

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID JAMES SCOTT,

Defendant-Appellant.

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UNPUBLISHED

January 20, 2011

No. 292897

Livingston Circuit Court

LC No. 08-017071-FH

Before: METER, P.J., and M. J. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of possession of morphine, MCL 333.7403(2)(a)(v). The trial court sentenced him to one year in jail, with credit for the 535 days he had already served. We affirm.

Michigan State Police Trooper Christopher Corriveau testified that he received a tip from a confidential informant that defendant would be selling some morphine on December 11, 2007. Officers did find defendant with morphine, and two witnesses, Thomas Larsen and Dawn Hutchens, testified that they had been planning to purchase morphine from defendant that day. Defendant claimed that the morphine belonged to an acquaintance of his, Thomas Bickman, and that Bickman must have inadvertently left it in defendant's car. Defendant was charged with the greater offense of possession with intent to deliver, but the jury convicted him of simple possession.

On appeal, defendant argues that his trial attorney rendered ineffective assistance of counsel.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations and italics omitted).]

Defendant claims that counsel improperly failed to object when the prosecutor, in her opening argument, informed the jury that Corriveau received information from a confidential informant regarding defendant's planned delivery of morphine. Defendant claims that counsel again improperly failed to object when the prosecutor alluded in her closing argument to the confidential informant's statement regarding the planned delivery. Defendant claims that the prosecutor's statements were improper because they referred to "the hearsay statements of the confidential informant . . . ." However, even assuming, for purposes of argument, that the prosecutor's statements were improper, we cannot conclude that any error affected the outcome of the case.

First, the trial court informed the jurors that "the lawyers' statements and arguments are not evidence" and that the jurors should "decide this case from the evidence."

Second, during his testimony, defendant stated that he found morphine pills in his vehicle on the day in question. When asked "[y]ou had morphine in your possession on that day, correct?" he answered, "[c]orrect." He claimed that he had no intent to deliver the morphine. During opening arguments, defendant's attorney admitted that defendant had morphine in his possession but claimed that he had no intent to deliver it. Accordingly, defendant and his counsel conceded to the possession of morphine.<sup>1</sup>

Finally, additional witnesses confirmed defendant's guilt. Larsen testified that he asked defendant, on the day in question, if he had any morphine and if defendant could "bring some by." Larsen testified that defendant did not decline this proposal and that Larsen had "ever[y] reason to believe" that defendant would deliver morphine to him that day. Hutchens testified that she was "attempting to get a controlled substance from [defendant] on the day in question" and that Larsen arranged the transaction in her presence. Hutchens testified that she was planning to purchase "[o]ne morphine" from defendant for twenty-five dollars.

After evaluating the evidence, the jury convicted defendant of the lesser-included offense of mere possession of morphine. In light of the foregoing, we simply cannot conclude that the prosecutor's challenged statements affected the outcome of the case. Indeed, the evidence in support of the conviction was very strong. The references to the confidential informant's statement tended to support a finding of intent to deliver, but, significantly, the jury rejected the charge of possession with intent to deliver.<sup>2</sup>

Defendant objects to the prosecutor eliciting from Larsen that he bought morphine from defendant in 2007 and eliciting from Hutchens that she had once in the past obtained "either

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<sup>1</sup> Counsel did argue that the possession was not a "knowing" possession.

<sup>2</sup> Defendant also mentions in his appellate brief the prosecutor's introduction of Corriveau's testimony regarding the information he received from the confidential informant. Defense counsel did object to this action by the prosecutor, and therefore defendant's ineffective-assistance-of-counsel argument is meritless in connection with this particular exchange.

prescription medications or street drugs” from defendant. Defendant also objects to the prosecutor eliciting from Hutchens how she knew that she could obtain drugs from defendant.<sup>3</sup> Defendant claims that in all three instances, the prosecutor elicited inadmissible other-acts evidence without having provided advance notice in accordance with applicable evidentiary rules. With regard to the third instance, defendant claims that the prosecutor also elicited inadmissible hearsay. Defendant claims that his attorney rendered ineffective assistance by failing to object to the prosecutor’s conduct. Once again, however, even assuming, for purposes of argument, that the prosecutor erred in her questioning, we cannot conclude that trial counsel’s failure to object affected the outcome of the case, in light of the extremely strong evidence in support of defendant’s conviction.

Defendant also claims that his attorney rendered ineffective assistance by failing to object to Corriveau’s hearsay testimony that Larsen and Hutchens told him “the same information that they testified to today.” Yet again, defendant cannot establish an effect on the outcome of the case. The trooper did not go into detail about his questioning of Larsen and Hutchens but merely stated that Larsen and Hutchens provided information consistent with their trial testimony. In light of the overwhelming evidence of guilt, this statement was harmless and counsel’s failure to object did not deny defendant a fair trial.

Defendant claims that his trial counsel was ineffective for failing to present Thomas Bickman and Michael Bickman as witnesses. Defendant claims that “they would have testified that they worked on [defendant’s] car the evening before the arrest and that Thomas Bickman was in the car and did lose/could have lost his pills therein.” Defendant filed an affidavit from Michael Bickman in which he stated that his brother, Thomas, “informed me that he left his prescription morphine” in Mr. Scott’s car. This crux of this affidavit involves inadmissible hearsay. As such, it does not demonstrate that counsel was ineffective for failing to present Michael Bickman as a witness. Significantly, defendant has not provided an affidavit from Thomas Bickman. Moreover, he admits in his appellate brief that “trial counsel sent a subpoena to both Bickmans, by regular mail.” He also admits that “the prosecution stated at trial that Thomas Bickman could not be found.” Under these circumstances, defendant has not demonstrated that counsel’s actions fell below an objective standard of reasonableness under prevailing professional norms. *Id.*

Defendant claims that his attorney rendered ineffective assistance by not challenging the allegations of the confidential informant. Defendant filed an affidavit by a Kelly Dorsey, who claimed that the confidential informant informed her that she had fabricated the allegations against defendant and that the morphine pills in question had been “planted.” In his appellate brief, defendant requests an evidentiary hearing to explore this issue. This relief, however, was previously granted by this Court. On April 30, 2010, this Court remanded the case for an evidentiary hearing regarding whether defendant was entitled to a new trial “on the grounds of newly discovered evidence as detailed in the affidavit of Kelly Dorsey.” The trial court denied

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<sup>3</sup> Hutchens responded that “my friend Christie had told me that he --” She did not finish the sentence.

the request for a new trial after the contents of the affidavit were contradicted and otherwise not verified in the trial court. Defendant's issue in his appellate brief is now moot.

Defendant next claims that the trial court should have allowed him to have a substitute appointed attorney. On February 5, 2009, defendant's trial attorney filed a motion to withdraw as counsel, stating that there had been "a breakdown in the attorney client relationship" and that defendant wished to represent himself "as to certain aspects of this case." At the motion hearing, defendant stated that he objected to the attempt to withdraw but that he was frustrated with the communication problems caused by his incarceration. The attorney stated that there had not been a breakdown of a personal relationship, but he could not "pursue the strategy that [defendant] wants me to pursue professionally. I'm blocked [from] doing that by law." Defendant then denied that he was insisting that counsel pursue a particular course of action or that he file a particular document. The court denied the motion to withdraw.

On April 9, 2009, during the course of a motion hearing, defendant raised the issue of representation, again claiming that his incarceration was causing problems with his communication with his attorney. He stated, in part:

So the problem is I basically cannot communicate with my attorney in a real time manner. So I don't know what else to do at this point other than represent myself.

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I would also suggest that possibly the firm of Mike Nichols has been appointed for another case that's before you. And I think they're in a better position at least to visit me at the jail and if -- I would ask that maybe you would consider appointing them and also for the reason that they would simply as far as I'm concerned one attorney handling all the cases [sic]. It would simply be that because there's issues that overlap in the various cases. And I think it might help resolve the problem with the communication.

The trial court denied defendant's request, stating that communicating while incarcerated would be an issue "no matter who your attorney was." The court also stated that the current attorney was communicating well with defendant, as evidenced by motions filed. The court lastly stated that defendant's request was intended to delay the proceedings.

We review this issue for an abuse of discretion. See *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). We find no abuse of discretion. As noted in *Traylor*, substitute counsel for an indigent defendant is warranted only if there is good cause and the substitution will not cause undue disruption to the judicial process. *Id.* With regard to the motion to withdraw, defendant specifically *objected* to the motion and essentially insisted that no good cause for withdrawal of counsel existed. With regard to the motion on April 9, 2009, defendant failed to demonstrate good cause. As noted by the trial court, communication issues related to incarceration would have existed no matter *who* represented defendant. Moreover, effective communication obviously had been ongoing, given that counsel was filing motions on defendant's behalf. We find no basis for reversal.

Defendant next claims that he is entitled to a new trial based on newly discovered evidence. We review this issue for an abuse of discretion. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994).

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal citations and quotation marks omitted).]

Defendant first argues that a new trial is warranted on the basis of Michael Bickman's affidavit. We disagree. First, the pertinent evidence from the affidavit was cumulative to defendant's testimony. Second, this evidence could have been discovered before and produced at trial. Thirdly, it is questionable whether the "evidence" about Thomas Bickman having placed the morphine in defendant's car would ever have been admitted at trial, considering that defendant provided no affidavit from Thomas but merely provided an inadmissible hearsay statement from Michael. A new trial is not warranted based on the affidavit.

Defendant also argues that a new trial is warranted based on Kelly Dorsey's affidavit. At the evidentiary hearing below, the confidential informant contradicted the statements in Dorsey's affidavit and denied that there had been a conspiracy to frame defendant. Also, the trial court, in making its ruling below concerning defendant's motion for a new trial, indicated that during an interview, Dorsey herself informed Corriveau that the affidavit was untrue.<sup>4</sup> Given these circumstances, a new trial is not warranted. There is no reasonable possibility of a different result on retrial. *Id.*

Affirmed.

/s/ Patrick M. Meter  
/s/ Michael J. Kelly  
/s/ Amy Ronayne Krause

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<sup>4</sup> Defense counsel had stipulated to the admission of the interview recording, but it was not transcribed as part of the record of the motion hearing.