

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 21, 2013

v

JEFFREY STEVEN SZEWCZYK,

Defendant-Appellant.

No. 306934
Macomb Circuit Court
LC No. 2011-001098-FH

Before: MURPHY, C.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Defendant was convicted by a jury of the manufacture of 20 or more but less than 200 marijuana plants, MCL 333.7401(2)(d)(ii), maintaining a drug house, MCL 333.7405(1)(d), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of five months to seven years for the marijuana manufacturing conviction and one to two years for the drug house conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm defendant's convictions, but remand for correction of the judgment of sentence to specify that defendant's sentences for maintaining a drug house and felony-firearm are to be served concurrently.

Defendant's convictions arise from the discovery of 73 marijuana plants in two rooms in the basement of defendant's home during the execution of a search warrant. The rooms also contained lamps for the plants, soil conditioners, fans, grow meters to measure soil acidity, an irrigation system, and ballasts to power high-voltage lights for growing plants. Three shotguns and a handgun were also found inside the house.

Although an attorney was appointed to represent defendant, defendant repeatedly requested in both the district court and the circuit court that he be permitted to represent himself. Defendant waived his right to a preliminary examination and was bound over to circuit court. In the circuit court, the court initially denied defendant's requests for self-representation because it was not convinced that he could intelligently waive his right to counsel in light of his strong religious and philosophical beliefs concerning the authority of the state and the court. After further dealings with defendant in subsequent proceedings, the court permitted defendant to represent himself at trial, with appointed counsel serving in an advisory capacity.

I. COMPETENCY TO STAND TRIAL

Defendant first argues on appeal that the trial court erred by not referring him for a competency examination to determine his competency to stand trial.

“A defendant to a criminal charge shall be presumed competent to stand trial.” MCL 330.2020(1). A defendant “shall be determined incompetent to stand trial only if he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner.” *Id.*; *People v Mette*, 243 Mich App 318, 331; 621 NW2d 713 (2000). It is for the court to “determine the capacity of a defendant to assist in his defense by his ability to perform the tasks reasonably necessary for him to perform in the preparation of his defense and during his trial.” MCL 330.2020(1). MCR 6.125(C)(1) provides that “[o]n a showing that the defendant may be incompetent to stand trial, the court must order the defendant to undergo an examination by a certified or licensed examiner of the center for forensic psychiatry or other facility officially certified by the department of mental health to perform examinations relating to the issue of competence to stand trial.” See also MCL 330.2026(1). The parties or the trial court can raise the issue of a defendant’s competence, and a “trial court has the duty of raising the issue of incompetence where facts are brought to its attention which raise a ‘bona fide doubt’ as to the defendant’s competence[.]” *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990). The trial court’s determination regarding the existence of a “bona fide doubt” is reviewed for an abuse of discretion. *Id.*; *People v Whyte*, 165 Mich App 409, 412; 418 NW2d 484 (1988).

Although the record in this case indicates that defendant adhered to some strongly held religious and philosophical beliefs concerning the inherent authority of the state to subject him to its laws, there was no evidence that a mental condition prevented defendant from understanding the proceedings or from assisting in his defense. Defendant’s conduct at the various hearings demonstrated his capacity to understand and fully participate in the proceedings, but indicated that he was simply unwilling to recognize the state’s authority over him. Defendant’s personally held religious and philosophical beliefs, while extreme, did not raise a bona fide doubt regarding his legal competency to stand trial. Thus, the trial court did not abuse its discretion by declining to order defendant to submit to a competency examination.

II. DEFENDANT’S RIGHT TO REPRESENT HIMSELF

Defendant next argues that the trial court erred by allowing him to waive his right to counsel and represent himself at trial. We review a trial court’s factual findings surrounding a defendant’s waiver of the right to counsel for clear error. *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). “However, to the extent that a ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo.” *Id.*

A defendant has a constitutional and statutory right to act as his own counsel. *People v Dennany*, 445 Mich 412, 426-427; 519 NW2d 128 (1994); MCL 763.1. In order for a defendant to be allowed to proceed in propria persona, the court must find (1) that the defendant’s request for self-representation is unequivocal, (2) that the defendant is asserting his right to proceed in propria persona knowingly, intelligently, and voluntarily, and (3) that allowing the defendant to

represent himself will not disrupt, unduly inconvenience, or burden the court and the administration of its business. *Dennany*, 445 Mich at 432. Before a court may accept a defendant's waiver of the right to counsel, it must also satisfy the requirements of MCR 6.005 and advise the defendant of the risks of proceeding without counsel. *People v Belanger*, 227 Mich App 637, 642; 576 NW2d 703 (1998).

In this case, defendant does not assert that he did not make an unequivocal request for self-representation and he does not contend that the trial court failed to comply with the requirements of MCR 6.005. Rather, he argues that the record does not support a finding that his waiver of counsel was knowingly, intelligently, and voluntarily made.

A waiver must be knowing and intelligent, with sufficient awareness of the relevant circumstances. *People v Williams*, 470 Mich 634, 641-642; 683 NW2d 597 (2004). A waiver is sufficient if the defendant knows what he is doing and makes his choice with awareness. *Id.* at 642. A defendant may be competent to stand trial, but lack the capacity to represent himself. *People v Brooks*, 293 Mich App 525, 541-542; 809 NW2d 644 (2011), vac'd in part on other grounds 490 Mich 993 (2012). But technical knowledge of legal matters is not relevant to the validity of the defendant's exercise of his right of self-representation. *Id.* at 539. Rather, the defendant's ability to remain coherent and intelligibly responsive to the issues is relevant. *Id.* at 542.

The record clearly establishes that defendant unequivocally desired to represent himself in the proceedings. During the early stages of the case, the trial court refused to allow defendant to represent himself because it questioned his ability to knowingly and intelligently waive his right to counsel. Although defendant's conduct raised questions about whether he could coherently and intelligently address the relevant issues in the case, the trial court's repeated dealings with defendant gave it the opportunity to reevaluate defendant's ability to knowingly and intelligently waive his right to counsel, with sufficient awareness of what he was doing. Moreover, throughout the case, the court continued to inform defendant of the charges he was facing and the associated penalties to make sure he understood what was at risk, and the court repeatedly warned defendant of the risks of self-representation and the conduct that he would be expected to adhere to at trial. The record shows that despite defendant's strongly held religious and philosophical beliefs, he had sufficient awareness of the relevant circumstances to knowingly and intelligently waive his right to counsel. Defendant's apparent refusal to accept the laws of Michigan and the rules that govern our legal process did not mean that he was unaware of the laws and rules or that he lacked the mental capacity to understand them. The trial court did not err in allowing defendant to represent himself at trial.

III. CONSECUTIVE SENTENCING

Defendant lastly argues that the trial court erred in ordering his sentences for maintaining a drug house and felony-firearm to be served consecutively. Defendant concedes that he did not preserve this issue by raising it below. Therefore, defendant has the burden of establishing a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999). We find that the trial court plainly erred by imposing consecutive sentences and that this error affected defendant's substantial rights, where it exposed defendant to a greater period of incarceration than otherwise permitted by law.

A consecutive sentence may be imposed if authorized by statute. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). The only authority for a consecutive sentence in this case is the felony-firearm statute, MCL 750.227b, which provides, in pertinent part:

(2) A term of imprisonment prescribed by this section is in addition to the sentence imposed for the conviction of the *felony* or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony. [Emphasis added.]

Maintaining a drug house is designated as a two-year misdemeanor. MCL 333.7405(1); MCL 333.7406. Defendant argues that because the drug house offense is a misdemeanor and not a felony, imposition of consecutive sentences relative to the felony-firearm and drug house convictions was improper under MCL 750.227b. The prosecution argues that despite the drug offense's classification as a misdemeanor, consecutive sentencing was proper because a two-year misdemeanor is classified as a "felony" under the Code of Criminal Procedure, which defines a felony as "a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony." MCL 761.1(g).

It is unnecessary to resolve the parties' dispute regarding whether the drug house conviction should be treated as a felony or misdemeanor conviction for purposes of MCL 750.227b, given that the predicate or underlying felony with respect to the felony-firearm charge was delivery or manufacture of marijuana plants, not maintenance of a drug house. The felony information alleged that defendant possessed a firearm "at the time he . . . committed or attempted to commit a felony, to-wit: manufacture of marijuana[.]" With respect to the felony-firearm instruction, the jury was instructed that the prosecutor had to prove that defendant committed the marijuana manufacturing offense and that defendant knowingly possessed a firearm when he committed the marijuana manufacturing offense. Neither the felony information nor the jury instructions reflected that the drug house offense served as the predicate felony for the felony-firearm charge.

In regard to MCL 750.227b(2), "it is evident that the Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony." *People v Clark*, 463 Mich 459, 463; 619 NW2d 538 (2000). "No language in the statute permits consecutive sentencing with convictions other than the predicate offense." *Id.* at 464. Under the judgment of sentence, the sentence on defendant's marijuana manufacturing conviction is to be served consecutively in relationship to the sentence on the felony-firearm conviction, which is proper, as the marijuana manufacturing offense constituted the predicate felony – the one and only predicate felony. Accordingly, there was no statutory basis to impose consecutive sentences relative to the felony-firearm and drug house convictions. Therefore, even were we to assume that the drug house offense should be treated as a felony, consecutive sentencing would nevertheless be improper because the drug house offense was not the predicate or underlying felony in relationship to the felony-firearm charge; concurrent sentences were mandated as to those two crimes.

Defendant's convictions are affirmed, but the case is remanded for correction of the judgment of sentence to specify that defendant's sentences for maintaining a drug house and felony-firearm are to be served concurrently. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher