

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN LARRY MOORE, JR.,

Defendant-Appellant.

UNPUBLISHED

January 10, 2006

No. 257198

Ingham Circuit Court

LC No. 04-000011-FH

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

PER CURIAM.

Following a bench trial, defendant was convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant appeals as of right, and we remand for an evidentiary hearing.

Defendant's sole argument on appeal¹ is that counsel was ineffective for failing to bring a motion to suppress evidence defendant claims was illegally seized. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error. *Id.* This Court reviews questions of constitutional law de novo. *Id.*

The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. Effective assistance of counsel is presumed, and any defendant seeking to prove otherwise bears a heavy burden. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In order to establish ineffective assistance of counsel, a defendant must show counsel's performance was deficient and the deficient performance prejudiced the defendant. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see also *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994) (adopting the *Strickland* test). In order to prove deficient performance of counsel, defendant must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, supra*, 466 US 687.

¹ Defendant's brief on appeal sets forth two issues, but the issue pertaining to defendant's initial sentencing was withdrawn after this Court remanded this case and defendant was resentenced.

The right to be free from unreasonable searches and seizures is guaranteed by the United States and Michigan Constitutions. US Const, Am IV; Const 1963, art 1, § 11. “Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions.” *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999), citing *Schneckloth v Bustamonte*, 412 US 218; 93 S Ct 2041; 36 L Ed 2d 854 (1973), and *People v Champion*, 452 Mich 92; 549 NW2d 849 (1996). These exceptions include: “(1) searches incident to arrest, (2) automobile searches and seizures, (3) plain view seizure, (4) consent, (5) stop and frisk, and (6) exigent circumstances.” *People v Davis*, 442 Mich 1, 10; 497 NW2d 910 (1993), citing *People v Toohey*, 438 Mich 265, 271, n 4; 475 NW2d 16 (1991). Generally, the exclusionary rule bars introduction of evidence seized in an unconstitutional search. *People v Hawkins*, 468 Mich 488, 498-499; 668 NW2d 602 (2003).

Although the United States Supreme Court has held that when a defendant is arrested on his front porch, the police may not enter and search the defendant’s residence absent an exception to the warrant requirement, see *Vale v Louisiana*, 399 US 30; 90 S Ct 1969; 26 L Ed 2d 409 (1970), the Supreme Court has also held that the police may validly arrest a suspect who having stood in the doorway of her house, retreats through the doorway and is followed by the police in hot pursuit, see *United States v Santana*, 427 US 38; 96 S Ct 2406; 49 L Ed 2d 300 (1976).

Therefore, the factual circumstances surrounding where defendant was arrested and how the police entered his residence are crucial in determining whether defense counsel was ineffective in failing to bring a motion to suppress.

In describing his arrest, defendant testified that he heard someone knock at his door, he opened the door, he stepped out of the trailer, and he closed the door behind him. Defendant further testified that the police immediately told him he was under arrest and placed handcuffs on him. Defendant also stated that the police opened the door and entered his house without a search warrant. Defendant’s testimony was substantially corroborated by defendant’s neighbor who testified that he saw defendant on defendant’s front porch, he saw the officers handcuff defendant, and he then saw the officers enter defendant’s trailer.

However, the police officer who effectuated defendant’s arrest testified that he approached defendant’s trailer with a warrant for defendant’s arrest for non-support. The officer said he knocked on defendant’s door and a male voice from inside told him to “come on in.” He then entered the residence, verified that the man inside was defendant, and identified himself as an officer. According to the officer, defendant then tried to shove the officer out of the residence, but the officers were able to handcuff him. The officer stated that from where he was standing in the doorway, he could see “in plain view” bags of marijuana on the living room table and a black nine-millimeter handgun on the kitchen counter. Based on his observations of the contraband, he obtained a warrant to search the trailer.

Thus, conflicting evidence was presented with regard to whether defendant was arrested on his porch, or whether defendant consented to the officers’ entry into his residence or retreated into his residence upon learning the officers’ identity. The trial court is in the best position to weigh the credibility of witnesses before it. See *Fletcher v Fletcher (After Remand)*, 229 Mich App 19, 29; 581 NW2d 11 (1998), quoting *Fletcher v Fletcher*, 447 Mich 871, 889-890; 526 NW2d 889 (1994). However, in this case, the trial court made no findings of fact regarding the

circumstances or location of defendant's arrest, nor conclusions of law regarding whether the evidence was properly admitted.² Therefore, there are no findings of fact or conclusions of law regarding the factual details surrounding defendant's arrest and the officer's subsequent finding of contraband, for this Court to review.

Accordingly, we conclude it is necessary to remand this case to the trial court for an evidentiary hearing to determine whether the failure to file a motion to suppress constituted ineffective assistance of trial counsel.

We remand this case to the trial court for an evidentiary hearing and any further appropriate proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Helene N. White

² The reason the trial court never addressed the issue whether the evidence was properly admitted was that defense counsel did not file a motion to suppress. Additionally, when this Court granted defendant's motion to remand, although defendant requested that the remand cover the present issue, this Court limited the issue to whether the trial court properly scored the guidelines and, if not, whether trial counsel provided ineffective assistance by failing to preserve the issue with a challenge at sentencing. Therefore, on remand the trial court did not address the issue whether the police lawfully entered defendant's residence because this Court limited the trial court's jurisdiction on remand to exploring the issues surrounding the sentencing guidelines.