

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT NORRESE JAMES ELDER,

Defendant-Appellant.

UNPUBLISHED

March 10, 2005

No. 248287

Muskegon Circuit Court

LC No. 02-047066-FH

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver between fifty and 224 grams of cocaine, MCL 333.7401(2)(a)(iii), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). He was sentenced as an habitual offender, second offense, MCL 769.10, to consecutive prison terms of twelve to thirty years and two to six years for his respective convictions. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion to quash the search warrant and suppress the evidence seized. He asserts that probable cause to issue the search warrant did not exist because the search warrant relied on unconfirmed anonymous tips. The trial court denied defendant's motion, concluding that the anonymous phone calls were sufficiently corroborated by subsequent police investigation so as to be reliable.

This Court reviews the trial court's finding of facts for clear error and its ultimate decision de novo. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). When reviewing a magistrate's decision to issue a search warrant, this Court must evaluate the search warrant and underlying affidavit in a commonsense and realistic manner. This Court must then determine whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for the magistrate's finding of probable cause. *Id.* This Court should give great deference to a magistrate's determination of probable cause. *People v Whitfield*, 461 Mich 441, 446; 607 NW2d 61 (2000).

To create probable cause, an affidavit prepared on the basis of information provided anonymously must set forth sufficient facts from which the magistrate could find that the information was based on personal knowledge and either the unnamed person is credible or the information is reliable. *Echavarria*, *supra* at 366-367. Probable cause exists "when all the facts and circumstances lead a reasonable person to believe that the evidence of a crime or contraband

sought is in the pace requested to be searched.” *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001) (citing *People v Brannon*, 194 Mich App 121, 132; 486 NW2d 83 (1992)). Further, MCL 780.653 provides:

The magistrate’s finding of reasonable or probable cause shall be based upon all the facts related within the affidavit made before him or her. The affidavit may be based upon information supplied to the complainant by a named or unnamed person if the affidavit contains 1 of the following:

* * *

(b) If the person is unnamed, affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable.

An independent police investigation that verifies information provided by an informant can support issuance of a search warrant. *Ulman, supra* at 509-510.

The search warrant was issued based on police officer Richard Bleich’s affidavit indicating that the police received anonymous tips of suspicious activity involving defendant. In his affidavit Bleich set forth in detail the nature of those tips and of subsequent police investigation confirming those tips. Considering these facts “in a commonsense and realistic manner,” the results of the police investigation, as set forth in the affidavit, were sufficient to allow a reasonably cautious person to conclude that there was a substantial basis for the magistrate’s finding of probable cause to issue a search warrant, “because there was a ‘fair probability that contraband or evidence of a crime [i.e., a handgun, ammunition and black clothing] [would] be found [at 1200 East Broadway].’” *Whitfield, supra* at 447-448.¹

Further, even were this Court to determine that the magistrate erred in finding probable cause to issue the warrant, because the officers obtained the warrant in good faith and acted in objectively reasonable good faith reliance on that warrant, the evidence seized during the search would not be suppressed. *People v Goldston*, 470 Mich 523; 682 NW2d 479 (2004).

Defendant next argues that the trial court abused its discretion in denying his challenge to the racial composition of the jury. This Court reviews the trial court’s ruling regarding discriminatory use of peremptory challenges for an abuse of discretion, and in so doing must give great deference to the trial court’s findings because they rest in large part on a determination of credibility. *People v Eccles*, 260 Mich App 379, 387; 677 NW2d 76 (2004).

¹ Although defendant presented the testimony of his girlfriend at the hearing on the motion in an effort to establish that the tips were false, nothing in her testimony contradicted the information provided by the tipsters.

During the impaneling of the jury five African-American and one Hispanic juror were called to the witness box. Two African-American jurors were excused for cause, and the prosecutor excused the remaining African-American jurors and the Hispanic juror peremptorily.

A prosecutor may not exercise his peremptory challenges to strike jurors solely on the basis of their race and set forth a three-step process for determining whether the prosecutor's use of peremptory challenges has been improper. *Kentucky v Batson*, 476 US 76, 89, 96-98; 1006 S Ct 1712; 90 L Ed 2d 69 (1986). Once a defendant asserts a prima facie case of discrimination, the burden shifts to the prosecutor to come forward with race-neutral explanations for the striking of the jurors at issue. *Batson*, supra at 96-98. Thereafter, the trial court must decide whether the defendant has proved that the use of the peremptory challenges constituted purposeful racial discrimination. *People v Bell (On Reconsideration)*, 259 Mich App 583, 589-590; 675 NW2d 894 (2003). As this Court explained in *Clarke v Kmart Corp*, 220 Mich App 381, 384; 559 NW2d 377 (1996),

The party providing the race-neutral reason is not required to justify the exercise of the peremptory challenge to the same degree one must justify a challenge for cause. Rather, the party must articulate a neutral explanation related to the particular case to be tried. The United States Supreme Court has stated that unless a discriminatory intent is inherent in the reason offered, which does not have to be persuasive or even plausible, the reason will be deemed race-neutral. [Citations omitted.]

The prosecutor identified race neutral reasons for excusing each of the jurors at issue and no discriminatory intent was inherent in these reasons. The trial court accepted these reasons as race-neutral. Giving appropriate deference to the trial court's decision, we conclude that the trial court did not abuse its discretion in so ruling.

Defendant asserts that the trial court abused its discretion in admitting the testimony of Detective Ramon Barthelemy that the type and quantities of the drugs seized themselves indicated that defendant had an intent to deliver. Because defendant's counsel failed to timely object, this issue is not properly preserved for appellate review. *People v Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). Therefore, this Court reviews this claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). This Court has held that an officer can be qualified as an expert, based on his experience and training, and can testify as to the significance of a quantity of drugs as related to an intent to distribute. *People v Ray*, 191 Mich App 706, 707-708; 479 NW2d 1 (1991). Thus, defendant cannot establish any error in the admission of Barthelemy's testimony.

Defendant also argues that the evidence was insufficient to support a finding that defendant had an intent to deliver the drugs. To establish the charged offenses, the prosecutor was required to show that defendant knowingly possessed the requisite substances in the requisite amounts and that he did so with an intent to distribute them. *People v Crawford*, 458 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201; 489 NW2d 748 (1992). An intent to deliver may be proven by circumstantial evidence and also may be inferred from the amount of controlled substance possessed. Here, defendant admitted to possessing the drugs in the requisite amounts, and the prosecutor presented testimony regarding the significance of the

quantity of drugs as related to an intent to deliver. The evidence was sufficient for the jury to infer that defendant had an intent to deliver.

Defendant next argues that he is entitled to resentencing because the trial court erred by ordering that the sentences be served consecutively. We disagree. The trial court was required to sentence defendant pursuant to the sentencing provisions in effect at the time of the offense. *People v Doxey*, 263 Mich App 115, 122; 687 NW2d 360 (2004). The applicable provisions of MCL 733.7401 in effect on the date defendant committed the offenses of which he was convicted required that defendant's sentence for possession with intent to deliver cocaine be imposed to run consecutively with his sentence for possession with intent to deliver marijuana. *Id.* at 122-123.

Defendant also argues that his sentence is unconstitutional, under *Washington v Blakely*, ___ US ___, 124 S Ct 2531; 159 L Ed 2d 403 (2004), because the trial court relied on findings of fact that were neither admitted by defendant nor found by the jury in determining defendant's sentence under the guidelines. Defendant's challenge to his sentence in this regard is misplaced, as the trial court was required by law to sentence defendant under the statute and not under the guidelines. Further, our Supreme Court explained in *People v Claypool*, 470 Mich 715, 730, n 14; 684 NW2d 278 (2004), that *Blakely* is inapplicable to Michigan's guideline scoring system. That determination constitutes binding precedent on this Court. *People v Dorhan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004).

Finally, defendant argues that he was denied the effective assistance of counsel by the conduct of two attorneys that represented him in this matter. We disagree.

Defendant asserts that Terry Nolan, who was himself arrested for possession of cocaine during the pendency of this matter, was ineffective in allowing defendant to meet with police officers without counsel present and to confess to the crimes charged. Defendant also asserts that his subsequent counsel, Charles Krueger, was ineffective in failing to move to suppress that confession on the grounds that Nolan had been ineffective and in failing to challenge the foundation for the admission of DNA evidence at trial. At the evidentiary hearing on defendant's claims, Nolan and Krueger both testified as to their actions, motivations, and strategy in representing defendant, and prosecuting attorney Joseph Bader testified as to the usual workings and policies of the prosecutor's office in drug cases. Defendant did not take the stand at the evidentiary hearing.

Following the evidentiary hearing, the trial court detailed five pages of factual findings. Based on these findings, the trial court concluded defendant had not established that he received ineffective assistance of counsel from Nolan because: Nolan chose the strategy of negotiating an agreement with the prosecutor in the manner he did because of the prosecutor's unwillingness to deal with defendant, the strength of the prosecutor's case and defendant's concern with the mandatory ten-year minimum sentence; defendant understood the risks and the rights he was giving up, and decided to give the interview; once defendant agreed to do the interview, there was no reason for Nolan to be present because there was nothing from which defendant had to be protected and nothing would have changed had Nolan stayed; and there was nothing in the record to suggest that Nolan "gave up" defendant in order to curry favor because of his own drug issues.

Further, the trial court concluded that defendant did not establish that he received ineffective assistance of counsel from Krueger, because: Krueger's failure to file a motion to suppress defendant's statement, if error, was harmless because defendant would not have prevailed on that motion and his statements would still have been presented to the jury; and a very extensive foundation for the admissibility of the DNA evidence was presented at trial and additional testimony would have been available if necessary, and therefore, even if error, any failure to object to the foundation for admission of the DNA evidence was harmless because the evidence would still have been admitted.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. The 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. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms, and that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To establish that his counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id.* at 302. "This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if that strategy backfired." *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001) (citing *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987)). That counsel's chosen strategy ultimately fails does not render its use ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Nor will this Court assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant does not take issue with the trial court's factual findings on appeal. Rather, he argues that the trial court erred in determining that these facts did not constitute ineffective assistance of counsel. We disagree.

Testimony established that, at the time he began representing defendant, Nolan felt that the evidence against defendant, which included that the drugs were found in a jacket that defendant's girlfriend was willing to testify belonged to defendant and which had defendant's DNA on it, was strong and that conviction was likely. Defendant does not argue that this assessment was objectively unreasonable, nor would we so find. In the face of this evidence, defendant was "deeply concerned" about the mandatory ten-year minimum sentence applicable to the cocaine-related charge and 'begged' Nolan to do something to help him. After reviewing the case against defendant, in which the prosecution had great confidence, Nolan concluded that the only course of action available was to cooperate with police with the hope of receiving consideration from the prosecutor's office. Nolan was clear that he explained all of defendant's rights to him and defendant knowingly and understandingly waived those rights and chose to speak to the police. Defendant did not testify at the evidentiary hearing, and there was nothing to refute Nolan's assertion that defendant was properly advised of his rights and waived them. Thus, under the circumstances as they existed when Nolan was retained by defendant, defendant has not overcome the presumption that Nolan's course of action constituted sound trial strategy.

Further, because the record is clear that defendant knowingly and understandingly waived his right to self-incrimination and voluntarily provided his statement to the police, there is no merit to the assertion that Krueger was ineffective for failing to move for its suppression. As the trial court noted, any such motion would have been meritless and therefore, Krueger was not required to make it. *Matuszak, supra* at 58; *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Nor was Krueger required to object to the admission of the DNA evidence, as any such objection also would have been meritless, or at best, would have been easily overcome by additional foundational testimony from the forensic scientist, which testimony the scientist was fully prepared to offer.

While Nolan's drug use and arrest present a difficult circumstance, there is no indication that Nolan's drug use affected his representation of defendant. Thus, defendant has not overcome the strong presumption that Nolan's conduct constitutes sound trial strategy. Further, despite defendant's discontent with the result, there would have been no basis for Krueger to forestall the admission of defendant's confession or the DNA evidence against him. Therefore, even if Krueger had erred regarding either piece of evidence, both ultimately would have been admitted and the outcome of defendant's trial would have been exactly the same. Thus, defendant was not denied ineffective assistance of counsel.

Affirmed.

/s/ Bill Schuette
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra