

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UNPUBLISHED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, P.J., and Fitzgerald and Schuette, JJ

SCHUETTE, J. (*dissenting*).

I respectfully dissent from the majority's conclusion that defendant was denied effective assistance of counsel because counsel failed to present evidence at the evidentiary hearing that might have exculpated defendant.

I would find meritless defendant's argument that trial counsel was ineffective for failing to subpoena or to call to testify certain witnesses that supported defendant's version of the facts. Defendant does not tell who these witnesses are or how they could have supported his claims. Therefore, this Court cannot determine whether trial counsel's failure to subpoena or call these witness to testify was unreasonable or whether defendant was prejudiced by this failure.

Trial counsel was not ineffective due to his failure to introduce into evidence in the probable cause hearing the letter from the homeowner giving defendant permission to be on the property. Defendant did not tell the arresting officer that he had such a letter. Therefore, evidence of the letter was irrelevant to the trial court's determination of whether the police had probable cause to arrest defendant. Such a determination must necessarily involve an analysis of only those facts and circumstances which were known, or should have been known, by the officer at the time he or she made the arrest. *People v Beuschlein*, 245 Mich App 744, 750; 630 NW2d 921 (2001) ("Probable cause exists when the facts and circumstances known to the police officers at the time of the search would lead a reasonably prudent person to believe that a crime has been or is being committed and that evidence will be found in a particular place.") Therefore, trial counsel did not act unreasonably and defendant was not prejudiced. For the same reason, trial counsel was not ineffective due to his failure to introduce into evidence in the probable cause hearing the register of actions from the district court indicating that defendant could return to the property with the owner's permission. The register of actions is evidence that defendant was not trespassing, but it is not evidence that the officers lacked probable cause to

arrest him. The officers had no knowledge of the register of actions, nor should they have known about it.

Further, I would find that trial counsel was not ineffective because he failed to introduce into evidence in the probable cause hearing pictures of the “no occupancy” sign. Defendant claims that the police lacked probable cause to arrest him because the sign said “no occupancy,” not “no trespassing.” Defendant is incorrect. A person can be convicted of criminal trespass even if there is not a “no trespassing” sign posted on the land or premises. See MCL 750.552. Therefore, defendant was not prejudiced by trial counsel’s failure to introduce the photograph into evidence in the probable cause hearing.

Similarly, I would conclude that trial counsel was not ineffective due to his failure to introduce a photograph of the building permit into evidence in the probable cause hearing. Trial counsel introduced the actual building permit into evidence in the probable cause hearing. The trial court found that the permit was not posted when the officers arrived at the house. The photograph of the building permit on the house at 4390 Ninth Street does not contradict the trial court’s finding because it does not prove that the permit was posted on the house at the time officers arrived. Moreover, even if defendant’s photograph proved that a building permit was posted on the house on the day defendant was arrested, a question would still have remained as to whether defendant had permission to be on the property because the building permit did not state that defendant had permission to work on the house. Therefore, defendant was not prejudiced by trial counsel’s failure to introduce the photograph into evidence in the probable cause hearing.

I would affirm.

/s/ Bill Schuette