

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WARREN A. BROWN,

Defendant-Appellant.

UNPUBLISHED

October 20, 2005

No. 245177

Wayne Circuit Court

LC No. 99-001934

Before: Cavanagh, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver 650 or more grams of cocaine, MCL 333.7401(2)(a)(i), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possessing or carrying a firearm during the commission or attempted commission of a felony (“felony-firearm”), MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for the cocaine conviction, and twenty to forty-eight months’ imprisonment for the marijuana conviction, to be served consecutive to a two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

After obtaining a warrant to search an apartment and take defendant into custody, the police searched an upper apartment in a building owned by defendant. That apartment was occupied by the sister of defendant's girlfriend. According to the police, while searching that apartment, they were informed that defendant had run into his girlfriend's apartment, which was located on the lower floor of the same building. The police entered defendant’s girlfriend’s apartment to arrest defendant. After securing the lower apartment, the police obtained a warrant to search the apartment. The police subsequently found large amounts of cash, drugs, and weapons inside the lower apartment.

I

Defendant first argues that the trial court erred in denying his motion for a second evidentiary hearing on his motion to suppress evidence. Defendant apparently moved for rehearing under MCR 2.119(F). As this Court explained in *People v Walters*, 266 Mich App 341, 350-351; 700 NW2d 424 (2005):

A court's decision to grant a motion for reconsideration is reviewed for an abuse of discretion. *Kokx [v Bylenga]*, 241 Mich App 655, 658; 617 NW2d 368 (2000)].

MCR 2.119(F)(3) provides:

"Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."

This Court has held that the palpable error provision in MCR 2.119(F)(3) is not mandatory and only provides guidance to a court about when it may be appropriate to consider a motion for rehearing or reconsideration. *Smith v Sinai Hosp of Detroit*, 152 Mich App 716, 722-723; 394 NW2d 82 (1986). "If a trial court wants to give a 'second chance' to a motion it has previously denied, it has every right to do so, and this court rule does nothing to prevent this exercise of discretion." *Id.* at 723. See also *Sutton v Oak Park*, 251 Mich App 345, 349; 650 NW2d 404 (2002) (under MCR 2.119[F][3], a trial court's discretion in ruling on a motion for reconsideration is not restricted).

After conducting an evidentiary hearing pursuant to *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978), the trial court denied defendant's motion to suppress evidence obtained pursuant to the search warrant for the lower apartment. Defendant subsequently argued that the officer in charge gave false testimony at that hearing and claimed that he had new information that the affidavit used to procure the search warrant contained false statements. Defendant therefore requested another evidentiary hearing on his motion to suppress. The judge who conducted the original evidentiary hearing denied defendant's request for a new hearing. Later, however, a successor judge agreed to conduct an evidentiary hearing to determine whether a new *Franks* hearing should be held. The court subsequently denied defendant's request for a new *Franks* hearing.

Defendant now argues that the trial court erred in denying his request for a new *Franks* hearing. Defendant also appears to argue that the police did not have probable cause to enter the lower apartment without a warrant to arrest him.

Defendant has not shown that the trial court erred in its determination that the police had probable cause to enter the lower apartment without a warrant. There were exigent circumstances to permit the police to enter and secure the lower apartment without a warrant for the safety of the officers involved and to prevent the destruction of evidence after they had probable cause to believe that defendant had fled into that apartment and that the apartment also contained illegal drugs. *People v Beuschlein*, 245 Mich App 744, 749-750; 630 NW2d 921 (2001). Defendant has failed to show that the trial court should have granted rehearing on this issue.

Nor has defendant shown that the trial court erred in denying his motion for rehearing with regard to whether there was probable cause to issue the search warrant for the lower apartment. Probable cause to search must exist at the time a warrant is issued. *People v Stumpf*, 196 Mich App 218, 227; 492 NW2d 795 (1992). "Probable cause exists when a person of reasonable caution would be justified in concluding that evidence of criminal conduct could be found in a stated place to be searched." *Id.*

When reviewing a decision to issue a search warrant, the reviewing court must read the search warrant and the affidavit in a common-sense and realistic manner. Deference is afforded the magistrate's decision because of the preference for searches conducted pursuant to warrants. A reviewing court must only be sure that there is a substantial basis for the magistrate's conclusion that there is a fair probability that contraband or evidence of a crime will be found in a particular place before granting the warrant. *People v Russo*, 439 Mich 584, 603-604; 487 NW2d 698 (1992). However, false statements cannot be used to find probable cause:

Franks[, *supra* at] 155-156[,] . . . requires that if false statements are made in an affidavit in support of a search warrant, evidence obtained pursuant to the warrant must be suppressed if the false information was necessary to a finding of probable cause. In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause. *Id.*, pp 171-172; *People v Williams*, 134 Mich App 639, 643; 351 NW2d 878 (1984), lv den 421 Mich 860 (1985). The rule from *Franks* has been extended to material omissions from affidavits. *People v Kort*, 162 Mich App 680, 685-686; 413 NW2d 83 (1987), lv den 430 Mich 860 (1988). [*Stumpf, supra* at 224.]

Thus, the fact that an affidavit may contain false information does not by itself invalidate the search warrant. Instead, "where the affidavit includes sufficient untainted information to establish probable cause apart from the misinformation, the affidavit, and resulting search warrant, remain valid within the scope and to the extent of the untainted information." *People v Griffin*, 235 Mich App 27, 42; 597 NW2d 176 (1999).

Although the officer in charge admitted that he incorrectly testified at the *Franks* hearing about the time he arrived at the scene of the search, that discrepancy does not affect a finding of probable cause. Likewise, contrary to defendant's argument, the time that the truck was rented does not prove that the police searched the lower apartment before the search warrant was issued. The testimony did not indicate that the money seized in the search of the lower apartment was used to pay for the initial truck rental, but rather that the seized money was used to reimburse an officer, who initially paid for the rental with his own money. Further, although some officers did not recall smelling marijuana inside the building, other officers did. Thus, defendant has failed to show that the affidavit contained false information about whether some officers smelled marijuana inside the building. Defendant has also failed to show that any false information in the affidavit regarding the search of the upper apartment, or whether officers heard running in the building, affected a finding of probable cause to issue the warrant, especially given the testimony that Tania Peterson informed officers that defendant ran into the lower apartment. Consequently,

the trial court did not abuse its discretion in refusing to grant rehearing of defendant's motion to suppress the evidence.

II

Defendant next argues that the trial court erred in allowing the officer in charge to testify that, in a separate forfeiture proceeding, defendant claimed ownership of the currency seized during the search of the lower apartment in this case. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003).

Although defendant argues that the forfeiture proceeding also involved property seized from a separate location, the trial court allowed the disputed testimony only after determining that defendant did not limit his claim of ownership to those items taken from the other location. Furthermore, the trial court did not permit the witness to testify regarding the seizures that occurred at the separate location. Therefore, defendant was not prejudiced by testimony regarding the circumstances surrounding the seizure of the property from the other location.

We also find no merit to defendant's unpreserved argument that his request for a return of the seized property was not a "statement" and, therefore, did not qualify as a party admission under MRE 801(d)(2)(C) or (D). Because this argument was not raised in the trial court, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999). Defendant relies on *People v Alphonzo Jones (On Rehearing After Remand)*, 228 Mich App 191, 205; 579 NW2d 82 (1998), mod in part on other grounds 458 Mich 862 (1998), to argue that his request for a return of the seized property was not a statement as defined in MRE 801(a) because it was not an assertion, but rather a command. We disagree. In his response to the complaint for forfeiture of the currency in question, defendant asked the court to deny the plaintiff's order of forfeiture and order the plaintiff to return the seized property to defendant. By making this request, defendant essentially asserted that he was the rightful owner of the currency. Accordingly, there was no plain error.

III

Next, defendant argues that the trial court erroneously permitted the officer in charge to offer improper "drug profile" evidence. We disagree. This Court reviews the trial court's admission of evidence for an abuse of discretion. *Washington, supra* at 670-671.

The use of drug profile evidence as substantive evidence of guilt is not permitted. *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Drug profile evidence is an informal compilation of characteristics often displayed by those trafficking in drugs. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). "Drug profile evidence is essentially a compilation of otherwise innocuous characteristics that many drug dealers exhibit, such as the use of pagers, the carrying of large amounts of cash, and the possession of razor blades and lighters in order to package crack cocaine for sale." *Id.* This evidence is inherently prejudicial because it may suggest to the jury that otherwise innocuous behavior indicates criminal activity. *Id.* at 53. However, courts are permitted to use expert testimony, even expert police testimony, to explain the significance of items seized and aid the jury's understanding in controlled substance cases. *Id.*

The challenged testimony in this case did not constitute improper “drug profile” evidence. The officer did not testify concerning innocuous characteristics that many drug dealers exhibit and did not suggest that, because he exhibited some of those characteristics, defendant must be a drug dealer. Instead, the officer explained the significance of the specific amounts and types of narcotics found, how narcotics are packaged and sold, the significance of other items found with the narcotics, and discussed the various types of locations involved in the processing, warehousing and distribution of illegal narcotics. While the witness did express his opinion that the location where the drugs were seized was likely a “stash house” (i.e. warehouse location), the ultimate issue as to defendant’s guilt properly remained with the jury. *Id.* at 57. Therefore, the evidence was not improper drug profile testimony and the trial court did not abuse its discretion in permitting it.¹

IV

Defendant next argues that he was denied his rights to due process, to confront the witnesses against him, and to present a defense when the trial court refused to order the production of Delford Fort as a witness. Constitutional issues are reviewed de novo. *People v Hickman*, 470 Mich 602, 605; 684 NW2d 267 (2004).

Fort was a police officer who was involved in this search, but was subsequently imprisoned in the federal system. The prosecution declined to call him as a witness. Even if Fort was a *res gestae* witness, which was disputed below,² the prosecution was only obligated to offer defendant reasonable assistance to locate and serve process upon Fort. MCL 767.40a(5). MCL 767.40a no longer requires the prosecution to produce all *res gestae* witnesses, only those witnesses included on its witness list. See *People v Perez*, 469 Mich 415, 418-419; 670 NW2d 655 (2003). Moreover, “it is not the prosecution’s responsibility to call any witness whom the defendant believes may support his defense in some way.” *People v Lee*, 212 Mich App 228, 257-258; 537 NW2d 233 (1995). There is no dispute that defendant knew where Fort was being housed in the federal prison system. Although defendant complained of the cost involved in producing Fort for trial, he had retained counsel and never claimed that he was indigent and unable to bear the cost of producing Fort. Because defendant was not indigent, the prosecution was not obligated to produce this witness. See *People v Miller*, 78 Mich App 336, 346-347; 259 NW2d 877 (1977). In addition, defendant could have requested a subpoena under the uniform act to secure the attendance of witnesses from without a state in criminal proceedings (the Uniform Act), MCL 767.91 *et seq.*, to compel Fort’s production. See *People v McFall*, 224 Mich App 403, 407-408; 569 NW2d 828 (1997). However, defendant never made a proper request for the production of this witness under the Uniform Act.

¹ Defendant also faults the trial court for refusing to give a limiting instruction regarding this evidence. However, while such an instruction is usually warranted, trial courts are not required to give them. *Murray, supra* at 57.

² The prosecutor asserted below that Fort was not involved in the search of the lower apartment where the drugs, currency, and firearms were found.

Therefore, under the facts of this case, the prosecution had no duty to produce Fort as a witness and the trial court did not err by refusing to order his production or issue an adverse witness instruction.

V

Next, defendant argues that the trial court was under the erroneous assumption that it was without discretion when sentencing him to life imprisonment for possession with intent to deliver 650 or more grams of cocaine. We disagree.

At the time the offense was committed in 1999, the penalty for a violation of MCL 333.7401(2)(a)(i) was "imprisonment for life or any term of years but not less than 20 years." The trial court imposed a life sentence and did not mention its discretion to impose an indeterminate sentence. Because nothing in the record suggests that the trial court was unaware of its discretion to impose a sentence less than life, defendant is not entitled to resentencing.³ See *People v Gomer*, 206 Mich App 55, 59; 520 NW2d 360 (1994).

VI

Defendant next argues that his first trial attorney was ineffective. Defendant requested an evidentiary hearing on this issue in the trial court, which was denied. From our review of the existing record and defendant's offer of proof, we conclude that defendant has not established that his counsel was ineffective or that the trial court erred in refusing to grant an evidentiary hearing on this issue.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, the defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant argues that his attorney was ineffective when he prepared defendant's response in a forfeiture case to indicate that defendant was requesting the return of the property seized from the apartment where the police seized the drugs, money, and firearms at issue in this case. This evidence was admitted against defendant at trial as a party admission. Defendant does not cite any legal authority in support of his argument that the right to the effective assistance of counsel extends to counsel's representation in other proceedings. "The mere statement of a party's position without citation of relevant authority is generally insufficient to present an issue for this Court's review." *People v Harlan*, 258 Mich App 137, 140; 669 NW2d

³ While the trial court did improperly state on the record that it was sentencing defendant to life in prison without the possibility of parole, the judgment of sentence reflects a proper sentence of life imprisonment.

872 (2003). "This Court ordinarily declines to review issues for which a party has failed to provide authority, and will not search for authority to support or contradict a party's argument." *Id.* "Such cursory treatment constitutes abandonment of the issue." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004). For these reasons, this issue is not properly before this Court and we decline to address it.

Further, defendant has failed to show that counsel was ineffective for not raising the issue of standing at the hearing on his motion to suppress evidence. To the contrary, the issue was brought up by defense counsel. While the trial court appeared to conclude that defendant had standing to challenge the search of the lower apartment, it declined to resolve that issue and proceeded to consider the merits of defendant's motion. Therefore, defendant cannot show that he was prejudiced by his attorney's performance. *Pickens, supra.*

Defendant also argues that his attorney was ineffective for not calling certain witnesses at the *Franks* hearing on his motion to suppress evidence. Because defendant's second attorney was permitted to develop a factual record on what most of these witnesses would have testified to in support of his motion for a second evidentiary hearing, and because the trial court did not err in determining that the additional testimony would not have caused a different result, defendant was not prejudiced by his original attorney's failure to call these witnesses. *Pickens, supra.*

Therefore, there was no ineffective assistance of counsel.

VII

Finally, because we have not found any errors, defendant has failed to establish that reversal is required due to the cumulative effect of multiple errors. *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael R. Smolenski
/s/ Brian K. Zahra