

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OMARR EL-HUSSAN STEWART,

Defendant-Appellant.

UNPUBLISHED

August 16, 2012

No. 305269

Bay Circuit Court

LC No. 10-010208-FH

Before: TALBOT, P.J., AND WILDER AND RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). He was sentenced as a fourth habitual offender, MCL 769.12, to 46 months to 30 years. We affirm.

I. FACTUAL BACKGROUND

A narcotics task force executed a search warrant on a house located in Bay City, Michigan. Defendant was found on the floor and a large plastic bag filled with several smaller bags of cocaine was located in the couch. A field test was later conducted, which confirmed that the substance was cocaine. After giving defendant *Miranda* warnings,¹ he confessed to the police that the cocaine was his, he brought it from Detroit to sell, and he sold some cocaine earlier in the day.

Defendant was charged with possession with intent to deliver cocaine. At the preliminary examination, two police officers testified about the search, arrest, and defendant's confession. One of the police officer's testified that while he was not responsible for submitting the confiscated drugs to the police lab, he believed the drugs had been sent to the lab. The prosecution moved to adjourn the preliminary examination in order to await the lab results of the drugs. Defendant did not object to the adjournment but expressed concerns that there was no submitting officer listed as responsible for the drugs being sent to the lab. The trial court granted the adjournment.

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

The preliminary examination resumed a couple of weeks later, where it was revealed that the drugs had not been sent to the lab when the preliminary examination had begun a couple of weeks ago. After further evidence was submitted, the preliminary examination was adjourned again because the prosecution was missing a material witness who transported the drugs to the crime lab. Defendant did not object to the adjournment. The preliminary examination was eventually concluded and the trial court found there was probable cause to bind defendant over. Over two months after the preliminary examination was concluded, defendant filed a motion to dismiss for lack of good cause to adjourn the preliminary hearing, which the trial court denied. A month later, defendant filed a second motion to dismiss for lack of good cause to adjourn the hearing, which the court treated as a motion for reconsideration and denied. Defendant now appeals the trial court's decision to adjourn the initial preliminary hearing.

II. STANDARD OF REVIEW

If party objects to the adjournment of the preliminary examination, "the court may not adjourn a preliminary examination unless it makes a finding on the record of good cause shown for the adjournment." MCR 6.110(B). However, at the time the prosecutor requested the adjournment, defendant did not object.² Thus, we review defendant's claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-763; 597 NW2d 130 (1999).

III. ANALYSIS

"The primary function of a preliminary examination is to determine if a crime has been committed and, if so, if there is probable cause to believe that the defendant committed it." *People v Glass*, 464 Mich 266, 277; 627 NW2d 261 (2001). MCL 766.4 requires the trial court to set a date for the preliminary examination "not exceeding 14 days after the arraignment." However, a trial court may adjourn the preliminary examination for "good cause shown." MCL 766.7. Furthermore, even if the preliminary examination was improperly adjourned, it is considered "harmless error unless the defendant demonstrates actual prejudice." MCR 6.110(B)

It was not plain error to adjourn the preliminary examination.³ Neither party disputes that the results of the lab tests were not available at the time of the initial preliminary examination. Even though field tests confirmed the substance was cocaine, the adjournment ensured a thorough preliminary examination that avoided any doubt regarding the substance confiscated. In addition, defendant raised questions relating to the chain of custody at the close of the initial preliminary examination, seeking more information. The adjournment allowed for additional witnesses to be presented, which again ensured a thorough preliminary examination. Hence, there was no error in adjourning the preliminary examination.

² While defendant objected months later to the adjournment, such an objection was not timely as the adjournment had already been granted.

³ In his brief on appeal, defendant only objects to the initial adjournment of the preliminary examination.

Furthermore, defendant failed to demonstrate that his substantial rights were affected. “[A]n error in the preliminary examination procedure must have affected the bindover and have adversely affected the fairness or reliability of the trial itself to warrant reversal.” *People v McGee*, 258 Mich App 683, 698; 672 NW2d 191 (2003). There is no evidence that this adjournment affected the fairness or reliability of trial. As the trial court noted, defendant was on a parole hold so the delay of the preliminary examination would not have affected his time in jail. In addition, even if the charges were dismissed, it would have been without prejudice, and the prosecution could have refilled as soon as the lab results were obtained. See *People v Dunson*, 139 Mich App 511, 513-514; 363 NW2d 16 (1984).

Lastly, defendant’s challenge to the police officer’s mistaken testimony at the preliminary examination and the lack of chain of custody evidence is also meritless. Not only is it within the trial court’s sound discretion to judge the credibility of the prosecution’s evidence, defendant has failed to demonstrate how either of these two issues “would necessarily have changed the result of the bindover.” *People v Coons*, 158 Mich App 735, 738; 405 NW2d 153 (1987). While it may be true that the officer mistakenly testified that the drugs had already been submitted to the lab, not only is this a fairly minor mistake, the officer acknowledged that he was not involved with sending the drugs to the lab, implying that he had no personal knowledge of this aspect of the procedure. Furthermore, chain of custody evidence was eventually submitted. Also, while defendant continually insists that the police “planted” evidence of the drugs at the lab, defendant had already confessed to police officers that the substance confiscated was cocaine and a field drug test confirmed that it was cocaine. Thus, defendant has failed to show that the correction of any alleged errors in the preliminary examination would have resulted in a different result at trial.

IV. CONCLUSION

It was not plain error to adjourn the preliminary examination and defendant has failed to demonstrate any prejudice resulting from the adjournment, the police officer’s mistaken testimony, or the initial lack of evidence relating to the chain of custody. Hence, defendant has failed to demonstrate any errors in the preliminary examination that require reversal of his convictions.

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder
/s/ Michael J. Riordan