

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

QUACY LEE ROBERTS,

Defendant-Appellant.

UNPUBLISHED

March 15, 2011

No. 293838

Berrien Circuit Court

LC No. 2009-001531-FH

Before: GLEICHER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Defendant Quacy Lee Roberts was charged with possession of less than 25 grams of cocaine¹ and possession of marijuana.² A jury convicted Roberts of possession of less than 25 grams of cocaine. The trial court sentenced Roberts, as a third habitual offender, to two years of probation.³ Roberts now appeals as of right. We affirm.

I. FACTS

On April 7, 2009, Benton Harbor Police Detective Wesley Smigielski and Officer Bobo were watching a monitor in the dispatch office and observed surveillance video of a group of men near a fence. They appeared to be selling drugs in an area known for that type of activity. Detective Smigielski responded to the scene, as did Captain Robert O'Brien, Deputy Mark Hopkins, and Deputy Dick Mann. Police officers detained several people, including Roberts.

Arriving on the scene, Detective Smigielski yelled, "stop, police." He then saw Roberts put his left hand in his pocket, and then move toward a fence and make a bending-over motion. The surveillance video recorded Roberts' actions. The camera recorded a piece of paper falling to the ground during the encounter. It landed on the far side of the fence. The other men were all within reach of the piece of paper, but Detective Smigielski did not see any of the other men make a similar motion.

¹ MCL 333.7403(2)(a)(v).

² MCL 333.7403(2)(d).

³ MCL 769.11.

Deputy Hopkins retrieved a balled-up lottery ticket from the far side of the fence. It did not appear to have been there long and contained 0.098 of a gram of crack cocaine. Deputy Hopkins said that Roberts was closest to the crumpled paper and in position to have easily dropped it. Deputy Hopkins acknowledged that the other men, namely Ricky Crumb, were also within reach of the lottery ticket. Deputy Hopkins also found a “blunt” (slang for a marijuana cigar) near the crack cocaine.

The jury convicted Roberts of possessing the cocaine, but they acquitted him of marijuana possession. Roberts moved for a new trial after filing his claim of appeal, and six months after being convicted. This motion was based on his belief that his counsel was ineffective for failing to call Crumb, Officer Bobo, and Deputy Mann, and for failing to request a missing witness instruction. In an affidavit attached to Roberts’s motion for a new trial, Crumb indicated that he would testify that the drugs belonged to a man named Otis Jones.

The trial court issued a written opinion regarding Roberts’ motion for a new trial. The trial court concluded that Crumb’s testimony may have had an effect on the outcome of the trial, but the date of the affidavit was after the date of the trial. The trial court reasoned that because Roberts did not show that his trial counsel had knowledge of Crumb’s testimony before trial, his failure to elicit Crumb’s testimony was not ineffective assistance. Further, the trial court found that the police made reasonable efforts to serve Crumb with a subpoena and that Crumb’s absence did not give rise to a finding of ineffective assistance.

The trial court also noted that the missing witness instruction could only be appropriate with respect to Officer Bobo because the prosecutor listed him as a witness and he was not properly excused. However, the trial court concluded that the instruction would not have been appropriate because there was no indication that Officer Bobo’s testimony would have been favorable to Roberts. Accordingly, the trial court denied Roberts’ motion. Roberts now appeals.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

“The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law.”⁴ The trial court “must first find the facts, and then decide whether those facts constitute a violation of the defendant’s constitutional right to effective assistance of counsel.”⁵ “A trial court’s findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo.”⁶

⁴ *People v McMullan*, 284 Mich App 149, 155; 771 NW2d 810 (2009).

⁵ *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004).

⁶ *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008).

B. LEGAL STANDARDS

“To establish a claim of ineffective assistance of counsel, a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that, but for defense counsel’s errors, there was a reasonable probability that the result of the proceeding would have been different.”⁷ Likewise, “[a] defendant must affirmatively demonstrate that counsel’s performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial.”⁸ “The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy.”⁹ “[C]ounsel’s failure to call a particular witness is presumed to be trial strategy. This Court will not substitute its judgment for that of trial counsel in matters of trial strategy.”¹⁰

C. APPLYING THE STANDARDS

1. OVERVIEW

Roberts argues that he was denied the effective assistance of counsel. He cites four alleged errors by his attorney: failure to subpoena or call Ricky Crumb; failure to call Deputy Mann; failure to subpoena or call Officer Bobo; and the failure to request a missing witness instruction regarding Officer Bobo.

2. FAILURE TO SUBPOENA OR CALL RICKY CRUMB

By statute, “[t]he prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, *reasonable* assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness.”¹¹ Here, the record reflects that the prosecutor subpoenaed Ricky Crumb, but law enforcement officers’ attempts to serve him were unsuccessful. The record established that Crumb was subject to an arrest warrant and ran from the house when officers arrived to serve him. Officers from the Fugitive Task Force also tried unsuccessfully to serve him. Because Crumb was actively trying to evade service of the subpoena, and two different police units attempted to serve him, the trial court did not clearly err in finding that reasonable efforts had been made to secure his testimony.

Crumb’s failure to appear was not the fault of defense counsel. Indeed, the record reflects that, at trial, Roberts confirmed that he did not plan to call any witnesses. Accordingly,

⁷ *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

⁸ *Id.*

⁹ *Id.* at 385-386

¹⁰ *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999) (internal citations omitted).

¹¹ MCL 767.40a(5) (emphasis added).

we conclude that Crumb's failure to appear is not a basis for a finding that counsel rendered ineffective assistance.

3. FAILURE TO CALL DEPUTY DICK MANN

The record is silent regarding why Deputy Mann did not appear at trial. Roberts has not submitted an affidavit or other proof to indicate the substance of Deputy Mann's anticipated testimony, and he does not represent that it would have been beneficial to him.¹² Roberts has not established that the failure to call Deputy Mann was outside the realm of reasonable trial strategy.¹³ Accordingly, Roberts has not shown that the failure to call Deputy Mann constituted ineffective assistance of counsel.

4. FAILURE TO SUBPOENA OR CALL OFFICER BOBO

The record does not indicate that Officer Bobo witnessed any significant criminal event. Although he initially observed the surveillance video of the men standing near the fence, he did not respond to the scene, and there is no suggestion that he was viewing the video at the time that Roberts threw away the lottery ticket containing the cocaine. Because Officer Bobo presumably did not know anything of significance, defense counsel cannot be faulted for deciding against calling him as a witness. Moreover, without showing that Officer Bobo would have offered testimony favorable to Roberts, Roberts cannot establish that the outcome of the proceedings would have been different if Officer Bobo had been called to the stand.¹⁴

5. FAILURE TO REQUEST MISSING WITNESS INSTRUCTION

MCL 767.40a(4) allows a prosecutor to add or delete witnesses from the trial list upon leave of the court and for good cause shown, or by stipulation of the parties. The missing witness instruction may be given "if a prosecutor fails to secure the presence at trial of a listed witness who has not been properly excused."¹⁵ If a prosecutor fails to provide such assistance, "it *might* be appropriate to instruct a jury that the missing witness would have been unfavorable to the prosecution."¹⁶ "There may be other occasions that warrant the jury instruction; in every instance, *the propriety of reading CJI2d 5.12 will depend on the specific facts of that case.*"¹⁷ This Court reviews for an abuse of discretion a trial court's determination whether the missing witness instruction is appropriate.¹⁸

¹² See *Knapp*, 244 Mich App at 385.

¹³ See *Avant*, 235 Mich App at 508.

¹⁴ See *Knapp*, 244 Mich App at 385.

¹⁵ *People v Perez*, 469 Mich 415, 420; 670 NW2d 655 (2003).

¹⁶ *Id.* (emphasis added).

¹⁷ *Id.* at 420-421 (emphasis added).

¹⁸ *People v Steele*, 283 Mich App 472, 485; 769 NW2d 256 (2009).

Given these “specific facts,” it would not have been logical to give the missing witness instruction because there was no basis to infer that the testimony would have been unfavorable to the prosecution.¹⁹ Here, the prosecutor likely could have produced Officer Bobo. However, there is no indication that Officer Bobo could have shed any light on whether Roberts did or did not possess the cocaine. The surveillance video supported Detective Smigielski’s testimony that Roberts bent over the fence and discarded the lottery ticket containing the cocaine. Even if defense counsel requested the instruction and it were to have been given, Roberts did not show that it is reasonably probable that the outcome would have been different.²⁰ Therefore, defense counsel was not ineffective for failing to request CJI2d 5.12, and the trial court did not abuse its discretion by finding that application of the jury instruction was inappropriate.

III. RIGHT TO PRESENT A DEFENSE

A. STANDARD OF REVIEW

Roberts next argues that the trial court denied him his right to present a defense and abused its discretion by excluding testimony that a former officer of the Benton Harbor Police Department was convicted of falsifying evidence. We review a trial court’s determination on an evidentiary issue for an abuse of discretion.²¹ This Court reviews the question whether a lower court denied the constitutional right to present a defense de novo.²²

B. LEGAL STANDARDS

“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.”²³ Accordingly, “[a] criminal defendant has a state and federal constitutional right to present a defense.”²⁴ However, “the accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.”²⁵

¹⁹ See *Perez*, 469 Mich at 420.

²⁰ See *Knapp*, 244 Mich App at 385.

²¹ *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

²² *People v Unger*, 278 Mich App 210, 247; 749 NW2d 272 (2008).

²³ *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006) (internal quotes and citations omitted).

²⁴ *People v Kurr*, 253 Mich App 317, 326; 654 NW2d 651 (2002).

²⁵ *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008) (internal quotes and citations omitted).

C. APPLYING THE STANDARDS

It is undisputed that Roberts' prior conviction involving cocaine was set aside because it involved a former police officer who was convicted of falsifying evidence. Roberts contends that the jury could have inferred from this evidence that the officers in this case had planted the cocaine. In response, the trial court stated that the former officer's actions were regrettable but concluded that the evidence would not be relevant to whether Roberts possessed the cocaine on this occasion.

Under the Michigan Rules of Evidence, "evidence is admissible only if it is relevant as defined by MRE 401" ²⁶ Likewise, "[p]ursuant to MRE 401, evidence is relevant if two components are present, materiality and probative value." ²⁷ "Materiality is the requirement that the proffered evidence be related to any 'fact that is of consequence' to the action." ²⁸ When determining whether evidence is probative, "a Court considers whether the evidence tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." ²⁹

The record provides no indication that the officers involved in this case engaged in misconduct. In fact, the record supports a presumption that the officers in this case acted appropriately. The record indicates that the Federal Bureau of Investigation conducted a thorough inquiry into the former officer and did not attribute the misconduct to any members of the Benton Harbor Police Department who were involved in this case.

Additionally, Roberts never offered any evidence that the former police officer falsified evidence regarding *his* previous cocaine conviction. The record reflects that dismissal of Roberts' conviction was purely prophylactic. While such misconduct could be a fact of consequence, the proffered evidence does not have any tendency to prove it. ³⁰ Therefore, the trial court did not abuse its discretion in holding that the evidence was inadmissible and his right to present a defense was not abridged.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ William C. Whitbeck
/s/ Donald S. Owens

²⁶ *People v Feezel*, 486 Mich 184, 197; 783 NW2d 67 (2010).

²⁷ *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998).

²⁸ *Id.*, quoting MRE 401.

²⁹ *Feezel*, 486 Mich at 197 (internal quotations and citations omitted).

³⁰ See *Id.* at 197.