STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED June 6, 2006
v	No. 260024 Wayne Circuit Court
CURTIS BRANCH, Defendant-Appellee.	LC No. 01-005124-01

Before: Cavanagh, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Plaintiff appeals by delayed leave granted from an order granting defendant's motion for a new trial based on ineffective assistance of counsel. Because defendant failed to meet his burden of showing that trial counsel's performance was so deficient as to have affected the outcome of trial, we reverse.

In May 2002, defendant was convicted at a bench trial of possession of 50 or more but less than 225 grams of cocaine, contrary to MCL 333.7403(2)(a)(iii)[1], and possession of marihuana, in violation of MCL 333.7403(2)(d). He was sentenced to concurrent prison terms of 10 to 20 years for the cocaine conviction and one day of time served for the marijuana conviction. Defendant appealed his convictions to this Court as of right in Docket No. 246714 and, while the appeal was pending, filed a pro se motion for a new trial and for an evidentiary hearing based upon ineffective assistance of counsel. At the conclusion of a *Ginther*[2] hearing, the trial court granted defendant's motion for a new trial and the appeal was thereafter dismissed by stipulation.

In the present appeal, the prosecutor argues that the trial court erred in finding defendant's trial counsel performed so deficiently that defendant was denied the effective assistance of counsel.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether

[1] Effective April 1, 2003, this subsection was amended to prohibit the possession of 50 or more but less than 450 grams of a controlled substance.

[2] *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

To establish ineffective assistance of counsel, defendant was required to show that counsel's performance was deficient such that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the constitution. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant was also required to overcome the presumption that the challenged conduct might be considered sound trial strategy and to show that he was prejudiced by the error in question. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001). To establish prejudice, defendant was required to show a reasonable probability that the error may have made a difference in the outcome of the trial. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, *supra*.

It is well settled that "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). The fact that a particular strategy does not work does not prove that counsel was ineffective. *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

In this case, defendant's attorney, Marvin Barnett, failed to pursue defendant's claim, preserved by interim counsel, that the drugs seized by the police weighed less than 50 grams. Instead, Barnett creatively argued that the weight of the three baggies found on defendant could not be aggregated absent evidence that the drugs came from the same batch, and that Michigan law does not prohibit the possession of pure cocaine, so that the prosecutor was required to show that the drugs were a *mixture* containing cocaine as an element of the crime.

The two defenses pursued by Barnett at defendant's trial could be considered frivolous. In *People v Justice (After Remand)*, 454 Mich 334, 350-358; 562 NW2d 652 (1997), our Supreme Court held that small drug transactions spanning several months could be combined for the purpose of charging the defendants with conspiracy to deliver over 650 grams of cocaine, where the transactions were part of a single scheme. *Justice* is dispositive of Barnett's argument that the weight of the baggies found on defendant's person could not be aggregated. It is only where an attempt is made to add the weight of a substance that does not contain *any* drugs that this Court has held that the combination is impermissible. See, e.g., *People v Hunter*, 201 Mich App 671, 675; 506 NW2d 611 (1993); *People v Barajas*, 198 Mich App 551, 552-559; 499 NW2d 396 (1993), aff'd 444 Mich 556 (1994); *People v Velasquez*, 125 Mich App 1, 4-7; 335 NW2d 705 (1983). In this case, by contrast, cocaine was found in all three baggies.

Similarly, the language of the Public Health Code does not support Barnett's novel argument that Michigan law does not prohibit the possession of pure cocaine, and that the existence of a "mixture" must instead be proven as a necessary element of the crime. MCL 333.7403(1) prohibits the knowing and intentional possession of "a controlled substance." The controlled substance that defendant was convicted of possessing was a schedule 2 which includes, by definition, coca leaves and any salt, compound, derivative, or preparation thereof

which is chemically equivalent to or identical with cocaine, its salts, and stereoisomers. See MCL 333.7214 (a)(iv).

We recognize that, in affirming this Court's decision in *Barajas*, *supra* at 557, our Supreme Court stated that this Court "reversed the defendant's conviction because there was insufficient evidence of a conspiracy . . . *and because the separately packaged cocaine and baking soda did not constitute a "mixture"* (emphasis added). The Court "emphasize[d]," however, "that the analysis employed by the Court of Appeals is limited strictly to the facts of this case." *Id*. This Court's rationale in *Barajas* was that where pure baking soda was found with cocaine, but the two items were kept separately and not mixed, the baking soda could not be considered a mixture containing cocaine and, therefore, could not be added to the cocaine for the purpose of convicting the defendant of a more serious crime. The case, then, does not support Barnett's argument that possession of pure cocaine is not illegal.

Though the defenses presented by Barnett may have been frivolous, in order to establish ineffective assistance of counsel, defendant was required to establish not only that Barnett's performance was deficient, but also that defendant was prejudiced (i.e. there was a reasonable probability that the outcome of trial would have been different but for the errors).

As argued by defendant, in *United States v Cronic*, 466 US 648, 659-662; 104 S Ct 2039; 80 L Ed 2d 657 (1984), the United States Supreme Court reaffirmed the general principle that, in some cases of ineffective assistance, prejudice may be presumed. In particular, prejudice may be presumed "when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *Id*. at 659 n 25. "Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id*. at 659-660. "Apart from circumstances of that magnitude, however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt." *Id*. at 659 n 26.

In the present case, there is no claim that Barnett was absent from trial or was prevented from rendering appropriate assistance. In fact, defendant's claim of ineffectiveness is based upon Barnett's trial performance. Thus, contrary to defendant's argument, this is not a situation where prejudice should be presumed.

Moreover, defendant has failed to establish prejudice. At the *Ginther* hearing, defendant refused to waive the attorney-client privilege during Barnett's testimony. Barnett was never asked what defendant told him, if anything, concerning the actual weight of the drugs and although the drugs were still available at the time, defendant failed to request that they be produced and weighed. Additionally, evidence indicated that the arresting officer found the weight of the cocaine to be 75 grams and the State Police Laboratory found the weight to be just over 67 grams. While there is a discrepancy between the weight reported by the arresting officer and that set forth in the lab report, both amounts were well in excess of 50 grams. Thus, defendant failed to prove that, but for Barnett's deficient representation, the outcome of trial might have been different.

Nonetheless, the trial court was apparently troubled enough by the weight issue that it requested that the drugs be produced for re-weighing. It was only after the trial court learned that the drugs had been destroyed by the police that it granted defendant's motion for a new trial. The court did not, however, engage in a destruction-of-evidence analysis, which we believe is necessary to a complete analysis of the issues involved in this case.

This Court has held that the government's "[f]ailure to preserve evidentiary material that may have exonerated the defendant will not constitute a denial of due process unless bad faith on the part of the police is shown." *Hunter, supra* at 677. Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). For example, "the routine destruction of taped police broadcasts, where the purpose is not to destroy evidence for a forthcoming trial, does not mandate reversal." *Id*. Conversely, in *People v Albert*, 89 Mich App 350, 353-354; 280 NW2d 523 (1979), this Court found bad faith where the police purposefully destroyed a codefendant's confession for the admitted purpose of preventing the defendant from using it at trial.

In the present case, there was no testimony tending to show that the officers involved knew in April 2004 that the trial court had asked that the drugs be produced for weighing. While it appears that the officer who cleaned out the property room attempted to cover up the unauthorized destruction of the evidence, we cannot agree that the drugs were destroyed in bad faith. Rather, the evidence indicated that the drugs were apparently destroyed by mistake. Therefore, defendant was not deprived of due process such that he should be entitled to an inference that the drugs would have weighed less than 50 grams, contrary to the chemist's report.

For these reasons, the trial court erred in granting defendant's motion for a new trial based on the unauthorized destruction of the drugs. Defendant failed to meet his burden of showing that Barnett's deficient performance may have affected the outcome of the trial.

Reversed.

/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto