

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM R. ROBINSON,

Defendant-Appellant.

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UNPUBLISHED

May 23, 1997

No. 180849

Kent Circuit Court

LC No. 93-062827-FH

Before: Murphy, P.J., and Markey and A. A. Monton\*, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of possession with intent to deliver more than 225 grams but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii), maintaining a drug house, MCL 333.7405(d); MSA 14.15(7405)(d); possession of a short-barreled shotgun, MCL 750.224b; MSA 28.421(2), felony-firearm, MCL 750.227b; MSA 28.424(2), and possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d). We affirm.

I

First, defendant claims that the trial court erred in failing to suppress evidence seized pursuant to a search warrant because the officers executing the warrant violated the “knock and announce” statute, MCL 780.656; MSA 28.1259(6). We will not reverse the trial court’s ruling on a motion to suppress unless it is clearly erroneous. *People v Burrell*, 417 Mich 439, 448; 399 NW2d 403 (1983).

MCL 780.656; MSA 28.1259(6) provides:

The officer to whom a warrant is directed, or any person assisting him, may break any outer or inner door or window of a house or building, or anything therein, in order to execute the warrant, if, after notice of his authority and purpose, he is refused admittance, or when necessary to liberate himself or any person assisting him in execution of the warrant.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

In other words, the knock and announce statute requires police executing a warrant to give notice of their authority and purpose and be refused entry before they are allowed to force their way in. *People v Williams (After Remand)*, 198 Mich App 537, 545; 499 NW2d 404 (1993). Police must allow a reasonable time for the occupants to answer the door following the yelled announcement of authority and purpose. *Id.*

In this case, it was estimated by the officers that approximately five seconds passed from the time of the yelled announcement to the time of entry into the house. In *People v Asher*, 203 Mich App 621, 623-624; 513 NW2d 144 (1994), this Court held that an “entry into the premises less than five seconds after knocking and announcing” violated the “knock and announce” statute. See also, *People v Polidori*, 190 Mich App 673, 674; 476 NW2d 482 (1991) (holding that an entry within six seconds of announcement violated the statute.) However, it is clear that, under certain circumstances, strict compliance with the knock and announce statute is not necessary. *Williams (After Remand)*, *supra*; *Asher*, *supra*. In *Williams (After Remand)*, *supra* at 545, this Court stated that “substantial compliance with the statute has been found or has been excused where the officers have been observed before knocking and where, after knocking, officers have heard running and other suspicious noises inside.”

Based on the officers’ testimony, we find that they substantially complied with the knock and announce statute. The officers approached defendant’s home wearing “Grand Rapids Police Department” shirts. As they approached, one officer yelled “police, search warrant,” and another officer could see someone standing inside the home near a front window. It became apparent to the officer that the person in the window saw the officers approach, and consequently moved away from the window. Noises indicating movement within the home were heard. At that point, an officer again yelled his presence and entered the home. In light of these facts and this Court’s holding in *Williams (After Remand)*, we cannot say that we are firmly convinced that the trial court made a mistake in failing to suppress the evidence seized pursuant to the search warrant.

## II

Next, defendant claims that there was insufficient evidence to support his felony-firearm conviction. We disagree.

During the search of defendant’s home, defendant was found in an upstairs bedroom closet. In a separate upstairs bedroom, officers found a loaded .25 caliber pistol, and in the first-floor kitchen, officers found a sawed-off shotgun in a cupboard above the refrigerator. Defendant argues that these facts do not indicate that a firearm was reasonably accessible to defendant, and therefore, his conviction should be reversed.

MCL 750.227b; MSA 28.424(2) provides that “[a] person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . is guilty of a felony.” In this case, the issue is whether defendant had “possession” of the firearm. Possession may be actual or constructive and may be proved by circumstantial evidence. *People v Williams*, 212 Mich App

607, 609; 538 NW2d 89 (1995). A defendant may have constructive possession of a firearm if its location is known to the defendant and is reasonably accessible to him. *Id.* Because there is no definition of “reasonably accessible,” we look to the facts of prior cases for assistance.

In *Williams (After Remand)*, 198 Mich App at 540, this Court recounted the facts as follows:

The record shows that the loaded gun was found inside a metal box located within a padlocked wooden safe in the basement of defendant’s home . . . . Defendant and a woman were also found in the basement, along with drugs, money and paraphernalia. Neither made any attempt to get to the safe . . . . The keys to the safe were never found; the police broke into it.

This Court went on to hold that the facts were sufficient to overcome the defendant’s motion for a directed verdict, and that whether the contents of the safe were reasonably accessible was a question of fact for the jury. *Id.* at 540-541.

In *People v Beacoats*, 181 Mich App 722, 725; 449 NW2d 687 (1989), the defendant was found in a bathroom. In a bedroom across the hallway from the bathroom were two loaded pistols, one on a headboard shelf, the other under the bed. In a closet in a bedroom next to the bathroom was an unloaded pistol. A pistol and two rifles were found in the basement. No firearms were found in the bathroom where the defendant was found. This Court held that this evidence was sufficient to find that the defendant possessed a firearm during the commission of a felony. *Id.* at 726.

On the basis of these cases, and the facts of the case at bar, we find that the question of whether defendant possessed a firearm was one for the jury, and that the evidence presented was sufficient to justify an affirmative answer.<sup>1</sup>

Defendant cites *Bailey v United States*, 516 US \_\_; 116 S Ct \_\_; 133 L Ed 2d 472 (1995) in support of his position that he cannot be convicted of felony-firearm. However, *Bailey* construed the federal felony firearm statute, 18 U.S.C. § 924(c)(1), which punishes a person who “during and in relation to any . . . drug trafficking crime . . . uses or carries a firearm.” Because the federal statute pertains to “using or carrying” a firearm and Michigan’s statute pertains to “carrying or possessing,” and the question in this case concerns “possession,” we find *Bailey* to be inapplicable to the case at bar.

### III

Next, defendant claims that he was denied the effective assistance of counsel. Defendant argues that his trial counsel was deficient in that he failed to call a witness and failed to properly move for suppression of the evidence seized pursuant to the search warrant.<sup>2</sup>

To establish that a defendant’s right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel’s representation fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d

797 (1994). The prejudice must be such that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Launsbury*, 217 Mich App 358, 362; 551 NW2d 460 (1996). Because defendant failed to move for a *Ginther*<sup>3</sup> hearing, appellate review is precluded unless the record contains sufficient detail to support defendant's claims, and if the record is sufficient, review is limited to mistakes apparent therein. *People v Maleski*, 220 Mich App 518; 560 NW2d 71 (1996). Here, the record does not support defendant's contentions.

First, defendant's claim that counsel was deficient for failure to properly move for the suppression of the evidence seized pursuant to the search warrant must fail. As previously indicated, the evidence was not improperly seized. Therefore, no matter when or how the motion to suppress was brought, there is not a reasonable probability that the result would have been different.

Next, defendant's claim that counsel was deficient in failing to call Derrick Booker as a witness must also fail. Booker was present in defendant's home when the search was executed and was a codefendant in the instant case. The decision whether to call a witness is a matter of strategy, and a defendant must overcome a presumption that counsel's decision was sound strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In this case, a review of the record does not reveal anything to overcome this presumption and lead us to believe that counsel's decision was anything but sound strategy. We will not second guess a matter of strategy, and the simple fact that the it may not have worked does not constitute ineffective assistance of counsel. *People v Murph*, 185 Mich App 476, 479; 463 NW2d 156 (1990), remanded on other grounds on rehearing 190 Mich App 707 (1991).

#### IV

Next, defendant claims that his prosecution in the case at bar violates double jeopardy. We disagree.

Defendant argues that the prior forfeiture proceedings against him placed him in jeopardy and precluded the instant prosecution. In support of this claim, defendant cites *United States v Ursery*, 59 F3d 568 (CA 6, 1995). However, subsequent to the filing of defendant's brief, the United States Supreme Court reversed the Sixth Circuit, *United States v Ursery*, 518 US \_\_; 116 S Ct 2135; 135 L Ed 2d (1996), and this Court adopted the Supreme Court's holding, *People v Acoff*, 220 Mich App 396; 559 NW2d 103 (1996).

In *Acoff*, this Court stated that civil in rem forfeitures are generally not "punishment" in the context of the right to be free from multiple punishments, and that a criminal conviction and sentence following a civil forfeiture are presumed not to violate the Double Jeopardy Clause of the United States Constitution. *Id.* at 398. The Court went on to state that the presumption can only be rebutted by the "clearest proof" of an excessive punitive purpose or effect" such that the forfeiture is the equivalent of a criminal proceeding. *Id.* 398-399. In the instant case, because there is no evidence that the forfeiture was so punitive in form of effect as to render it a criminal proceeding, we find defendant's claim to be without merit.

Defendant also argues that he was placed in jeopardy by previous proceedings in federal court. Defendant was originally charged in state court in the instant matter. Subsequently, federal authorities became involved and sought to have defendant share his knowledge regarding the drug activities he was involved in. Defendant and federal authorities came to an agreement, and defendant pleaded guilty in federal court to possession of cocaine. However, prior to sentencing in federal court, a conflict arose between defendant and the federal authorities regarding the plea agreement. As a result, defendant's plea was set aside, and the parties stipulated to dismissal of the federal charge.

In federal court, in the case of a plea, jeopardy normally attaches when the court unconditionally accepts the guilty plea. *United States v Baggett*, 901 F2d 1546, 1548 (11 th Cir, 1990). However, a defendant may be retried on a count to which he pleaded guilty if the defendant successfully withdraws his plea. *Id.* at 1549; see also, *People v Mexy*, 453 Mich 269, 304; 551 NW2d 389 (Levin, J. dissenting). In other words, jeopardy has not attached when a defendant successfully withdraws a guilty plea. Under the facts of this case, we are of the opinion that jeopardy did not attach in federal court. Therefore, the instant state prosecution did not offend double jeopardy.

## V

Defendant also claims that he was denied a speedy trial because of the nearly thirteen-month delay before his trial began. We disagree.

In determining whether a defendant has been denied a speedy trial, four factors must be considered: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his right to a speedy trial; (4) prejudice to the defendant from the delay. *Baker v Wingo*, 407 US 513. 530; 92 S Ct 2182, 2192; 33 L Ed 2d 101 (1972); *People v Chism*, 390 Mich 104, 111; 211 NW2d 193 (1973); *People v O'Quinn*, 185 Mich App 40, 47-48; 460 NW2d 264 (1990). When the delay is under eighteen months, the defendant must prove prejudice. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994). Because defendant has failed to prove how he was prejudiced by the delay, we conclude that defendant was not denied a speedy trial. *Id.*

## VI

Last, defendant claims that he was denied a fair trial because Derrick Booker, who defendant claims is a res gestae witness, was not called to testify. However, defendant failed to raise this issue below. Therefore, it is not properly preserved for appeal. See *People v Jacques*, 215 Mich App 699, 702; 547 NW2d 349 (1996); *People v Calhoun*, 178 Mich App 517, 520; 444 NW2d 232 (1989).

Affirmed.

/s/ William B. Murphy  
/s/ Jane E. Markey  
/s/ Anthony A. Monton

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<sup>1</sup> We distinguish this case from *Williams, supra*, 212 Mich App 607, on the facts. In *Williams*, this Court held that reasonable accessibility does not exist where a defendant “is far away from the location of the firearm.” In *Williams*, the defendant was not home when the firearm was found during a search of his home. In this case, in light of the cases cited herein, we do not consider defendant to have been sufficiently “far away from the location of the firearm,” specifically the pistol, to require reversal.

<sup>2</sup> Defendant brought a motion to suppress and a motion to dismiss on double jeopardy grounds prior to trial, and a hearing was held. At the hearing, the trial court ruled on the double jeopardy motion, but the motion to suppress was not argued or decided. Following the jury verdict, the motion to suppress was renewed and argued. The trial court relied on the trial testimony and denied the motion.

<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).