

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK RICHARD KANE,

Defendant-Appellant.

UNPUBLISHED

June 12, 2007

No. 267899

Cass Circuit Court

LC No. 05-010227-FH

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of operating or maintaining a methamphetamine laboratory, MCL 333.7401c(2)(f), conspiracy to operate or maintain a methamphetamine laboratory, MCL 750.157a; MCL 333.7401c(2)(f), possession with the intent to deliver methamphetamine, MCL 333.7401(2)(b)(i), maintaining a drug house, MCL 333.7405(1)(d), second-degree child abuse, MCL 750.136b(3), possession of a firearm during the commission of a felony, MCL 750.227b, and possession of marijuana, MCL 333.7403(2)(d). We affirm.

Defendant first argues that the trial court erred by not suppressing evidence obtained during a police search of his property. We review a trial court's factual determinations regarding the validity and scope of a consent for clear error, with deference given to the trial court's determinations regarding conflicting evidence and witness credibility. See *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999). A finding is clearly erroneous if, after reviewing the record, we are left with a definite and firm conviction that the trial court made a mistake. *People v Dagwan*, 269 Mich App 338, 342; 711 NW2d 386 (2005).

The federal and state constitutions protect against unreasonable searches and seizures, and a search without a warrant is generally considered unreasonable. *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000). A consent to search permits a warrantless search and seizure when the consent is unequivocal, specific, and freely and intelligently given. *People v Galloway*, 259 Mich App 634, 648; 675 NW2d 883 (2003). In the absence of coercive factors, police may approach a person at his residence and ask for consent to search the premises. See *People v Frohriep*, 247 Mich App 692, 698; 637 NW2d 562 (2001). The validity of a consent search is determined by the totality of the circumstances, and the prosecutor has the burden of proving that the person granting consent was authorized to do so and did so freely. *Galloway*, *supra* at 648; *People v Malone*, 180 Mich App 347, 355-356; 447 NW2d 157 (1989).

Generally, consent must come from the person whose property is being searched, or from a third party who possesses common authority over the property. *People v Jordan*, 187 Mich App 582, 587; 468 NW2d 294 (1991). “Common authority” is based “on mutual use of the property by persons generally having joint access or control for most purposes.” *United States v Matlock*, 415 US 164, 171 n 7; 94 S Ct 988; 39 L Ed 2d 242 (1974). The determination whether a person has common authority is not derived from the law of property, but instead from “mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.” *People v Goforth*, 222 Mich App 306, 311-312; 564 NW2d 526 (1997). The consent of one authorized party does not render a search valid if another authorized party is present and expressly objects to the search. *Georgia v Randolph*, 547 US 103; 126 S Ct 1515, 1523; 164 L Ed 2d 208 (2006).

Citing *Randolph*, defendant argues that the police were not allowed to override his express refusal of consent to search the property by relying on the consent granted by his son. We disagree.

This case is distinguishable from *Randolph, supra*, because Detective Davis, the officer who first entered defendant’s house in the present case, was never made aware that defendant had refused to grant his consent. On the contrary, Davis knew only that defendant’s son had consented to a search of the house. The trial court found that defendant never communicated to Davis or to his son that he was denying his consent to search. The trial court stated:

[Defendant is] out in the yard. He’s talking to Detective Small, and they’re engaged in a conversation, and at the front door is [Detective] Davis, and she’s engaged in a conversation with [defendant’s son], and there was no communication between them. Se even though one party who could give consent is not [giving consent], another party who could give consent was consenting.

Consistent with the trial court’s findings, defendant acknowledged that Davis likely did not hear him refuse his consent to search the property because “[s]he never even waited for the question to be brought up.” Defendant admitted that when he asked Detective Small to leave, he and Detective Small were “further down the driveway,” but that at the same time Davis was near the front door of the house, speaking to defendant’s son.

The trial court also determined that defendant’s son had sufficient possessory authority to grant consent, and that under the totality of the circumstances, he freely gave his consent for the police to enter the house.

The trial court’s conclusions were supported by the evidence presented at the suppression hearing, and were not clearly erroneous. *Farrow, supra* at 209. We affirm the trial court’s decision to deny defendant’s motion to suppress.¹

¹ We note that even if the police conduct in this case had run afoul of *Randolph, supra*, the
(continued...)

Defendant next argues that he was denied his right to a fair trial because the prosecution failed to provide a copy of an audio recording made by the police during the search of defendant's house. It is generally desirable that police "keep all evidence until the criminal prosecution is concluded without concern for its value at trial." *People v Tate*, 134 Mich App 682, 692; 352 NW2d 297 (1984). However, the failure to preserve evidence that may potentially exonerate the defendant does not constitute a denial of due process unless the defendant shows that the police acted in bad faith, *People v Hunter*, 201 Mich App 671, 677; 506 NW2d 611 (1993), or intended to purposely deprive the defendant of evidence, *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). The defendant bears the burden of demonstrating that the evidence was exculpatory or that the police acted in bad faith. *Id.* at 365.

Defendant cannot show bad faith on behalf of the prosecutor or the police in this case. Detective Small testified at trial that the sound recording was destroyed accidentally, when it was downloaded onto a computer that was infected with a virus. Defendant offered no contrary evidence, and there was no indication that Small was not testifying truthfully in this regard. Defendant failed to meet his burden of proving that the recording was lost or destroyed through the bad faith of the police. *Id.*

Defendant also argues that he was denied the effective assistance of counsel because his trial counsel failed to move for a hearing on the destruction of the audio recording, and because his trial counsel failed to request an adverse inference instruction. However, all of the evidence presented below indicates that the loss of the audio recording was accidental and that the police did not act in bad faith with respect to its inadvertent destruction. Counsel is not ineffective for failing to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005); *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Counsel's failure to move for a hearing did not constitute ineffective assistance of counsel. Nor was defendant entitled to an instruction allowing the jury to infer that the missing evidence was favorable to defendant. An adverse inference instruction need not be given where the defendant has not shown that the prosecutor acted in bad faith in failing to produce the evidence. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Counsel's conduct in failing to request the instruction did not fall below an objective standard of reasonableness.

Defendant next argues that the trial court erred in its decision to score ten points for offense variable (OV) 13. MCL 777.43. We review issues concerning the proper scoring of sentencing variables for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650

(...continued)

evidence still would have been admissible under the doctrine of inevitable discovery. The record shows that Davis performed a cursory sweep of the house, but waited until other officers returned with a search warrant before completing a full and detailed search. None of the evidence observed inside the house was actually needed to procure the search warrant because Davis had smelled the odor of marijuana while speaking to defendant's son at the front door. This odor of marijuana alone was likely sufficient probable cause to justify the issuance of a search warrant. See *People v Kazmierczak*, 461 Mich 411, 426-427; 605 NW2d 667 (2000). Because the evidence at issue in this case would inevitably have been discovered upon arrival of the search warrant, the exclusionary rule does not bar its admission. *People v Kroll*, 179 Mich App 423, 429-430; 446 NW2d 317 (1989).

NW2d 700 (2002). The trial court's factual findings associated with its sentencing determination are reviewed for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

OV 13, the variable titled "continuing pattern of criminal behavior," may be scored at ten points where the offense was part of a pattern of felonious criminal activity directly related to membership in an organized criminal group. MCL 777.43(1)(d). The trial court, in determining that OV 13 should be scored at ten points, held that there was sufficient evidence in the trial record and in the presentence report to establish that defendant participated in a pattern of felonious activity directly related to membership in an organized criminal group. We agree.

There was evidence in the record to support the trial court's determination that defendant was a member of an organized criminal group with his codefendants. MCL 777.43(2)(b) provides that "[t]he presence or absence of multiple offenders, the age of the offenders, or the degree of sophistication of the organized criminal group is not as important as the fact of the group's existence, which may be reasonably inferred from the facts surrounding the sentencing offense." At trial, defendant's girlfriend, to whom he referred as his "common law wife," admitted that she conspired to manufacture methamphetamine in order to raise the sum of money required for her brother's release from jail. Defendant admitted that he used methamphetamine, the controlled substance being manufactured on his property. The evidence found on defendant's property, including the large amount of money in defendant's possession, appeared to show that he was a financier of a methamphetamine distribution operation. While defendant claimed that the evidence was insufficient to show that he was a member of the group that was manufacturing drugs on his property, the record does not support his claim. There was sufficient evidence in the record to support the trial court's factual finding under MCL 777.43, *Babcock, supra* at 264-265, and we find no abuse of discretion in the trial court's decision to score ten points for OV 13, *Hornsby, supra* at 468.

Defendant lastly argues that the trial court violated his Sixth Amendment rights by scoring the guidelines based on facts not found by a jury. Normally, such a Sixth Amendment challenge presents a question of constitutional law that is reviewed de novo. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006). However, because defendant failed to preserve this issue, review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

It is generally a violation of the Sixth Amendment when the trial court increases a defendant's sentence beyond the maximum sentence permitted by law on the basis of facts not found by the jury. *Blakely v Washington*, 542 US 296, 301-302; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, Michigan's sentencing scheme is not affected by the ruling in *Blakely* because Michigan uses an indeterminate sentencing scheme wherein the trial court sets a minimum sentence but cannot exceed the statutory maximum. *Drohan, supra* at 164. Therefore, "[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury's verdict." *Id.* at 164. In addition, an exception to the general rule allows a sentencing judge to take into account the defendant's prior criminal convictions, even when the issue of prior convictions has not been submitted to the jury. *Blakely, supra* at 301. The sentence imposed in this case did not violate defendant's Sixth Amendment right to a trial by jury.

Affirmed.

/s/ Deborah A. Servitto

/s/ Kathleen Jansen

/s/ Bill Schuette