

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY SCOTT ETHERTON,

Defendant-Appellant.

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UNPUBLISHED

October 16, 2008

No. 277459

Ionia Circuit Court

LC No. 06-013467-FH

Before: Markey, P.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of one count of possession of cocaine in an amount more than 50 but less than 450 grams, MCL 333.7401(2)(a)(iii). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to serve a prison term of 20 to 40 years. Defendant also appeals the court's October 22, 2007, decision to deny his motion for a new trial on the basis of newly discovered evidence. We affirm.

Defendant presents five issues on appeal: first, whether the trial court abused its discretion by denying defendant's motion to adjourn the trial; second, whether trial counsel was ineffective; third, whether defendant is entitled to a new trial due to newly discovered evidence, and whether the trial court improperly substituted its judgment for the jury's by evaluating this "new" evidence in denying defendant's motion for a new trial; fourth, whether the trial court erred by denying defendant's motion to suppress evidence obtained during what defendant argues was an illegal search; and fifth, whether the trial court improperly enhanced defendant's sentence by scoring Offense Variable (OV) 14 and OV 15.

First, we find that the trial court properly denied defendant's motion to adjourn. The trial court's decision was based on defendant's failure to show good cause in seeking the adjournment. Defendant's motion relied upon his desire to file an interlocutory appeal of the court's decision to deny his motion to suppress evidence, and the court's subsequent refusal to grant a stay of trial in order to request leave to appeal from this Court. Defendant also contended that he had not had adequate time to prepare for trial with his counsel. According to the court, the "essence" of the case was whether defendant had consented to the police search, and the court concluded that he had. The court noted that defendant had not refused consent to the search, and that he was an "experienced defendant." The court further remarked that based on the video evidence that was available from the traffic stop as well as the testimony presented at

the hearing on defendant's motion to suppress, the court was convinced that defendant had consented to the search, and that the search was therefore legitimate.

On appeal, defendant argues that another reason he moved to adjourn the trial was because he had recently learned of a new witness, Dan Clayton, whose testimony would refute Ryan Pollie's account of the incident. Defendant argues that the court's finding that defendant had not told defense counsel of the existence of Clayton prior to trial was "flatly contradicted by [trial counsel]'s testimony." Insofar as defendant's claim relies on this argument, it lacks merit.

Defendant argues that defense counsel's mention of a "local" witness who was in "lockup" before the opening of proofs at trial was in reference to Clayton. However, it is plain from the context that this is not the case. Defense counsel's statements were as follows:

Just, your Honor, . . . we believe we've shown a good cause for an adjournment and also that there would be no prejudice to the People. The witnesses are local. One is in lockup, he's not going anywhere. My client and I have not had an opportunity to prepare to our satisfaction for this trial today. . . . [O]n the one hand we'd like to maintain and preserve our right to appeal and on the other hand we'd like the benefit of ordering transcripts for potential impeachment purposes, should that become necessary from the motion to suppress, thank you.

It is clear to this Court that defense counsel was not referring to any defense witnesses when she referred to local witnesses or the "[o]ne . . . in lockup." Further, defendant made no reference to any potential witnesses in his motion to adjourn, which was filed the day before trial. Although defendant claims on appeal that he told defense counsel about Clayton and his willingness to testify the morning of trial, defense counsel made no effort to tell the court of his existence or to include Clayton's testimony as one of the reasons counsel and defendant were not prepared for trial. Counsel may have known about Clayton prior to trial as defendant claims on appeal, but the record does not support this claim in any way.

In *People v Williams*, 386 Mich 565; 194 NW2d 337 (1972), our Supreme Court held that a trial court abuses its discretion in denying a motion for a continuance where a defendant is: "1) . . . asserting a constitutional right . . . ; 2) he had a legitimate reason for asserting this right . . . ; 3) he was not guilty of negligence; and 4) the trial court was incorrect in stating that defendant had caused the trial to be adjourned several times[.]" *Id.* at 578. In *People v Wilson*, 397 Mich 76, 81; 243 NW2d 257 (1976), the Court added the additional requirement that a defendant be able to demonstrate prejudice as a result of the trial court's abuse of discretion. Defendant argues that he met the four requirements outlined in *Williams*, but he does not show on appeal that he suffered prejudice due to the court's denial of his motion for adjournment based on the grounds asserted in the motion.

Defendant claims on appeal that he has satisfied all of the requirements set forth in *Williams* and *Wilson*. According to defendant, the first *Williams* factor was met because defendant desired to present a favorable witness, which is part of his constitutional right to due process. As noted above, defendant did not include Clayton's testimony as one of his reasons for filing his motion to adjourn. Rather, defendant claimed in the motion that an adjournment was necessary because defense counsel had been unable to prepare because she believed that the trial

judge would be out of town on the date scheduled for trial based on misinformation she received from the court's staff.

The trial court rejected defendant's claims, stating that based on its experience presiding over the trial, and based on the transcript of the trial, trial counsel had sufficient time to prepare although "in retrospect there is always something more that we would like to do either as judges or as trial attorneys but that does not mean that she did not do a good job for [defendant]." The court also rejected defendant's argument that counsel was unprepared because she was unable to ascertain the court's schedule, noting that the trial judge was at a conference and "it would have been very simple to know when . . . I left and when I came back." The trial judge also noted that he was able to communicate with his administrator via cell phone and e-mail.

While the court's statements are not necessarily dispositive of trial counsel's claim that she was misinformed by the court's staff, without corroborating testimony from the prosecutor it is difficult to determine whether defendant was led astray, however unintentionally, by the court's staff. Still, trial counsel cannot claim to have been taken by surprise by the trial date, as it was known to her that the trial had been scheduled for that day, even if she wrongly believed that the trial judge would be out of town. Furthermore, as the prosecutor argued, trial counsel pursued the same theory of defense that Clayton's testimony would have supported, namely, that the drugs found by police belonged to defendant's passenger, Pollie. Apparently, however, the jury did not find this line of argument persuasive.

Defendant argues that the second *Williams* factor was satisfied because defendant had a legitimate reason for seeking an adjournment: more time to prepare an effective defense. The court did not abuse its discretion by finding that defense counsel had enough time to prepare a defense. As aforementioned, defense counsel pursued the theory that defendant would have liked to pursue by presenting Clayton's testimony: that Pollie, not defendant, had purchased the cocaine found in the vehicle. Trial counsel vigorously cross-examined the prosecution's witnesses, but gave no indication that she desired to present witnesses on behalf of defendant; rather, defense counsel told the court that defendant did not intend to present any witnesses. Thus, to argue on appeal that defendant was denied the opportunity to present a defense based on Clayton's testimony is disingenuous.

Defendant concedes that the third *Williams* factor could weigh against him, in that there is a question as to whether defendant was negligent for failing to tell trial counsel about Clayton prior to trial. However, defendant notes that he attempted to call his attorney the day before trial, and had some trouble contacting her. Defense counsel testified that her office changed telephone carriers around the time of defendant's trial, and that they had "[s]ome difficulty in receiving calls, specifically collect calls." Defendant testified that he tried to tell his attorney about Clayton as soon as he was informed of his story and willingness to testify. It is not clear that defendant was negligent, assuming his testimony is credible. If defendant was unaware of Clayton's existence until the day before trial and gave his attorney this news immediately, he should not be deemed to have been negligent. In addition, if defendant's testimony is truthful, trial counsel should have mentioned Clayton by name on the morning of trial, even though she claims to have informed the court about him, although not by name. Trial counsel had multiple opportunities at trial, including during her motion to adjourn and at the close of the prosecution's proofs, to tell the court about Clayton. Still, *Williams* focuses on whether defendant was negligent, and there is no evidence that this was the case.

Because defendant had not requested adjournments previously, the fourth factor was met. However, the final factor does not weigh in defendant's favor. Defendant claims that he suffered prejudice because the trial court's refusal to grant his motion denied him the opportunity to present Clayton's exculpatory evidence. As discussed, it is not clear that Clayton was the basis for the motion to adjourn; he was not mentioned by either defendant or trial counsel at trial or before trial during the hearing on defendant's motion. Furthermore, Clayton's affidavit suggests that he intended to testify concerning conversations he had had with Pollie wherein Pollie confessed his guilt and ownership of the drugs. Although this perspective was not presented by Clayton or another third party at trial, trial counsel did raise this argument in her cross-examination of Pollie, so defendant was not deprived of his opportunity to present this defense. Additionally, the trial court noted that there is a good possibility that the jury would not have found Clayton to be a credible witness, as the prosecutor elicited testimony from Clayton during the hearing on defendant's motion for new trial about numerous letters Clayton had written to law enforcement officers proposing to provide them with information about various cases which he had learned while incarcerated. While the possibility exists that the jury would have found Clayton's testimony compelling, an equally strong possibility exists that the prosecutor would have successfully portrayed Clayton as a willing snitch who was eager to cooperate with law enforcement on others' cases in order to receive more lenient treatment in his future dealings with the Department of Corrections. Thus, defendant's failure to satisfy the requirements of the *Williams* test precludes his argument that the trial court abused its discretion by denying his motion to adjourn.

Second, defendant's claim that his trial counsel was ineffective also lacks merit. Defendant argues on appeal that trial counsel could not help but be unprepared because she did not have an adequate amount of time to prepare for trial. According to defendant, the court's (or its representatives) representations that "led [trial counsel] to believe that trial would not be held" and trial counsel's testimony that it was difficult for defendant to reach her by telephone due to problems with her telephone service provider all contributed to trial counsel's inability to prepare, and subsequent deficient performance at trial. In addition, defendant adds that even he was unaware of the admissions made by Pollie to Clayton, and so could not inform counsel of them in a timely manner.

In order "to find that a defendant's right to effective assistance of counsel was so undermined that it justified 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). Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations and emphasis omitted). Furthermore, effective assistance of counsel is presumed, and defendant bears a "heavy burden" of proving otherwise. *Id.* Defendant's claims regarding his trial attorney's performance do not overcome this burden.

The United States Supreme Court has held that a court's decision to refuse to postpone a criminal trial in order to give defense counsel more time to prepare will not necessarily result in a presumption that trial counsel was ineffective. *United States v Cronin*, 466 US 648, 661; 104 S

Ct 2039; 80 L Ed 2d 657 (1984). The Court in *Cronic* noted that it did not find counsel ineffective in *Avery v Alabama*, 308 US 444; 60 S Ct 321; 84 L Ed 377 (1940), despite the fact that “counsel was appointed in a capital case only three days before trial, and the trial court denied counsel’s request for additional time to prepare. Nevertheless, the Court held that since evidence and witnesses were easily accessible to defense counsel, the circumstances did not make it unreasonable to expect that counsel could adequately prepare for trial during that period of time.” *Cronic, supra* at 661.

In the instant case, trial counsel was apparently hired well in advance of trial. However, defendant claims that because trial counsel was not certain that trial would begin on the date scheduled, she did not have adequate time to prepare. The court found that counsel’s performance was not deficient, and under *Avery*, counsel’s belief that she lacked adequate time to prepare for trial is not sufficient to warrant a finding of ineffective assistance of counsel. In addition, as previously discussed, trial counsel vigorously cross-examined the prosecution’s witnesses, and pursued defendant’s theory of defense that Pollie was the owner of the drugs. Clayton’s story would only have corroborated this, and as noted by the trial court, perhaps in a rather unconvincing fashion. Even if trial counsel had had more time to prepare, it is not clear that defendant would have told her about Clayton so that she could interview him and present his testimony. Although defendant argues on appeal that he told defense counsel about Clayton the morning of trial, this is not clear from the record, and as noted, defense counsel made no attempt to introduce a late witness or to inform the court of Clayton’s existence at any point during the trial, assuming that she had in fact been told about him. Defendant does not overcome the presumption of effective assistance of counsel.

Next, defendant’s claim that he is entitled to a new trial on the basis of newly discovered evidence is also without merit. The trial court held that Clayton’s testimony was not newly discovered evidence because it was clear from his testimony at the motion hearing that “this evidence was common knowledge at the jail. As Mr. Clayton pointed out . . . everybody knew about it.” The court reasoned that if Clayton was to be believed, defendant should have known of the evidence or of other potential witnesses who could testify on his behalf. The court also determined that defendant had not informed his attorney of Clayton the morning of trial as trial counsel testified, and found that the record did not support her testimony. The court ultimately decided that a new trial was not warranted because a different result was unlikely on retrial; according to the court, Clayton was not a credible witness based on “all the letters that he wrote on his case, with all the other times where he supposedly was trying to get plea deals or sentencing agreements, the impeachment that would have been done with him . . . and his . . . criminal history, I doubt that he would have been believable at trial.”

Our Supreme Court has stated that in order “[f]or a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) ‘the evidence itself, not merely its materiality, was newly discovered’; (2) ‘the newly discovered evidence was not cumulative’; (3) ‘the party could not, using reasonable diligence, have discovered and produced the evidence at trial’; and (4) the new evidence makes a different result probable on retrial.” *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996).

Defendant argues that all of the requirements set forth in *Cress* have been met in the instant case. First, defendant states that Clayton’s testimony is newly discovered because the

information he disclosed in his interview with appellate counsel was not known to the defense until June 2007. It is not clear that the court abused its discretion by concluding that Clayton's testimony was not newly discovered. According to the claims of both defendant and trial counsel, they were aware of Clayton's testimony at least as early as the morning of trial. Trial counsel did not tell the court that there was a witness with information that was material to the theory of defense, and she did not seek an adjournment on this basis. If defendant and trial counsel are to be believed, by their own admission, the information Clayton apparently intended to testify to was not newly discovered evidence under the *Cress* standard.

The second requirement for newly discovered evidence is that it must not be cumulative. Because no other witnesses testified to the information that Clayton professed to know in his affidavit, his testimony cannot strictly be called cumulative. However, trial counsel was able to pursue with various prosecution witnesses the possibility that Pollie was the actual offender. Thus, the trial court did not abuse its discretion in refusing to grant a new trial on the basis of newly discovered evidence with respect to this requirement because defendant was able to pursue the theory of defense that Clayton would have supported.

Third, defendant could have produced this evidence at trial. Defendant argues on appeal that because of the court's decision to deny him a continuance, he could not produce Clayton at trial. This claim lacks merit, however, because Clayton was known to defendant before trial and to his attorney the morning of trial, according to their own testimony, and was incarcerated at the time of trial, so he could have been found easily. Thus, defendant does not satisfy the third *Cress* requirement. Finally, although defendant argues that Clayton's testimony would almost certainly have resulted in an acquittal, the trial court determined that Clayton lacked credibility for good reason. Clayton testified that he had written many letters while incarcerated, and sought to provide law enforcement with information on various cases, including a murder, drug deals, and also defendant's case. It is quite possible that the jury would have not believed Clayton's story, or that on retrial the jury might find it incredible that Clayton was discovered after trial and had also coincidentally been privy to information on various other cases while in prison.

Defendant claims, however, that the court's comment assessing Clayton's credibility amounted to a substitution of the court's judgment for that of the fact-finder, in this case, the jury. According to defendant, the trial court improperly engaged in "appellate speculation" by deciding that Clayton was not believable and that a jury would agree. Defendant's argument ignores the fact that it is the role of the judge, not the jury, to determine whether evidence is admissible. *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989) ("The decision whether to admit evidence is within the sound discretion of the trial court, and it will not be disturbed on appeal absent an abuse of discretion."). The court determined that Clayton's testimony was not newly discovered and thus did not support granting a new trial, and this decision was not an abuse of discretion. The court's further comments on Clayton's credibility were not improper, as the fourth requirement in *Cress* for determining whether evidence is newly discovered requires the court to decide whether the evidence makes a different result likely on retrial. Because of the various issues with Clayton's past actions and actions while incarcerated, the court determined that defendant was unable to satisfy this requirement. Thus, the court's actions were in line with its duties and not an improper substitution of its judgment for that of the jury.

Defendant's fourth claim, that his consent was coerced and is therefore invalid, must also fail. Generally, searches and seizures conducted without a warrant are unreasonable per se. *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999). However, an exception exists where consent has been given freely and intelligently, and is unequivocal and specific. The validity of a consent depends on the totality of the circumstances. *Id.*

The circumstances in which defendant expressed his consent to the search to the officer who made the initial traffic stop, Michigan State Police Trooper Trevin Antcliff were disputed. The following exchange occurred between defendant and trial counsel at the motion hearing:

Q [TRIAL COUNSEL]. So it's your testimony that you never told Trooper Antcliff that he could search your car?

A [DEFENDANT]. No, I did not.

Q. [H]ow many times do you maintain that you denied him access or how many times do you feel that you were being asked to be searched?

A. Probably at least three, cause he said the first time he asked me could he search—did I have a problem with him looking around the vehicle and I said I don't know why you'd want to search the vehicle, is there a problem and he said no and then he said but if there's nothing . . . illegal in the car then you shouldn't have a problem with me searching the car[,] right[?] and I was like well I don't want you to search the car. . . .

\* \* \*

Q. Okay, did he ever ask you if he could search your car?

A. Yes, he did.

Q. And did you ever say yes?

A. No, I did not.

In contrast, Antcliff testified that he asked defendant whether "he had anything illegal in his vehicle, he told me no. I asked if he minded if I searched the vehicle, he said I don't know why you'd want to and then I asked him if he's going to deny me doing my job and he then told me that it was okay if I wanted to search the vehicle." Another officer, Newaygo County Sheriff's Deputy Adam Mercer, testified that he interviewed defendant after Antcliff, and asked for consent to search the vehicle, which defendant gave after being "somewhat hesitate [sic], he just . . . stated you know I'm not doing anything wrong, why do you want to search the vehicle. I simply explained to him that we were out doing highway drug interdiction and that we were asking for consent to search most if not all the vehicles that we were stopping to try to intercept any drugs. At which point he gave consent and said it was okay for us to search."

Defendant's testimony did not refute Mercer's testimony, although he did offer a different account of the events than Antcliff. In addition to the testimony of defendant and the officers, the trial court also had the benefit of watching a video of the traffic stop, including some

portions with audio. Based on both the video evidence and the officers' testimony, the trial court decided that defendant had given consent. "The validity of a consent to search, it is true, is a question of fact to be determined from all of the evidence and reasonable inferences." *Gilbert v Louch*, 62 Mich App 722, 727; 233 NW2d 840 (1975). "This factual question, however, must be resolved by the trial judge exercising his discretion and is to be overturned by an appellate court only if clearly erroneous." *Id.* at 727-728. The judge did not abuse his discretion in finding that Antcliff and Mercer were more credible than defendant, especially in light of the fact that defendant did not refute Mercer's account of the circumstances in which defendant consented to the search. Thus, defendant does not demonstrate that the court plainly erred in denying his motion to suppress.

Finally, defendant's claim that the trial court denied his rights to due process and a jury trial by scoring OV 14 and 15 lacks merit.

At his sentencing hearing, defendant objected to "the scoring of OV 14, indicating that [defendant] was a leader and multiple offender" because according to defendant, there was no leader in the offense committed, and furthermore, "[t]here was another person involved who equally had as much participation if not more so." The trial court rejected the objection, stating that it was satisfied that defendant was the leader in the offense, based on the drugs being found on the driver's side of the car, defendant's ownership of the vehicle, and defendant's hesitance to allow officers to search the vehicle and caginess regarding the granting consent to search.

MCL 777.44 allows for the scoring of ten OV points if the defendant was "a leader in a multiple offender situation." Defendant argues on appeal that his constitutional rights were violated because the court's findings that were used to score OV 14 and 15 were not submitted to a jury and proven beyond a reasonable doubt. Defendant does not specifically discuss his objection to the scoring of OV 15 in his brief on appeal, nor did he object to its scoring before the court during the sentencing hearing. "A party may not rely on this Court to make his arguments for him." *Rorke v Savoy Energy, LP*, 260 Mich App 251, 260; 677 NW2d 45 (2003). Therefore, this Court considers this claim to be abandoned with respect to OV 15. *Moses, Inc v SEMCOG*, 270 Mich App 401, 417; 716 NW2d 278 (2006) (holding that a party abandons a claim if it fails to adequately brief its position or to support its claim with authority). Defendant's constitutional argument with respect to OV 14, however, is apparently based on a misunderstanding of the relevant law.

In *People v Drohan*, 475 Mich 140, 150; 715 NW2d 778 (2006), our Supreme Court noted the United States Supreme Court's opinion in *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), where the Court held that under the Sixth Amendment, any fact other than a prior conviction "that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi, supra* at 490. In *Apprendi*, the Court also held that conversely, "a fact 'that supports a specific sentence *within the range* authorized by the jury's finding that the defendant is guilty of a particular offense[.]" *id.* at 494 n 19 (emphasis in the original), is a sentencing factor that does not implicate the Sixth Amendment." *Drohan, supra* at 150-151. In the instant case, defendant's sentence was not increased beyond the statutory maximum for the offense of which he was convicted, and thus, defendant's arguments lack merit because *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), which defendant also cites on appeal, and *Apprendi* have not been implicated in this matter.

The statutory maximum for a defendant who is convicted of violating MCL 333.7401(2)(a)(iii) is 20 years' imprisonment. MCL 777.13m. However, defendant was sentenced as a fourth habitual offender pursuant to MCL 769.12. MCL 769.12(1)(a) provides that for any person who has been convicted of three or more felonies, "[i]f the subsequent felony is punishable upon a first conviction by imprisonment for a maximum term of 5 years or more or for life, the court, except as otherwise provided in this section . . . , may sentence the person to imprisonment for life or for a lesser term." The circuit court's sentence of 20 to 40 years was certainly within the statute's allowed maximum sentence of life imprisonment. Therefore, the constitutional protections discussed in *Drohan*, *Blakely*, and *Apprendi* are not applicable to defendant's argument, because his sentence was not increased by the court beyond the statutory maximum. See *Drohan*, *supra* at 159 (noting that "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and . . . judges may make certain factual findings to select a specific minimum sentence from within a defined range"). Thus, this issue fails.

Affirmed.

/s/ Jane E. Markey  
/s/ David H. Sawyer  
/s/ Kirsten Frank Kelly