STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2004
v	No. 244907 Wayne Circuit Court
WALTER EVERETT CUMMINGS, Defendant-Appellant.	LC No. 01-012985-01 ON RECONSIDERATION

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for four counts of armed robbery,[1] and possession of a firearm during the commission of a felony.[2] The circumstances surrounding defendant's convictions arose from his armed robbery of World Auto Sales on the afternoon of October 5, 2001. Defendant was sentenced to 285 months to 60 years' imprisonment for each armed robbery conviction, and two years' imprisonment for his felony-firearm conviction. We affirm.

I. Search Warrant

Defendant contends that the affidavit supporting the search warrant of his home lacked probable cause, and therefore, the trial court erred in refusing to suppress the evidence seized during the search. Defendant contends that the affidavit lacked sufficient specific information to establish probable cause. We disagree.

We review a trial court's factual findings on a motion to suppress for clear error.[3] "To the extent that a trial court's ruling on a motion to suppress involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo."[4]

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[1] MCL 750.529.

[2] MCL 750.227b.

[3] *People v Oliver*, 464 Mich 184, 191; 627 NW2d 297 (2001).

[4] *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

Clear error exists when this Court is left with a firm and definite conviction that a mistake was made.[5]

A search warrant may not be issued absent probable cause to justify the search.[6] "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place."[7] A magistrate's findings of probable cause in this regard shall be based upon all the facts related within the affidavit.[8] A reviewing court should read the underlying affidavit in a "common sense and realistic manner" and, giving due deference to the magistrate's decision, determine if there was a substantial basis for the finding of probable cause.[9]

The affidavit in support of the search warrant was executed by a Michigan State Police detective containing the following information:

> Affiant has been working on a series (8) of Armed Robberies in the city of Detroit, that are being committed by a similar modus operandi Where the perps are all armed with firearms.
>
> On October 24, 2001 a Derek Mixon was arrested after being shot in the process of committing an Armed Robbery Homicide after he sought treatment at Detroit Receiving Hospital. During his interrogation Mixon told Affiant that he had committed numerous armed robberies with two other perpetrators, One of the co-defendants was identified as Walter Cummings of 13406 Griener.
>
> Affiant confirmed that Mr. Cummings resides at this address, and that he matches the description given by numerous victims. Mixon also told Affiant that one of the guns that the trio was using to commit these Armed Robberies was still at 13406 Griener.
>
> On October 26, 2001, Affiant and other Task Force members observed Walter Cummings approaching his home at this location. Mr. Cummings was subsequently arrested and gave this address as his residence.[10]

A reasonably cautious person could conclude from the given facts that there was a substantial basis for the magistrate's finding of probable cause. Defendant matched the description given by numerous armed robbery victims. Mr. Mixon, a coparticipant in the

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[5] *People v McElhaney*, 215 Mich App 269, 273; 545 NW2d 18 (1996).

[6] US Const, Am IV; Const 1963, art 1, § 11; MCL 780.651.

[7] *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000); quoting *People v Russo*, 439 Mich 584, 604; 487 NW2d 698 (1992).

[8] MCL 780.653; *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001).

[9] *Russo*, *supra* at 603-604.

[10] [Affidavit for Search Warrant, p 3.]

robberies, indicated that one of the guns was still at defendant's residence, and gave the police defendant's address. Furthermore, the detective corroborated Mr. Mixon's information by verifying that defendant lived at the given address. Defendant was arrested outside of that address and admitted to residing there. Since the supporting affidavit provided a substantial basis for the magistrate's finding of probable cause, the trial court did not err in denying defendant's motion to suppress.

II. Ineffective Assistance of Counsel

Defendant also contends that he was denied the effective assistance of counsel as defense counsel failed to move to suppress the illegally seized evidence on proper grounds. Specifically, defendant alleges that defense counsel was ineffective for unsuccessfully moving to suppress illegally seized evidence based on an overbroad search warrant. We disagree. Absent a *Ginther*[11] hearing, our review is limited to plain error on the existing record affecting defendant's substantial rights.[12]

Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise.[13] To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.[14] Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[15]

A *Wade*[16] hearing was held on defendant's motion to suppress the search warrant and the evidence seized during the search. Defense counsel argued that the search warrant failed to reasonably show that the evidence would still be at defendant's residence on the date that the search was to be executed, as the search warrant was not obtained until two days after the information regarding the evidence was received. Defendant now claims that if trial counsel had argued that the gun and cellular phones seized during the search of defendant's home were beyond the warrant's scope and that the warrant was overbroad, the motion to suppress would have been granted. However, this Court will not substitute its judgment for that of trial counsel regarding matters of strategy or assess trial counsel's competence with the benefit of hindsight.[17] Defendant moved to suppress the evidence seized during the search, and the fact that his strategy failed does not render his performance constitutionally deficient.

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[11] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[12] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[13] *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[14] *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

[15] *Id.* at 600.

[16] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967).

[17] *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000).

III. Photo Lineup

Defendant finally contends that the trial court erred in refusing to suppress the results of an allegedly suggestive photo lineup. Specifically, defendant argues that the identifications were unreliable as the witnesses did not know the defendant, had a limited opportunity to observe the armed robber, and there were discrepancies between defendant's actual appearance and the descriptions given. We disagree. As noted *supra*, we review a trial court's factual findings in a motion to suppress for clear error[18] and conclusions of law de novo.[19]

"A photographic identification procedure violates a defendant's right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification."[20] The victims of the World Auto Sales robbery described defendant as a black male in his fifties with a scraggly beard. Defendant's photograph was not distinctive from the others in the photo lineup. At least four other photos depicted men in their fifties, and all the men had some form of facial hair. Most of the photos used in the photo lineup were fairly representative of defendant's physical features. The photo lineup was clearly not suggestive. The trial court properly denied defendant's motion to suppress the photo identification.

IV. Motion for Reconsideration

In response to defendant's motion for reconsideration of our original opinion in this matter, we have considered the additional issues raised in defendant's Standard 11 brief. We find defendant's arguments to be spurious and without merit. Therefore, further analysis of these issues is unnecessary.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello

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[18] *Oliver*, *supra* at 191.

[19] *Attebury*, *supra* at 668.

[20] *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998) (footnote omitted), citing *People v Kurylczyk*, 443 Mich 289, 304; 505 NW2d 528 (1993).