosphorous. According to Defendant, he obtained that component on February 15, 2001, started manufacturing methamphetamine again on that date, and again became “hooked” on it.

Defendant also described to Detective Trooper Whitney in detail the process he used to manufacture methamphetamine, and told Detective Trooper Whitney that he completed this process alone. Detective Trooper Whitney testified that the methods described by defendant were consistent with her training in manufacturing methamphetamine and were even a bit more sophisticated than the method with which she was familiar.

The defense rested without presenting any proofs. During its closing argument, the prosecution emphasized the evidence seized during the search and defendant’s statement to Detective Trooper Whitney. Defense counsel argued that the evidence was incomplete and that items that logically would be found if defendant were operating a methamphetamine laboratory were not seized. Following its deliberations, the jury returned a guilty verdict on three of four counts.<sup>1</sup>

At sentencing on August 10, 2001, the trial court stated that defendant’s sentencing guidelines reflected a minimum sentence of thirty to fifty months. Defense counsel made no

---

<sup>1</sup> While defendant was charged with four counts, Count II, operating or maintaining a methamphetamine laboratory, was a lesser charge of Count III, operating or maintaining a methamphetamine laboratory in the presence of a minor. Accordingly, the jury was instructed that defendant could not be found guilty of both of these charges and that it could either convict him of one of the charges or acquit him of both charges.

objections to the presentence investigation report. The probation department recommended sentencing at the lower end of the guidelines, and the prosecution recommended a sentence at the high end of the guidelines range. The prosecution also requested that the trial court impose a consecutive sentence for defendant's conviction of this crime.

Defense counsel emphasized in response that defendant suffers from an addiction to methamphetamine and that he had a spotless criminal history prior to this incident. Defendant apologized for his conduct and acknowledged his addiction, but stated that he was thankful that he was going to be incarcerated. In imposing defendant's sentence, the trial court stated that defendant's conduct was very dangerous given the volatile nature of the chemicals he was using. However, taking defendant's clean record into account, the trial court decided to sentence defendant in the middle of the guidelines range rather than the high end, arriving at a minimum sentence of forty months.

On December 3, 2001, defendant's appellate counsel filed a motion for resentencing and specific performance of a plea agreement, arguing that defendant was deprived of effective assistance of counsel when his trial attorney 1) failed to advise him of the sentencing benefit he would have received had he accepted a plea offer made by the prosecution before trial, and 2) failed to object to the trial court's score of ten points for offense variable fourteen and five points for offense variable fifteen. Defendant requested that he be given the benefit of the plea offer, which would have resulted in dismissal of all charges in exchange for a guilty plea on the charge of operating a methamphetamine laboratory in the presence of a minor. With a conviction of only one crime, defendant argued, his prior record variable score would be zero and he would have received a sentence in the range of twelve to twenty months. Defendant also requested resentencing because of the alleged scoring errors, claiming that the evidence did not support a score on either variable. Although the error on offense variable fifteen would not change defendant's sentencing guidelines, defendant argued that a score of zero for offense variable fourteen would reduce his guidelines range to twelve to forty months.

The trial court conducted an evidentiary hearing on defendant's motion. Defendant's trial attorney, who has handled several thousand criminal cases during his career, testified that at the time of defendant's preliminary examination, the prosecutor had indicated that a plea bargain could not be negotiated unless defendant was willing to cooperate with law enforcement, a so-called "no work/no deal" condition to negotiating a plea agreement. This condition, defendant's attorney testified, was standard in drug cases prosecuted in Cass County. At that point, there was no discussion of what benefit defendant might receive if he agreed to cooperate with law enforcement.

With respect to the first claim of ineffective assistance of counsel, trial counsel testified that at the final pre-trial conference, the prosecution offered to dismiss all other charges against defendant if defendant agreed to cooperate with law enforcement and plead guilty to maintaining or operating a methamphetamine laboratory in the presence of a minor. Defendant's trial counsel stated that he communicated that offer to defendant, despite the fact that defendant had always been adamant that he was not going to plead guilty to any charges and that he was not going to assist law enforcement. According to trial counsel, defendant reaffirmed his unwillingness to assist law enforcement when the plea offer was communicated to him after the final pre-trial. Trial counsel further testified that because defendant never indicated any willingness to accept a plea offer, he did not calculate the guidelines for the plea agreement, and

he did not make a recommendation. He did advise defendant that the prosecution had a strong case, that it was highly likely that he would be convicted of all the charges against him at trial, and that consecutive sentences could possibly be imposed if defendant was convicted of all counts. In addition, trial counsel testified that he generally keeps notes of sentencing guideline calculations in each of his files should a client ask about sentencing. In this case, however, because defendant was adamant that he would not plead guilty, trial counsel did not make any notation in his file concerning defendant's guidelines. He did note that he had conducted research to see whether defendant would be subject to consecutive sentences. Finally, trial counsel testified that he had a "vague recollection" that defendant had written the prosecutor's office a letter stating that he was interested in cooperating with law enforcement, but defendant had not sent him a copy of the letter. With respect to the second claim of ineffective assistance of counsel, trial counsel testified that he did not object to the score on offense variables fourteen and fifteen because he believed the evidence supported the score assessed on each of the variables.

Contrary to his trial counsel's testimony, defendant stated that he specifically asked counsel whether acceptance of the plea offer would change his sentencing guidelines and that counsel told him acceptance of the offer would not change his guidelines. Defendant contends he proceeded to trial believing he had nothing to lose. Moreover, defendant claims trial counsel did not at that time mention the "no work/no deal" condition of the plea bargain, although he admits that the "no work/no deal" policy might have been mentioned to him prior to his preliminary examination. Defendant suggests his recollection of the "no work/no deal" prerequisite was affected at the time of the preliminary exam because he was under the influence of the methamphetamine he had used two weeks earlier. He said that not until he was sent to the Adrian Temporary Facility did he receive the assistance of another inmate in calculating his sentencing guidelines and learn that if he had entered into the plea bargain, his guideline range would have been the lower range of twelve to twenty months. Defendant claims that he would have accepted the prosecutor's offer if he had known this would have put him in a lower sentencing guidelines range.

Defendant contends that after he discussed the plea offer with his attorney at the pre-trial and rejected it, he subsequently wrote a letter to the prosecutor stating that he would assist the prosecutor's office in any manner in order to have his sentence reduced, and that he did not receive a response to the letter. At that time, defendant said, he had no knowledge of the "no work/no deal" prerequisite to negotiating the plea bargain. Defendant admits that he never wrote to trial counsel to tell him that he was willing to cooperate with law enforcement and that he did not communicate to the trial court that he was willing to enter a plea. Defendant also admitted that at the pre-trial he stated on the record that he was satisfied with his attorney's representation of him at that point and was prepared to proceed to trial.

Ruling from the bench, the trial court concluded that trial counsel's performance was not deficient. First, the trial court found that defendant's claim that he would have accepted the offered plea if he had known of the lower sentencing guidelines range was speculative and the product of hindsight. The trial court also found that defendant's trial counsel communicated the offer, but that his discussion with defendant appropriately did not proceed beyond the basic terms of the offer because defendant was not willing to cooperate with law enforcement and therefore not eligible to receive the benefit of the offer. Second, the trial court found that there was sufficient evidence to support a score of ten points for offense variable fourteen because the

testimony and presentence investigation report showed that defendant purchased the ingredients, combined the chemicals, cooked the mixture, and admitted that he was operating the laboratory. Therefore, defendant's trial counsel did not unreasonably fail to object to the ten point score. Similarly, the trial court found that a five point score was appropriate for offense variable fifteen because the evidence supported the conclusion that defendant had delivered or possessed methamphetamine with the intent to deliver it. Contrary to defendant's argument, evidence of trafficking was not a prerequisite to a five point score on that variable. Accordingly, the trial court denied defendant's motion. Defendant's appeal of the trial court's rulings ensued.<sup>2</sup>

## II. Standard of Review

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review the trial court's factual findings for clear error. *Id.* Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made. *In re Costs & Attorney Fees*, 250 Mich App 89, 94; 645 NW2d 697 (2002). When conducting clear error review, we give deference to the trial court's ability to judge the credibility of witnesses. *People v Thenghkam*, 240 Mich App 29, 43-44; 640 NW2d 571 (2000). This Court reviews constitutional questions de novo. *LeBlanc*, *supra* at 579.

## III. Analysis

A defendant asserting a claim of ineffective assistance of counsel has the burden of demonstrating that counsel made serious errors in his representation of the defendant and that the defendant was prejudiced as a result of counsel's egregious errors. *LeBlanc*, *supra* at 578, citing *People v Mitchell*, 454 Mich 145, 155-156; 560 NW2d 600 (1997). As defendant asserts, his right to effective assistance of counsel extends to the plea bargaining process. *Hill v Lockhart*, 474 US 52, 58-59; 106 S Ct 366; 88 L Ed 2d 203 (1985). In plea bargaining cases, the prejudice prong of the ineffective assistance test depends on whether counsel's deficient performance affected the outcome of the plea process. *Id.* at 59; see also *Williams v United States*, 13 F Supp 2d 616, 618 (ED Mich, 1998); *Magana v Hofbauer*, 263 F3d 542, 547-548 (CA 6, 2001).

Failure to inform a client of a plea offer may constitute ineffective assistance of counsel. *People v Williams*, 171 Mich App 234, 241-242; 429 NW2d 649 (1988). Moreover, where the defendant's attorney offers erroneous advice in connection with a plea offer, his representation can be deemed ineffective. *Magana*, *supra*. In that situation, the defendant must demonstrate that but for counsel's deficient performance, there was a reasonable probability that he would have accepted the proposed plea. *Williams*, *supra* at 618.

In the present case, defendant argues that the trial court's findings of fact were clearly erroneous. We disagree. On the facts in this case, the trial court did not err by concluding that trial counsel was not ineffective when he failed to discuss the sentencing ramifications of

<sup>2</sup> Defendant does not appeal the trial court's decision concerning offense variable 15.

accepting the prosecution's plea offer because the evidence established that defendant had been adamant throughout the course of the proceedings that he was not willing to plead guilty and that he was not willing to cooperate with law enforcement. Because defendant was not willing to plead guilty or provide information to the narcotics team, the potential sentencing benefits of the plea bargain were irrelevant, and defense counsel had no obligation to further pursue the issue. We recognize that defendant disputes this account of the facts, but the trial court found more credible trial counsel's testimony on these issues. We give deference to the trial court's resolution of this credibility dispute. *Thengham, supra*. Additionally, we agree with the trial court that it is implausible that an experienced attorney would advise his client that his sentence under the plea agreement would have been no different than his sentence if he were convicted of all three counts. We find that the trial court did not err by concluding that given defendant's resistance to pleading guilty and insistence on his right to trial, trial counsel did not render constitutionally ineffective assistance by failing to further press the matter with his client.

Likewise, we find that defendant's trial counsel did not render ineffective assistance when he did not object to the trial court's assessment of a ten point score for OV 14. MCL 777.44 provides that the sentencing court is to assign ten points for OV 14 if the "offender was a leader in a multiple offender situation." MCL 777.44(1)(a). Additionally, the statute provides that "[t]he entire criminal transaction should be considered when scoring this variable." MCL 777.44(2)(a). The record considered by the trial court at sentencing, which included the presentence investigation report, established that defendant had admitted he initiated his wife's methamphetamine addiction and that defendant's wife had also been charged, as he had, with operating a methamphetamine laboratory. The record also reflected defendant's knowledge of the manufacturing process and that defendant procured the essential ingredients for manufacturing methamphetamine. Accordingly, the trial court's finding that defendant was the leader of a multiple offender situation is supported by the evidence. Because defense counsel is not required to make futile objections at sentencing, *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995), defendant's trial counsel did not render ineffective assistance at sentencing.

Affirmed.

/s/ Bill Schuette

/s/ David H. Sawyer

/s/ Kurtis T. Wilder