

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE RASHAWN BROWN,

Defendant-Appellant.

UNPUBLISHED

January 29, 2008

No. 273062

Jackson Circuit Court

LC No. 06-003491-FH

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and was sentenced as a second habitual offender, MCL 769.10, to 2-1/3 to 30 years' imprisonment. He appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On October 5, 2005, Jackson City Police Officer Sergio Garcia was working undercover trying to purchase drugs on the streets of Jackson. He drove by a party store and saw an occupant of a car nod towards him as he drove past. Garcia turned his vehicle around and parked on the street in front of the party store. When defendant walked over to Garcia's vehicle, Garcia said he was looking for a rock of crack cocaine.

Defendant instructed Garcia to move his vehicle up the street. After Garcia did so, defendant asked him some questions before selling him a rock of crack cocaine for \$20. During the transaction, Garcia was looking up at defendant as he stood at the driver's window of Garcia's car. Lighting was dim due to the time of night and distance from the nearest street lamps. The whole transaction took less than two minutes.

After the purchase, Garcia radioed a description of what defendant was wearing and what direction he was going to the nearby surveillance unit and marked patrol cars. According to Officer Rucinski, who was in a marked patrol car, the description was that the seller was a black male, approximately 19 years old, wearing a red baseball cap, a red t-shirt, and a sports jersey.

Garcia's radio description did not include defendant's height, weight, hair, or any mention of facial hair. Nevertheless, Rucinski testified that defendant fit the description and that he was the only person who fit the description that night. Rucinski then stopped defendant, spoke to him, searched him, and took his photograph. Officer Garcia saw the pictures of

defendant later on the night of the incident, and he positively indicated that the pictures were of the same person that sold him the crack cocaine.

On appeal, defendant claims that he was denied the effective assistance of counsel because his trial counsel did not move to suppress the identification procedure, which he claims was unduly suggestive. We disagree. The question of ineffective assistance of counsel is a mixed one of fact and constitutional law. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). “The trial court’s factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo.” *Id.* “In order to merit reversing a criminal conviction because of ineffective assistance of counsel, a defendant must show that his trial counsel’s conduct fell below an objective standard of reasonableness and was prejudicial, thereby denying the defendant a fair trial.” *People v Wilson*, 242 Mich App 350, 354; 619 NW2d 413 (2000). To prevail, defendant must “show that his counsel’s performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different.” *Matuszak, supra* at 57-58.

Defendant claims trial counsel was ineffective because he did not move to suppress the identification procedure by Officer Garcia. Garcia’s identification of defendant consisted of viewing photographs of defendant on the night of the incident, and confirming that the photographs were of the same person that sold him the cocaine earlier that night. Defendant argues that the photographic lineup with only his pictures was unduly suggestive, and therefore, violated his constitutional rights.

A photographic identification procedure may be found unduly suggestive and therefore improper if, in light of all the circumstances surrounding the identification, there is a substantial likelihood of misidentification. *People v Kurylczyk*, 443 Mich 289, 302, 306; 505 NW2d 528 (1993). Factors to consider when evaluating the likelihood of misidentification include

the opportunity of the witness to view the criminal at the time of the crime, the witness’ degree of attention, the accuracy of the witness’ prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. [*Id.*, 306.]

In this case, Officer Garcia viewed defendant in dim light because of the time of day and distance from the nearest streetlight, but the viewing was done in close proximity to one another, with defendant standing at the driver’s window of Garcia’s car. The close proximity and contact of this transaction lasted approximately two minutes. Further, Garcia was a trained police officer and participated in the controlled buy with knowledge that he would have to be attentive to identify the seller at a later time. Additionally, defendant fit the description given by Garcia over the radio just after the sale took place, defendant was stopped shortly thereafter, and the photographs of defendant were taken at the time of that stop.

The final two factors include a high level of certainty by Garcia that his identification was accurate, and a short length of time between the crime and confrontation with Garcia viewing the photos on the same night that the controlled buy took place.

The totality of the circumstances in this case does not lead to a substantial likelihood of misidentification, and the process was not unduly suggestive. Accordingly, even if defendant’s

trial counsel had filed a motion to suppress the identification procedure, there is not a reasonable probability that the outcome would have been different. Hence, defendant was not denied the effective assistance of counsel.

Affirmed.

/s/ Jane E. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood