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STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

Case No: 16-261120-FH

v.

Hon. Martha D. Anderson

TAVON JOHNATHON MAGEE,

Defendant.
_____/

OPINION AND ORDER

This matter is before the Court on Defendant Tavon Johnathon Magee's Motion for Relief from Judgment. Pursuant to MCR 6.506(A), the People filed a Response to the Motion. See Order dated March 2, 2023. Pursuant to MCR 6.508(B) and (C), there will be no oral argument or evidentiary hearing.

I.

On August 3, 2017, the jury convicted Defendant of possession with intent to deliver 50 grams or more, but less than 450 grams, of a mixture containing the controlled substance heroin, contrary to MCL 333.7401(2)(A)(iii) (Count I); possession with intent to deliver 50 grams or more, but less than 450 grams, of a mixture containing the controlled substance fentanyl, contrary to MCL 333.7401(2)(A)(iii) (Count II); possession with intent to deliver less than 50 grams of a mixture containing the controlled substance cocaine, contrary to MCL 333.7401(2)(A)(iv) (Count III); possession of ammunition by a felon, contrary to MCL 750.224(F)(6) (Count IV); and maintaining a drug house, contrary to MCL 333.740(5)(D) (Count VI).[1] Consequently, on September 7, 2017, the Court sentenced Defendant as a habitual third offender under MCL 769.13 to 18 to 40 years' imprisonment (as to Counts I, II and III); 6 to 10 years' imprisonment (as to Count IV); and 2 to 4 years' imprisonment (as to Count VI).

On subsequent appeal of right, on June 27, 2019, the Court of Appeals affirmed Defendant's conviction addressing the following claims of error raised by Defendant: (1)

[1] The jury did, however, find Defendant not guilty of possession of the controlled substance oxycodone less than 25 grams, MCL 333.7403(2)(b)(v) (Count V) and not guilty of possession of the controlled substance marijuana, MCL 333.7403(2)(D) (Count VII).

abuse of discretion by denying his motion for a separate trial; (2) abuse of discretion by admitting the detectives' testimony that they observed Magee engaging in activity consistent with illegal drug transactions in the months preceding the execution of the search warrant; and (3) error by the trial court in failing to order the prosecution to produce police reports and that there is a reasonable probability that he would have been acquitted had the reports been produced. *People v Magee*, unpublished per curiam opinion of the Court of Appeals, issued June 27, 2019 (Docket No. 340421).[2]

On October 29, 2019, the Michigan Supreme Court denied Defendant's application for leave to appeal. *People v Magee*, unpublished order of Michigan Supreme Court, issued October 29, 2019 (Docket No. 159955). Defendant now brings the pending Motion for Relief from Judgment under MCR 6.500, *et seq.*[3]

II.

The Michigan Court of Appeals sets forth the facts of the case as follows:

> These cases arise out of an investigation by the Oakland County Sheriffs Department of suspected drug trafficking at a house located at 26 Gingell Street in Pontiac, Michigan. Over a six-month period of surveillance, detectives observed activity consistent with hand-to-hand drug transactions. The house was owned by Magee's mother. The lead investigator, Detective Daniel Main, testified that Magee was the person he saw most frequently at the house. Main observed Magee engaging in activity consistent with drug trafficking.
>
> On the basis of the investigation, officers obtained and executed a search warrant at 26 Gingell. Detective Jason Teelander was the first officer to enter the house. He testified that he made eye contact with Erkins who was seated at a dining table; Erkins yelled "police" and ran to the kitchen. Teelander found Erkins lying on the steps to the basement. Magee was in the kitchen near the basement stairs; two other people were also in the home.
>
> At the bottom of the stairs, officers found various bags containing crack cocaine, fentanyl, and fentanyl-heroin mixture. They also found drug

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[2] The Court of Appeals consolidated Defendant's appeal with the appeal of his Co-Defendant, Steven Shaquille Erkins. *People v Magee* (Docket No. 340421) and *People v Erkins* (340424). The People note that Defendant filed his appeal by right through appointed counsel subsequently substituted by retained counsel following the submission of briefs by all parties.

[3] On December 1, 2022, Defendant filed a Notice to Withdraw Previously Filed 6500 Motion. In the Notice, Defendant acknowledged he filed two identical motions for relief from judgment on October 22, 2020, withdrew the one filed at 4:44 p.m. and requested the Court base its decision on the Motion filed at 4:52 p.m. Defendant filed the proposed affidavits separately on the same day. Consequently, the People's Response and the Court's Opinion address the Motion filed on October 22, 2020 at 4:52 p.m.

trafficking and packaging paraphernalia including plastic bags and digital scales. Teelander testified that it looked like someone had thrown the items found at the bottom of the basement stairs in haste. Magee had $3400 in his possession, which according to testimony was the approximate wholesale value of the fentanyl and fentanyl-heroin mixture found in the basement. Officers also found crack cocaine along with packaging paraphernalia on the dining table. The jury convicted both defendants of two counts of possession with intent to distribute with respect to the fentanyl and cocaine found in the home.

Officers also found bags containing heroin in a vehicle at the house that Detective Main had previously observed Magee driving. The jury found Magee guilty of possession with intent to distribute regarding the heroin found in the vehicle, but acquitted Erkins of that charge.

A number of items bearing the last name "Magee" were found in the home, including a piece of mail addressed to defendant Magee at 26 Gingell. However, it did not appear to the officers that anyone actually lived in the house. Officers also found three boxes of ammunition. *Magee*, unpub op, p. 2-3.

Defendant's Motion for Relief from Judgment relies upon affidavits from his Co-Defendant (averring that heroin found in the basement, his pocket, and the Dodge Challenger belonged to him not the Defendant) and Sherrod Magee (his brother who averred that the ammunition was his not Defendants). In his Motion, Defendant advances the following arguments:

- The trial court must grant Defendant a new trial based on the recently obtained affidavit from Erkins that Defendant did not possess the heroin found in the house or in the car.

- The trial court must grant Defendant a new trial based on ineffective assistance of counsel where a recently obtained affidavit from Sherrod establishes that trial counsel failed to call a crucial defense witness, despite having notice that the witness would have testified that Defendant had no possessory interest in the ammunition found in the house during the search.

- Defendant is entitled to post-appellate relief pursuant to MCR 6.508(D)(3) based on ineffective assistance of appellate counsel (satisfying the good cause requirement) and actual prejudice because of errors set forth in the Motion.

III.

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Post-conviction relief under MCR 6.500, *et seq* is an extraordinary remedy that is appropriate only to prevent manifest injustice. *People v Reed*, 449 Mich 375, 388-89; 535 NW2d 496 (1995). The burden of establishing that he or she is entitled to relief from judgment remains with the defendant. See MCR 6.508(D); *People v Swain*, 288 Mich App 609, 630, 794 NW2d 92 (2010). A trial court may not grant relief from judgment if a defendant:

> (1) seeks relief from judgment of a conviction and sentence that still is subject to challenge on appeal pursuant to subchapter 7.200 or subchapter 7.300;
>
> (2) alleges grounds for relief which were decided against the defendant in a prior appeal or proceeding under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision; for purposes of this provision, a court is not precluded from considering previously decided claims in the context of a new claim for relief, such as in determining whether new evidence would make a different result probable on retrial, or if the previously decided claims, when considered together with the new claim for relief, create a significant possibility of actual innocence;
>
> (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates
>
> (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
>
> (b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,
>
> (i) in a conviction following a trial,
>
> (A) but for the alleged error, the defendant would have had a reasonably likely chance of acquittal . . .
>
> * * *
>
> (iii) in any case, 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;

(iv) in the case of a challenge to the sentence, the sentence is invalid.

The court may waive the 'good cause' requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime. MCR 6.508(D).

Ultimately, to obtain relief from judgment based on a claim not previously decided, a defendant must show: (1) actual prejudice from the alleged irregularities that support the claim for relief and (2) good cause for failure to raise the grounds for relief on appeal or in a prior motion *or* a significant possibility of innocence. MCR 6.508(D)(3). If either "good cause" or "actual prejudice" is lacking, the Court need not address the other prong before denying the motion. *People v Jackson*, 465 Mich 390, 405-406; 633 NW2d 825 (2001).

IV.

Defendant seeks to have the Court vacate his conviction and order a new trial as well as his immediate release based on recently obtained affidavits, which allegedly establish that (1) he did not possess the heroin found in the car or the house, and (2) he had no possessory interest in the ammunition found in the house. Thus, Defendant alleges grounds for relief that could have been raised in his appeal of right from the conviction and sentence. Accordingly, Defendant must demonstrate either good cause or actual prejudice. *Swain, supra* at 630 (citing MCR 6.508(D)(3)).

Defendant argues that he is entitled to a new trial based on Erkins's Affidavit and ineffective assistance of trial counsel.[4] The People disagree that Defendant is entitled to the requested relief because he failed to meet his burden set forth in MCR 6.508(D)(3). Specifically, the People argue that (1) Defendant cannot show "good cause" based on

[4] Notably, Defendant does not argue ineffective assistance of appellate counsel for failure to raise this issue on appeal. The People note that Attorney Gabi D. Silver (P36382) represented Defendant in the Court of Appeals, the Michigan Supreme Court, and filed the present Motion. The circuit court docket reflects that the Court appointed Susan Walsh (P40447) to represent Defendant as appellate counsel on his appeal of right. The appellate docket reflects that Attorney Walsh drafted and filed the appellate brief on direct appeal. It also reflects that Defendant retained Attorney Silver who substituted for Attorney Walsh on November 2, 2018 (after briefing completed and more than six months before the June 12, 2019 oral argument). It further reflects that Attorney Silver did not file any motions or supplemental briefs in the Court of Appeals and that Attorney Silver filed the application for leave to appeal in the Michigan Supreme Court. It cannot be overlooked that Attorney Silver filed the present Motion and expressly failed to assert *any* argument regarding ineffective assistance of appellate counsel.

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ineffective assistance of counsel and (2) Defendant cannot establish "actual prejudice" based on either "newly discovered evidence" or ineffective assistance of counsel.

Good Cause

One way a defendant establishes the good cause prong is by showing ineffective assistance of counsel. *People v Reed*, 449 Mich 375, 378 (1995). "To establish ineffective assistance of counsel, defendant must first show that (1) his trial counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Uphaus*, 278 Mich App 174, 185; 748 NW2d 899 (2008). "A defendant must meet a heavy burden to overcome the presumption that counsel employed effective trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defendant failed to demonstrate "good cause" for his failure to raise either issue set forth in the instant Motion sooner. First, as it relates to the Erkins Affidavit, Defendant proffers this "new evidence" to establish that he did not *possess* any of the heroin obtained in the house or the car parked in the driveway. First, the Erkins Affidavit merely avers that the drugs *belonged* (i.e., ownership) to him without providing any foundation to dispute that Defendant had *possession* of those drugs. Further, Defendant had to have known that Erkins – his Co-Defendant – owned the drugs; yet, he failed to direct the Court's attention to anything in the record that he tried to procure Erkins's testimony. The People prosecuted both Defendant and Erkins in a joint trial and Erkins unequivocally waived his right to testify at trial. As such, it is highly unlikely that he would have testified on behalf of Defendant. Further, the record clearly reflects that Defendant and Erkins were not the only individuals at the house when the police served the search warrant. Yet, Defendant failed to direct the Court's attention to anything in the record or the instant Motion to demonstrate that he sought testimony from the other individuals present (i.e., Anthony Knight or Co-Defendant Devonne Shaw) regarding the ownership of the drugs.

Next, as it relates to the Sherrod Affidavit, Defendant proffers it to establish that Sherrod – not Defendant – *owned* **a box** of ammunition and Sherrod offered to testify. The evidence about ownership does not dispute the evidence that Defendant *possessed* the three boxes of ammunition when the police served the search warrant. Further, the record

is devoid of any evidence to reflect that Sherrod alerted trial counsel regarding his proposed testimony or that Defendant advised his appellate counsel about the alleged failure so that it could be raised on appeal. Instead, Defendant waits to assert this claim in the instant Motion. Defendant failed to establish ineffective assistance of counsel for failing to introduce either Sherrod's or Erkins's purported testimony.

Therefore, Defendant failed to satisfy the good cause prong of the two-prong standard of MCR 6.508(D)(3). While the Court can waive the good cause prong if it concludes that there is a significant possibility that a defendant is innocent of the crime, Defendant merely acknowledged the "actual innocence" exception that can be established with a credible showing, but he failed to make the required showing. Consequently, the Court cannot grant the relief requested.

Actual Prejudice

A trial court may grant a defendant a new trial based on newly discovered evidence, but this ability does not negate the parties' responsibility to "use care, diligence, and vigilance in securing and presenting evidence." *People v Grissom*, 492 Mich 296, 312, 821 NW2d 50 (2012) (quotation marks and citations omitted). To establish that newly discovered evidence warrants a new trial, the defendant must demonstrate that:

> (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial.

Id. at 313 (quotation marks and citations omitted). This four-part test applies regardless of whether a defendant is seeking a new trial or relief from judgment under MCR 6.502. See *People v Rogers*, 335 Mich App 172, 193, 966 NW2d 181 (2020).

Contrary to Defendant's analysis, however, the Court finds that the Erkins Affidavit does not constitute newly discovered evidence under *Cress*. First, the Erkins Affidavit is "newly *available* evidence" not "newly discovered evidence" as set forth in the People's argument. Specifically, the express language in the Affidavit (e.g., "everybody who was inside the house knew the drugs in paragraph 5 belonged to me") supports that Defendant knew that the drugs belonged to Erkins. As such, the Erkins Affidavit fails on the first prong ("the evidence itself, not merely its materiality, was newly discovered") and the third prong

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("the party could not, using reasonable diligence, have discovered and produced the evidence at trial"). Further, as the People point out, the Erkins Affidavit would not satisfy the fourth prong ("the new evidence makes a different result probable on retrial"). The Erkins Affidavit would not (1) dispute a finding that Defendant *possessed* the drugs with intent to sell because possession and ownership are separate concepts or (2) create a question as to the accuracy of Det. Main's testimony. Finally, the People would be able to raise and the jury would most likely have significant reasons to doubt the trustworthiness and reliability of Erkins's potential testimony as set forth in the People's brief.

Under Michigan law, effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Defense counsel's performance must be measured against an objective standard of reasonableness. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel's competence with the benefit of hindsight." *People v Russell*, 297 Mich App 707, 716; 825 NW2d 623 (2012). "A trial strategy is not ineffective simply because it ultimately does not succeed. A strategy is also not ineffective because it entails taking calculated risks, especially if the range of available options for the defense is meager." *People v White*, 331 Mich App 144, 149; 951 NW2d 106 (2020) (citation omitted). "[D]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy[.]" *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (quotation marks, citation, and brackets omitted). Further, "the failure to call a particular witness at trial is presumed to be a matter of trial strategy, and an appellate court does not substitute its judgment for that of counsel in matters of trial strategy." *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009). Defendant bears the burden of establishing that defense counsel provided ineffective assistance by showing that "(1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (quotation marks and citations omitted).

Defendant presents the Sherrod Affidavit to establish that his trial counsel failed to call him as a trial witness when Sherrod approached him at the time of trial to advise him that he – not Defendant – owned **a box** of ammunition found at the house. Defendant fails to analyze the *Cress* factors[5] related to the Sherrod Affidavit and instead focuses on trial counsel's alleged failure to call Sherrod as a witness. Regardless, Defendant fails to meet his burden of establishing that defense counsel provided ineffective assistance. Primarily, there is nothing in the record or in the Sherrod Affidavit to establish that "but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." The purported testimony would have only established that Defendant may not have owned one of the three boxes of ammunition found at the house, but it would not have challenged that the police found three boxes of ammunition at the house or that the presented evidence demonstrated that Defendant possessed the three boxes of ammunition. Additionally, the People identify facts (an immediate family member, not present at the time the police served the warrant, waiting until the day of trial to offer testimony that he owned a box of ammunition) that would support defense counsel declining to call Sherrod as a witness because it creates skepticism in its veracity. The Sherrod Affidavit and Defendant's argument are insufficient to overcome the strong presumption that defense counsel acted effectively at trial.

In sum, Defendant failed to satisfy the "actual prejudice" prong of the two-prong standard of MCR 6.508(D)(3), and thus, this Court cannot grant the relief requested.

V.

THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for Relief from Judgment is summarily **DENIED** in its entirety, pursuant to MCR 6.504(B)(2).

IT IS SO ORDERED.

/s/ Martha Anderson
May 4, 2023
HON. MARTHA D. ANDERSON
CHIEF CIRCUIT JUDGE PRO TEMPORE

Dated: 5/4/2023.

[5] The Court finds that it would fail to meet the first, third, and fourth prongs of the *Cress* factors because Defendant knew or should have known that his brother offered to testify that he owned the bullets and that his trial counsel failed to call him as a witness when he filed his appeal.

Order

Michigan Supreme Court
Lansing, Michigan

September 30, 2024

166716

Elizabeth T. Clement,
Chief Justice

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Megan K. Cavanagh
Elizabeth M. Welch
Kyra H. Bolden,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 166716
COA: 367077
Oakland CC: 2016-261120-FH

TAVON JOHNATHON MAGEE,
Defendant-Appellant.

/

On order of the Court, the application for leave to appeal the January 23, 2024 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).

s0923

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.

September 30, 2024

Clerk

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Court of Appeals, State of Michigan

ORDER

People of MI v Tavon Johnathon Magee

Docket No. 367077

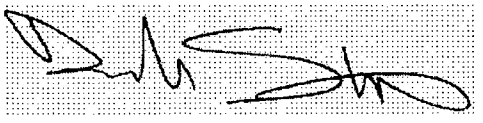
LC No. 2016-261120-FH

Douglas B. Shapiro
Presiding Judge

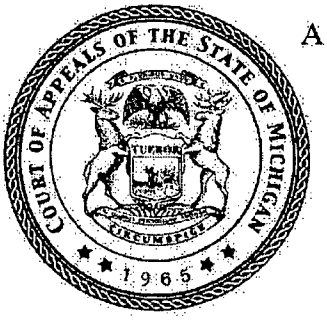
Jane E. Markey

Christopher P. Yates
Judges

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

January 23, 2024
Date


Chief Clerk

Additional material from this filing is available in the Clerk's Office.