

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES EDGAR GREGORY,

Defendant-Appellant.

UNPUBLISHED
November 1, 2005

No. 256194
Wayne Circuit Court
LC No. 03-011884-01

Before: Owens, PJ, and Fitzgerald and Schuette, JJ

PER CURIAM.

Defendant appeals as of right from his jury conviction for carrying a concealed weapon, MCL 750.227, for which he was sentenced as an habitual offender, fourth felony, MCL 769.12, to thirty-six months' probation. The trial court ordered defendant to participate in the Wayne County "jail based – 3 phase program" for the first nine months of his probation. We reverse.

Defendant was arrested for trespassing on residential property and searched by the police. The search revealed a concealed weapon. Defendant testified that he was not trespassing but, rather, had permission to work on the home as an employee of a roofing company. Defendant testified that he had a letter from the homeowner granting him permission to be on the property and that this letter was in his pocket when he was arrested by the police. Defendant also testified that a "no occupancy" sign was posted on the house, but that there was no "no trespassing" sign on the house, as the police claimed.

Defendant first argues that the trial court erred in denying his motion to suppress the evidence that he was carrying a concealed weapon. We disagree.

We review de novo a trial court's ultimate decision on a motion to suppress. *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004). Defendant claims that the police lacked probable cause to arrest him for trespassing and, therefore, the search incident to the arrest was illegal. Before arresting a person for committing a crime, the police must have probable cause to believe that the person committed the crime. *People v Davis*, 468 Mich 897, 899; 660 NW2d 67 (2003) (*Corrigan, C.J., Dissenting*), citing *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). "Probable cause to believe that the defendant committed the crime is established by a reasonable ground of suspicion, supported by circumstances sufficiently strong to warrant a cautious person in the belief that the accused is guilty of the offense charged." *People v Woods*, 200 Mich App 283, 288; 504 NW2d 24 (1993), citing *People v*

Vasher, 167 Mich App 452, 456; 423 NW2d 40 (1988). If the police have probable cause, they may search the accused incident to the arrest without further justification. *People v Licavoli*, 245 Mich 202, 203; 222 NW 102 (1928).

Trespass requires proof that a person without lawful authority either (a) willfully entered another's property after the owner forbade him from doing so, or (b) refused to leave after the owner told him to depart. MCL 750.552. "Merely entering the private property of another is not an offense unless one has been forbidden to do so or refuses to depart after having been told to do so by a proper person." *People v Shankle*, 227 Mich App 690, 694; 577 NW2d 471 (1998). Here, the two police officers testified that there was a "no trespassing" sign on the front of the house, and there was no building permit posted. A "no trespassing" sign would have put defendant on notice that he was prohibited from entering the property. The absence of the building permit indicated an absence of lawful authority to be present at the house. Therefore, had the situation been as the officers testified, the officers would have had probable cause to arrest defendant.

Defense witnesses testified, on the other hand, that the sign stated "no occupancy" rather than "no trespassing," and that a building permit was indeed posted. Under defendant's version of events, nothing prohibited him from being on the property, and the building permit was some indication that he had legal authority to be there. Under these circumstances, the officers would not have had probable cause to arrest defendant. See *Shankle, supra*. The trial court found that the police officers were more credible than the witnesses offered by defendant. This Court generally defers to the trial court's superior ability to assess witness credibility. MCR 2.613(C).

Witnesses for the defense also testified that a building permit was posted on the house sometime before the night defendant was arrested. A building permit dated September 15, 2003, was entered into evidence even though counsel stated it was not the permit that was posted. After reviewing the permit, the trial court found that the permit was not posted on the house when defendant was arrested. The trial court based its finding on the fact that the permit was not issued until the day before defendant was arrested. The trial court's findings were supported by the evidence presented during the probable cause hearing. Therefore, given the evidence before it, its ruling that the police had probable cause to arrest defendant was not error. Defendant's motion to suppress was properly denied.

Defendant next argues that he was denied effective assistance of counsel because counsel failed to present evidence at the evidentiary hearing that would have demonstrated that the officers were not being truthful and would have supported defendant's version of events. We agree. This issue is unpreserved because defendant did not move for an evidentiary hearing or new trial. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004). Because this issue is unpreserved, we consider this issue only to the extent that claimed mistakes are apparent on the record. *Id.*

"[T]o find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant may establish prejudice by showing that the result of the proceedings would have been different if it had not been for counsel's error. *People v Mack*,

265 Mich App 122, 129; 695 NW2d 342 (2005). Here, if counsel had proven that there was no probable cause to arrest, the gun recovered during the search incident to arrest would have been suppressed, and the charges would have been dismissed. *People v Lewis*, 160 Mich App 20, 25; 408 NW2d 94 (1987).

Defendant argues that counsel was ineffective for failing to present a photograph of the “no occupancy” sign at the probable cause hearing. Notably, when both officers were confronted with the “no occupancy” sign at trial, one officer affirmatively testified that the sign he saw stated “no occupancy,” while the other officer stated she could not recall with certainty whether the sign said “no trespassing” or “no occupancy.” Moreover, counsel presented and defendant identified a photograph of a building permit that, according to defendant, had once been red but had faded to yellow because of exposure to the sun; defendant asserted that the permit had been in the window since 2000. At the evidentiary hearing, one of the officers acknowledged that defendant told her he was performing work at the house, but claimed that she did not see any tools. However, this same officer testified at trial that “junk” and “old tools” were in the back yard; when confronted with photographs, she identified various building materials, including siding, that had been in the back yard the night of the arrest. Had the photographs been presented at the evidentiary hearing, they would have corroborated defendant’s hearing testimony as well as what he told the officer the night of the arrest.

Defendant also argues that trial counsel was ineffective because he did not subpoena or call to testify certain witnesses that supported defendant’s version of the facts. After the court issued its ruling at the probable cause hearing, defense counsel indicated defendant wanted an opportunity to prove that the building permit sign was in the window, and stated that defendant had previously given him “a whole list of names at one point in time.” The trial court stated that it would not give counsel another bite at the apple, and defendant would have to appeal its decision. Defendant indicated three times at three separate hearings that he wanted to appeal the court’s decision; however, there is no indication in this Court’s docket that an interlocutory appeal was filed on defendant’s behalf during the applicable timeframe.

The prosecutor moved in limine to preclude defendant from presenting testimony at trial regarding the legality of the arrest and whether defendant had a right to be on the property. Defense counsel indicated that seven witnesses had been subpoenaed to testify on behalf of defendant. Although the record does not indicate why, only one witness besides defendant actually testified. We conclude that if the photographs and witness testimony contradicting the officers’ testimony and supporting defendant’s version of events had been admitted, it is reasonably probable that the court would have found there was no probable cause to arrest defendant, *Shankle, supra*, and would have excluded the evidence, *Lewis, supra*. Hence, it is reasonably probable that a different result would have occurred but for counsel’s actions, and reversal is required. *Mack, supra*.

Finally, defendant argues that, pursuant to MCL 769.11b, he was entitled to a 222-day credit toward the nine-month residential mental health treatment program he was ordered to attend because the program takes place in jail. We need not address this issue because it is moot. An appeal is moot where the occurrence of an event makes it impossible to fashion a remedy. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Reversed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald