Order

Michigan Supreme Court
Lansing, Michigan

October 30, 2018

Stephen J. Markman,
Chief Justice

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

157460 & (20)(21)(22)(31)

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 157460
COA: 340080
Oakland CC: 2001-177766-FC

LARRY A. McGHEE,
Defendant-Appellant.

/

On order of the Court, the motion to amend the application is GRANTED. The application for leave to appeal the February 22, 2018 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D). The motion to remand for resentencing, the motion to remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973), and the motion to remand for a hearing pursuant to *Franks v Delaware*, 438 US 154 (1978), are DENIED.

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

October 30, 2018

Clerk

s1022

Court of Appeals, State of Michigan

ORDER

People of MI v Larry A McGhee

Docket No. 340080

LC No. 2001-177766-FC

Mark T. Boonstra
Presiding Judge

Joel P. Hoekstra

Jane M. Beckering
Judges

The Court orders that the motion to waive fees is GRANTED and fees are WAIVED for this case only.

The Court orders that the motion to remand for a *Ginther* hearing and the motion to remand for a *Franks* hearing are DENIED.

The Court orders that the delayed application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred in denying the motion for relief from judgment.

Presiding Judge

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

FEB 22 2018
Date

Chief Clerk

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No. 01-177766-FC

Hon. Denise Langford Morris

v

LARRY McGHEE,

Defendant.

_____/

OPINION AND ORDER

Defendant was convicted of possession with intent to deliver 650 grams or more of cocaine, MCL 333.7401(2)(a)(i), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), and possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii). He was sentenced to consecutive terms of 20 to 30 years in prison for the cocaine conviction, 1 to 20 years in prison for the heroin conviction, and three months in prison for the marijuana conviction. This matter is now before the Court on Defendant's motion for relief from judgment under MCR 6.501 *et seq.*

I. FACTS

The charges arose after the execution of a search warrant on September 14, 1998, at 483 Montana, a house in the City of Pontiac. During the execution of the warrant, the police found substantial quantities of cocaine and marijuana, and a smaller amount of heroin. In addition, the police found a scale with cocaine residue, a drug ledger, a cardboard box for a Highpoint Arms firearm, and documents containing Defendant's name and the address of the house. The search warrant was based on the affidavit of Special Agent Jerome Sharpe. In the affidavit, Agent Sharpe indicated that Lamark Northern testified before an Oakland County grand jury that he had

purchased cocaine from Defendant in 1994 or 1995. In addition, Agent Sharpe averred that Marvin Smith testified before the grand jury that Defendant had supplied him with four ounces of cocaine in 1995. The affidavit further indicated, based on Northern's grand jury testimony, that in 1995, Defendant provided some of the money for a 10 or 11 kilogram cocaine purchase, from which Defendant was to receive at least one kilogram of cocaine.

II. RELIEF FROM JUDGMENT UNDER MCR 6.501 *et seq.*

Post-conviction relief under MCR 6.501 *et seq.* is an extraordinary remedy that is appropriate only to prevent manifest injustice. *People v Reed*, 449 Mich 375, 388; 535 NW2d 496 (1995). Defendant has the burden of proving entitlement to the relief requested. MCR 6.508(D). This Court may not grant relief from judgment if the motion alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal, unless Defendant demonstrates good cause for failing to raise the issue on appeal and actual prejudice from the alleged irregularity. MCR 6.508(D)(3). If either "good cause" or "actual prejudice" is lacking, this Court need not address the other prong before denying the motion. *People v Jackson*, 465 Mich 390, 405-406; 633 NW2d 825 (2001).

Under MCR 6.508(D)(3)(a), good cause for failing to raise an issue on appeal may be established by showing that an external factor prevented the defendant from raising the issue earlier or by proving ineffective assistance of appellate counsel. *Reed*, 449 Mich at 378. Here, Defendant argues that ineffective assistance of appellate counsel prevented him from raising on appeal the issues he now raises in his motion for relief from judgment. The standard for ineffective assistance of appellate counsel is the same as that for trial counsel. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Thus, to prove ineffective assistance of appellate counsel, Defendant must show that appellate counsel's performance fell below an

objective standard of reasonableness and that, as a result, he was prejudiced. *People v Pickens,* 446 Mich 298, 302-303, 312-324; 521 NW2d 797 (1994). To establish the prejudice required for an ineffective assistance of counsel claim, Defendant must show a reasonable probability that the outcome would have been different but for counsel's errors. *People v Grant,* 470 Mich 477, 486; 684 NW2d 686 (2004).

In a conviction following a trial, "actual prejudice" means that "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal." MCR 6.508(D)(3)(b)(i). "Actual prejudice" may also be found where "the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case." MCR 6.508(D)(3)(b)(iii).

III. ANALYSIS

Defendant argues that various errors occurred with respect to the search warrant that led to the seizure of the illegal drugs at 483 Montana. First, Defendant argues that he was denied the effective assistance of counsel because defense counsel failed to request a *Franks*[1] hearing where Agent Sharpe knowingly and intentionally, or with a reckless disregard for the truth, omitted from the affidavit the fact that Lamark Northern made inconsistent statements regarding Defendant's involvement in the 1995 drug deal. Specifically, Defendant contends that Northern failed to mention Defendant's involvement in the drug deal when he testified before a federal grand jury in 1997 and when he made certain statements about the drug deal to Agent Furmack in a 1997 police report, and that it was not until Northern's Oakland County grand jury testimony that he first mentioned that Defendant was involved in the drug deal.

[1] *Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978).

The purpose of a *Franks* hearing is to determine whether the affiant knowingly and intentionally, or with a reckless disregard for the truth, inserted false material into the affidavit or omitted false and material information from the affidavit. *Franks v Delaware*, 438 US 154, 171-172; 98 S Ct 2674; 57 L Ed 2d 667 (1978); *People v Ulman,* 244 Mich App 500, 510; 625 NW2d 429 (2001); *People v Stumpf,* 196 Mich App 218, 224; 492 NW2d 795 (1992). In order to prevail on a motion to suppress the evidence obtained pursuant to a search warrant procured with alleged false information, the defendant must show by a preponderance of the evidence that the affiant had knowingly and intentionally, or with reckless disregard for the truth, inserted false material into the affidavit and that the false material was necessary to a finding of probable cause. *Franks,* 438 US at 171-172. "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof." *Id.* at 171.

Defendant has not provided this Court with Lamark Northern's federal grand jury testimony or the police report in which Northern allegedly failed to mention Defendant's involvement in the 1995 drug deal. Therefore, this Court cannot evaluate Defendant's claim that Northern's prior statements were inconsistent with his testimony before the Oakland County grand jury. *People v Hoag,* 460 Mich 1, 6; 594 NW2d 57 (1999)(it is a defendant's responsibility to establish a factual predicate for a claim of ineffective assistance of counsel). Furthermore, even if Agent Sharpe had included in the affidavit facts indicating that Northern's prior statements regarding the 1995 drug deal did not mention Defendant's involvement, these facts would not necessarily have negated a finding of probable cause. *Franks,* 438 US at 171-172. The fact that Defendant's name was not expressly mentioned in Northern's federal grand

jury testimony or in the 1997 police report does not conclusively show that Northern's testimony before the Oakland County grand jury was false. Furthermore, there was other information in the affidavit indicating that Defendant sold cocaine to Marvin Smith in 1995. Under these circumstances, Defendant has not shown that appellate counsel was ineffective for failing to argue on appeal that defense counsel erred by failing to request a *Franks* hearing. *Reed,* 449 Mich at 391 ("[A]ppellant counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance.") Therefore, Defendant has not shown good cause for failing to raise this issue on appeal. MCR 6.508(D)(3). Defendant has also failed to meet the "actual prejudice" standard set forth in MCR 6.508(D)(3) where he has not shown a reasonable likelihood that the result of the proceedings would have been different had a *Franks* hearing been held. Accordingly, Defendant has not shown that he is entitled to relief from judgment with respect to this issue.

Defendant next argues that defense counsel should have requested a *Franks* hearing because Agent Sharpe made inaccurate statements in the affidavit. Specifically, Defendant argues that (1) the transcript of the grand jury testimony does not support Sharpe's statement that Northern testified that a man named Demar Garvin told Northern that at least one kilogram of cocaine from the 1995 drug deal was for Defendant, and (2) that Sharpe's statement in the affidavit that Northern testified that he purchased cocaine from Defendant in 1994 or 1995 in 7 gram and 28 gram increments was misleading because it was not clear from the statement that there were two purchases – one for 7 grams and one for 28 grams.

Again, because Defendant has not provided this Court with a copy of the grand jury testimony at issue, he has not shown that the testimony did not support certain statements in the search warrant affidavit. Furthermore, even if the statements regarding Northern's purchase of

cocaine from Defendant were misleading regarding the number of purchases made, the testimony still showed that Defendant provided cocaine to Northern in 1994 or 1995. In addition, the affidavit referenced testimony from Marvin Smith that he had purchased cocaine from Defendant in 1995. Given these circumstances, this Court cannot conclude that appellate counsel was ineffective for failing to raise this issue on appeal, or that there is a reasonable likelihood that the result of the proceedings would have been different had a *Franks* hearing been held. Accordingly, Defendant has not shown that he is entitled to relief from judgment with respect to this issue. MCR 6.508(D).

Defendant next argues that the information in the affidavit indicating that Defendant was selling drugs in 1995 was too old to be of value in 1998, when the search occurred. While staleness of information is a factor to weigh in determining whether there is probable cause to search, the age of the information, alone, is not determinative of whether the information is stale. *People v Stumpf,* 196 Mich App 218, 226; 492 2nd 795 (1992). Other factors, such as the nature of the property sought, should also be considered. *Id.* Here, the police were seeking items such as computers, tax records, ledgers, receipts, and photographs. It is likely that an individual would retain these types of items rather than to promptly dispose of them. *Id.* In addition, the affiant indicated that, based on his training and experience, drug traffickers often maintain such items where they have ready access to them. Given the types of items specified in the search warrant, Defendant has not shown that the information indicating that Defendant was selling drugs in 1995 was stale. Because Defendant has shown no error, he cannot meet the "good cause" and "actual prejudice" standards set forth in MCR 6.508(D)(3).

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to challenge a lab report admitted into evidence, which identified the type

of illegal drugs found at 438 Montana and indicated that the weight of the drugs was 654.2 grams, less than five grams over the threshold required to increase the mandatory minimum prison sentence from ten to twenty years under MCL 333.7401(2)(a)(i), as it existed at the time of Defendant's offenses. Defendant further argues that defense counsel's failure to require that the analyst that prepared the lab report be produced at trial for cross-examination violated his Sixth Amendment right to confront witnesses against him.

While Defendant argues that defense counsel should have challenged the evidence that Defendant possessed at least 650 grams of cocaine, he has presented no evidence that he possessed less than 650 grams of cocaine nor has he presented any evidence that calls into question the lab report's conclusion that the weight of the cocaine exceeded 650 grams. Defendant has the burden of establishing a factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Because Defendant has not shown that he had a reasonably likely chance of acquittal had defense counsel challenged the evidence that the weight of the cocaine exceeded 650 grams, he has not shown actual prejudice from the alleged error. MCR 6.508(D)(3)(b). Accordingly, Defendant has not shown that he is entitled to relief from judgment with respect to this issue.

Similarly, while Defendant argues that he was denied the effective assistance of counsel because defense counsel failed to require that the lab analyst testify at trial, he has shown no prejudice resulting from the fact that the lab analyst did not testify at trial. Generally, a defendant has a right to confront at trial the author of a forensic lab report regarding the composition and weight of a seized illegal substance unless the author is unavailable to testify and the defendant had a prior opportunity to cross-examine the author. *Melendez–Diaz v Massachusetts*, 557 US 305, 311; 129 S Ct 2527; 174 L Ed 2d 314 (2009); *People v Dendel,* 289

Mich App 445, 455; 797 NW2d 645 (2010). Where Defendant has not shown a likelihood that the weights listed in the lab report were in any way erroneous, however, he has not shown that the outcome of the proceedings would have been different had the lab analyst testified at trial. Therefore, Defendant has not shown that appellate counsel was ineffective for failing to raise the issue on appeal, or that he would have had a reasonably likely chance of acquittal had defense counsel required the author to testify at trial. MCR 6.508(D)(3). Accordingly, Defendant has not shown that he is entitled to relief from judgment on the basis of this issue.

Finally, Defendant argues that he is entitled to resentencing because MCL 333.7401(2)(a)(i) was amended while his case was pending and he should not have been sentenced under the previous version of the statute.

Defendant committed the offenses in September, 1998. At that time, MCL 333.7401(2)(a)(i) required a mandatory minimum term of 20 years in prison for possession of 650 grams or more of a controlled substance. In 2003, an amendment of the statute deleted the mandatory minimum sentence and provided that a person who possessed a controlled substance in the amount of 1,000 grams or more was guilty of a felony punishable by imprisonment for life or any term of years, or by a fine of not more than $1,000,000.00, or both. MCL 333.7401(2)(a)(i). Under the amended version of the statute, a person who possessed a controlled substance in an amount of at least 450 grams but less than 1,000 grams, was guilty of a felony punishable by imprisonment for not more than 30 years, or a fine of not more than $500,000.00, or both. MCL 333.7401(2)(a)(ii). The amendment of MCL 333.7401 applies only to offenses committed on or after March 1, 2003, the effective date of the legislation amending the statute. 2002 PA 665; *People v Doxey,* 263 Mich App 115, 122; 687 NW2d 360 (2004).

Because Defendant committed the offenses before March 1, 2001, he is not entitled to resentencing under the amended statute.

WHEREFORE, IT IS HEREBY ORDERED that Defendant's motion for relief from judgment is DENIED.

IT IS SO ORDERED.

MAY 25 2012

JUDGE DENISE LANGFORD MORRIS

Hon. Denise Langford Morris, Circuit Judge

A TRUE COPY
LISA BROWN
Oakland County Clerk / Register of Deeds
By
Deputy

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