

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM EARL COATS,

Defendant-Appellant.

UNPUBLISHED

April 13, 2006

No. 258983

Wayne Circuit Court

LC No. 04-004863-01

Before: White, P.J., Whitbeck, C.J., and Davis, J.

PER CURIAM.

Defendant was convicted of possession with intent to deliver 50 to 449 grams of cocaine, MCL 333.7401(2)(a)(iii). He was sentenced as a third habitual offender, MCL 799.11, to ten to forty years in prison. He appeals as of right. We affirm.

Defendant first argues that the trial court erred when it denied his motion to suppress evidence obtained from the execution of improperly granted search warrants that contained incorrect information. Defendant also asserts that the trial court erred in denying his request that the prosecution produce the confidential informant who was relied on in the affidavits supporting the search warrants that contained incorrect information. Defendant asserted below that the confidential informant was neither credible nor reliable, and questioned the existence of the informant in the first instance.

When considering a ruling on a motion to suppress evidence, this Court reviews the trial court's findings of fact for clear error, giving deference to the trial court's resolution of factual issues. This Court may not substitute its judgment for that of the trial court or make independent findings. The trial court's ultimate decision on the motion to suppress is reviewed de novo. *People v Jenkins*, 472 Mich 26, 31; 691 NW2d 759 (2005); *People v Bolduc*, 263 Mich App 430, 436; 688 NW2d 316 (2004).

A magistrate's decision to issue a search warrant should be upheld so long as there is "a 'substantial basis' for the finding of probable cause." *People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992). "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). A "finding of reasonable or probable cause shall be based upon all the facts related within the affidavit."

In the instant case, the affidavit stated that the confidential informant personally observed cocaine for sale at a residence located at 3919 Farnum Street. Police officers then conducted surveillance at the Farnum Street location and observed defendant letting individuals inside the location, and later observed defendant and the confidential informant drive away in defendant's car. The police officers followed defendant's vehicle directly to an apartment complex at 29855 Cherry Hill Road, observed defendant and the confidential informant go inside the Cherry Hill Road location, where they remained for several hours, and observed them leave together and drive back to the Farnum Street location. The police officers then met the confidential informant at a pre-determined location and the confidential informant informed the police that he observed defendant sell about four ounces of cocaine to some individuals at the Farnum Street location, and observed defendant pick up more cocaine at the Cherry Hill Road location and bring it back to the Farnum Street location. Therefore, we conclude that the magistrate could properly have concluded that the confidential informant spoke with personal knowledge of the information provided in the affidavit and that the information was reliable. *People v Levine*, 461 Mich 172, 180-181; 600 NW2d 622 (1999). There was a 'substantial basis' for the magistrate to infer that there was a 'fair probability' that cocaine would be found at the Cherry Hill Road location, and therefore, there was probable cause for the magistrate to issue the search warrant in question. *Kazmierczak, supra* at 417-418; MCL 780.653. Thus, we uphold the magistrate's decision to grant the search warrant. *Russo, supra* at 603.

Defendant correctly observes that a search warrant must particularly describe the place to be searched and the persons or things to be seized. *People v Hellstrom*, 264 Mich App 187, 192; 690 NW2d 293 (2004); MCL 780.654(1). In the instant case, although the warrant itself mistakenly described the Cherry Hill Road location as the Farnum Street residence and mistakenly named defendant as William Coats Smith, the warrant was still valid because it included the address to be searched and what was to be searched for. *People v Westra*, 445 Mich 284, 285-286; 517 NW2d 734 (1994) (holding that a warrant with an incorrect address that otherwise correctly described the place to be searched was still valid); *Hellstrom, supra* at 192. Moreover, even if it were determined that the warrant was invalid, the police acted in objectively reasonable good faith reliance on a facially valid search warrant issued by a detached and neutral magistrate. *Hellstrom, supra* at 198-202.

Defendant asserted below that none of the information supplied by the confidential informant was true and challenged the existence of the informant in the first instance. The trial court refused defendant's request that the prosecution produce the informant, concluding that defendant's offer of proof was insufficient under *Franks v Delaware*, 438 US 154; 98 S Ct 2674; 57 L Ed 2d 667 (1978). We agree.

False statement cannot be used to find probable cause. *Id.* 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.* at 155-156.

Although the identity of an informant is privileged, that privilege is not absolute. *People v Underwood*, 447 Mich 695, 703-704; 526 NW2d 903 (1994). Disclosure is required if the informant's identity or statement is relevant or helpful to the defense of the accused or is

essential to a fair determination of the case. *Id.* at 704, 707. When a defendant demonstrates a possible need for the informant's testimony, the trial court should require production of the informant and conduct an in camera hearing, outside the presence of the defendant. See *Underwood, supra* at 704, quoting *Roviaro v United States*, 353 US 53; 77 S Ct 623; 1 L Ed 2d 639 (1957).

This Court reviews the trial court's denial of a motion to disclose the identity of an informant for an abuse of discretion. *People v Rodriguez*, 65 Mich App 723, 728-729; 238 NW2d 385 (1975). The trial court's factual findings in connection with that determination are reviewed for clear error. *People v Lucas*, 188 Mich App 554, 573; 470 NW2d 460 (1991).

MCL 780.653 provides:

The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:

- (a) If the person is named, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information.
- (b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

The reliability of information given by an unnamed person can be established by police corroboration and investigation of the information. *Levine, supra* at 180-181.

We conclude that the trial court did not abuse its discretion in denying defendant's request that the prosecution produce the informant. We agree with the trial court that defendant's offer of proof fell short of showing 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. *Franks, supra* at 155-156. In light of the substantial evidence independent of the information allegedly supplied by the confidential informant, which corroborated the information supplied by the confidential informant, we conclude that the trial court did not abuse its discretion in denying defendant's request that the confidential informant be produced.

Defendant's next argument is that the trial court erred when it denied defendant's motion to quash. We disagree. This Court reviews a trial court's decision to deny a motion to quash charges de novo to determine if the district court abused its discretion in binding over the defendant for trial. *People v Libbett*, 251 Mich App 353, 357; 650 NW2d 407 (2002).

A magistrate must bind over a defendant for trial when the prosecutor presents competent evidence constituting probable cause that a felony was committed and that the defendant committed it. *People v Northey*, 231 Mich App 568, 574; 591 NW2d 227 (1998). Probable cause requires a reasonable belief that the evidence presented at the preliminary examination is consistent with the defendant's guilt. *Id.* at 575. Circumstantial evidence, as well as the inferences which can be drawn from that evidence, is sufficient to establish probable cause. *Id.* To bind a defendant over for trial, a magistrate must find that there is evidence regarding each

element of the crime charged or evidence from which the elements may be inferred. *People v Hudson*, 241 Mich App 268, 278; 615 NW2d 784 (2000).

The elements of possession with intent to deliver 50 to 449 grams of cocaine are: (1) the recovered substance is cocaine, (2) the mixture weighs between 50 and 449 grams, (3) the defendant was not authorized to possess the cocaine, and (4) the defendant knowingly possessed the substance with intent to deliver. *People v Gonzalez*, 256 Mich App 212, 225-226; 663 NW2d 499 (2003). In regard to the “intent to deliver” element, the prosecution need not show actual delivery to prove intent to deliver. *Id.* at 226. “An actor’s intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor’s state of mind, minimal circumstantial evidence is sufficient.” *Id.* In regard to the “knowingly possessed” element, constructive possession will suffice. *People v Johnson*, 466 Mich 491, 500; 647 NW2d 480 (2002). “Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband.” *Id.*

Here, it was established at the preliminary examination that the police recovered between 50 to 449 grams of cocaine from 29855 Cherry Hill Road, apartment 13. The large amount of cocaine, the presence of four bottles of room deodorizer, which is often added to cocaine as a cutting agent, and the presence of a scale with cocaine residue on it were facts from which an intent to deliver could be inferred. *Gonzalez, supra* at 226. The presence of photographs of persons including defendant (some of which depicted defendant in the actual premises), paperwork regarding a car registered to defendant, defendant’s bank statements and mail addressed to defendant, albeit at another address, supported an inference that defendant possessed the cocaine found on the premises. *Johnson, supra* at 500. Therefore, defendant was properly bound over for trial, and the trial court did not err when it denied defendant’s motion to quash the charges. *Gonzalez, supra* at 225-226; *Hudson, supra* at 278; *Northey, supra* at 574-575.

Defendant further asserts that the trial court erred when it denied his motion for a new trial. Defendant specifically argues that he should have been granted a new trial because he was denied his right to counsel at a critical stage of his trial, and the jury was allowed to view a box of documents that defendant alleges had not been properly admitted into evidence. We disagree. This Court reviews a trial court’s decision on a motion for a new trial for an abuse of discretion, but reviews its factual findings for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

A court “may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice.” MCR 6.431(B). “The complete denial of counsel at a critical stage of a criminal proceeding is a structural error that renders the result unreliable, thus requiring automatic reversal.” *People v Russell*, 471 Mich 182, 194 n 29; 684 NW2d 745 (2004). If counsel’s absence will harm defendant’s right to a fair trial, the moment of absence would be considered a critical stage. *People v Green*, 260 Mich App 392, 399; 677 NW2d 363 (2004). If the activity in question “has some effect on the determination of guilt or innocence which could properly be avoided, or mitigated, by the presence of counsel,” it will likely be considered a critical stage. *Id.* at 400. Moreover, a trial court may not provide the jury with evidence that has not been admitted. *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996).

Defendant's argument that he should have been granted a new trial because he was denied his right to counsel at a critical stage of the trial fails. Here, the prosecutor moved for the admission of exhibit 43 (a box of mail) during trial, and stated that he would "inventory it before we complete the case." The following colloquy ensued:

THE COURT: To the lawyers - - you're moving for it's [sic] admission right now, right?

[PROSECUTOR]: I'm going to move for its admission but we'll go through it so we can organize it better.

THE COURT: Very well.

Members of the jury, we're just not going to go through each and every one of those, okay. But if there is a need for you to look at them, then we'll direct that to you later.

Based on this exchange, we conclude that the exhibit was, in fact, admitted into evidence, without objection by defendant, and the court did not err in permitting the jury to view the exhibit.

Defendant's objection to the manner in which the court handled the jury's request for evidence is more troublesome. After instructing the jury and releasing the alternate juror, the court instructed the attorneys to "be readily available at some point in case we need to reach you. Just let the clerk know where you can be reached." The jury was excused from the courtroom to begin deliberations at 12:24. At 3:04 the court went back on the record, in the presence of counsel and stated:

Just to get you up-to-date, the jury did make some requests for some items here. They wanted the lease agreement, photograph, judge's instructions, box of mail, furniture receipt, walk-through sheet, that was the first request. And I had - - before the box of mail was given, I told them to go through and make sure there was nothing that referenced to the Defendant being on parole or any other items with reference to the Michigan Department of Corrections or anything of that nature before they got that box. Then they asked for the apartment ledger and the property list. And those items were passed on to them. And a few minutes ago, about twenty minutes ago they sent a note that they have reached a verdict.

The court took the verdict, without objection. The following day, the attorneys appeared before the court. At that point, defense counsel objected to the court's failure to notify him of the jury's note, and sought a mistrial. The court denied the request for a mistrial, but scheduled a hearing regarding the contents of the box.

At the hearing, defense counsel explained his concern that there had been certain items in the box that were prejudicial to defendant, in particular certain photographs, a card of a parole officer located in a planner, and letters from defendant and others indicating that defendant and the persons with whom he was corresponding had been in prison or jail. Defense counsel explained that he did not go through the box at the conclusion of the trial, because the prosecutor

expressed the opinion that the jury would not request the box, and that they could go through it later if the jury did request it. The prosecutor then explained that he had removed the photographs from the box before it was presented at trial.

The court officer was sworn in and testified that he went through the box and removed a Michigan Department of Corrections card and two letters. At a later hearing, the officer in charge testified that he went through the box with the court officer, that a letter was removed, and that the box only contained “general mail.” The court confirmed that these actions occurred in its presence, denied defendant’s request to bring in members of the jury to answer questions regarding the contents of the box and the effect on the jury’s deliberations, and reaffirmed its denial of the motion for new trial.

We are troubled by the court’s failure to contact defense counsel before submitting the box to the jury. Although the box was admitted into evidence, it was received subject to its being culled through and items being removed, and defense counsel should have been present for this process. However, counsel did not object when the court notified the attorneys that the box had been examined and submitted to the jury in their absence, and did not raise an objection until the day after the verdict was received. Thereafter, the court held a hearing to recreate what had transpired. Any deficiency in the record could have been avoided had defense counsel objected when the court stated what had happened and requested an opportunity to review the box at that time. Notwithstanding the affidavit submitted regarding juror Hoffman’s vague statements, there is no basis to conclude that objectionable material was submitted to the jury, and we will not reward counsel’s failure to make a timely objection.

Defendant next asserts that the trial court erred in denying his second motion for a new trial, which was based on new information that the main officer involved in the case had been dismissed from the police department for corrupt activities.¹ We disagree. This Court reviews a trial court’s decision on a motion for a new trial for an abuse of discretion, but reviews its factual findings for clear error. *Cress, supra* at 691.

Defendant correctly points out that discovery of perjured trial testimony can be grounds for a new trial. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). In order to merit a new trial on the basis of the discovery of perjured trial testimony, a defendant must show that the evidence that can establish perjury: “(1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and was not discoverable and producible at trial with reasonable diligence.” *Id.*

Here, the fact that Pasienza was discharged from the police force is newly discovered, was not discoverable at trial and is not cumulative to any of the evidence produced at trial. However, defendant has provided no evidence that the fact that Pasienza was discharged from the police force establishes that Pasienza’s trial testimony was perjured. Moreover, even if it were established that Pasienza’s testimony was perjured, Charlene Baker’s, Officers Byron Paisley’s and Scott Rechtzigel’s testimony independently supports defendant’s conviction.

¹ Pasienza was the officer in charge of the case and the prosecution’s main witness.

Therefore, introduction of evidence of the fact that Pasienza was discharged from the police force would most likely not have led to a different verdict, and thus, the trial court did not abuse its discretion when it denied defendant's second motion for a new trial. *Cress, supra* at 691; *Mechura, supra* at 483.

Defendant also contends that there was insufficient evidence to support his conviction. We disagree. This Court reviews insufficiency of the evidence claims de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). This Court reviews the evidence presented in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of the offense. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993).

To prove possession with intent to deliver 50 to 449 grams of cocaine, the prosecution must show that: (1) the recovered substance is cocaine, (2) the mixture weighs between 50 and 449 grams, (3) defendant was not authorized to possess the cocaine, and (4) defendant knowingly possessed the substance with intent to deliver. *Gonzalez, supra* at 225-226. In regard to the "intent to deliver" element, the prosecution need not show actual delivery to prove intent to deliver. *Id.* at 226. "An actor's intent may be inferred from all of the facts and circumstances, and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient." *Id.* In regard to the "knowingly possessed" element, constructive possession will suffice. *Johnson, supra* at 500. "Constructive possession exists when the totality of the circumstances indicates a sufficient nexus between defendant and the contraband." *Id.*

Here, the police recovered between 50 to 449 grams of cocaine. The large quantity, the presence of four bottles of room deodorizer, which is often added to cocaine as a cutting agent, and the presence of a scale with cocaine residue on it were facts from which an intent to deliver could be inferred. *Gonzalez, supra* at 226. Defendant's control of the premises was sufficiently established by evidence that the apartment was leased to defendant, that police found photographs that had defendant in them, defendant's bank statements and a box of mail addressed to defendant at another address, and that the premises appeared lived in and men's clothing was found throughout the premises. *Johnson, supra* at 500. Moreover, while some evidence was presented that Monica Tony (Tony) may have lived at the premises, evidence was also presented that Tony did not live there, and this Court must afford deference to the trier of fact's special opportunity and ability to determine the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201; 489 NW2d 748 (1992). Therefore, we conclude that viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found that the essential elements of possession with intent to deliver 50 to 449 grams of cocaine were proven beyond a reasonable doubt, and thus, sufficient evidence was presented at trial to support defendant's conviction. *Johnson, supra* at 723; *Gonzalez, supra* at 225-226.

Lastly, defendant asserts that the trial court abused its discretion when it calculated defendant's minimum sentence guidelines range. The record reflects that the sentencing information report was not available at sentencing, and that defense counsel and the prosecutor arrived at a guidelines range of 87 to 217 months, which included enhancement for defendant's

sentencing as a habitual third offender. When a defendant is sentenced as an habitual offender, the upper level of the appropriate recommended minimum sentence range for an indeterminate sentence must be increased by 50 percent if a defendant has two prior felonies. *People v Houston*, 261 Mich App 463, 474; 683 NW2d 192 (2004), aff'd 473 Mich 399; 702 NW2d 530 (2005); MCL 777.21(3).

The trial court sentenced defendant to 120 months or ten years. Subsequently, the sentencing information report became available, and it reflected the proper minimum guidelines range of 51 to 85 months. With the upper level of the range increased by 50 percent, defendant's proper guidelines range would be 51 to 127 months. *Houston, supra* at 474.

After sentencing, defendant filed a motion to correct sentencing guidelines range and for resentencing. The trial court granted the motion to correct sentencing guidelines range, agreeing with defendant that, properly scored, the minimum guidelines range would have been 51 to 85 months, and 51 to 127 months with the habitual offender enhancement. The trial court denied defendant's motion for resentencing, noting that the minimum sentence it imposed (120 months or ten years) was still within the properly scored sentence guidelines range of 51 to 127 months, and further noting:

there's nothing that I recall or said on the record that I sentenced him because of the [improper] range that was there. I guess one can make the argument that maybe the Judge, looking at those kind of scores, but I still gave him a lot of leeway there considering I could have imposed a sentence, even on those numbers, if done incorrectly, up to 217 months and I merely went about, what, three years beyond what would be the 87 months for the minimum that was there. I'm within that range, I'm not going to grant your request to resentence. I will change the range there to 51 to 127 but I'm not going to resentence.

When the guidelines are incorrectly scored, the proper remedy is to remand the matter to the trial court for the limited purpose of determining whether the defendant's sentence would be changed in light of the correct scoring. *People v Cheesebro*, 206 Mich App 468, 473; 522 NW2d 677 (1994). If the trial court determines that it would impose a different sentence, it must bring the defendant before the court for resentencing, but if the trial court determines that it would have imposed the same sentence under the correct guidelines range, it may enter an order affirming its original sentence without bringing the defendant before the court. *Id.* at 474. In this case, the trial court concluded it would impose the same sentence under the corrected guidelines range, thus remand for resentencing is not appropriate.

We affirm defendant's conviction and sentence.

/s/ Helene N. White
/s/ William C. Whitbeck
/s/ Alton T. Davis