STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 22, 2005
v	No. 251613 Barry Circuit Court
CHARLES MARVIN TROUT, Defendant-Appellant.	LC No. 03-000120-FH

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

PER CURIAM.

A jury found defendant guilty of possession of methamphetamine, MCL 333.7403(2)(b)(1). Defendant appeals as of right. We affirm.

I. FACTS

During the time in question, defendant was living in a cabin type structure, referred to as a shed, in a remote area of Barry County Michigan. Vickie Sprague and Jay Shovan resided in a mobile home next to defendant's shed. Prior to defendant's arrest on March 18, 2003, Shovan was a suspect for his involvement in a hit-and-run accident while driving defendant's truck. Police recognized the truck when defendant's wife drove it to the police post to pay a fix-it ticket. Police later received an anonymous tip that Shovan was located in defendant's shed, and that the shed was being used for the manufacturing of methamphetamine.

On March 18, 2003, police traveled to the remote area where the shed was located. Police parked several hundred yards away and proceeded on foot toward the shed. As the police approached the shed, a strong chemical odor was present that was consistent with the production of methamphetamine. Officer Linebaugh knocked on the door and defendant answered, stating that Shovan and Sprague were inside. Officer Linebaugh heard Officer Cook say "knife," at which point Officer Linebaugh grabbed defendant. Officer Cook testified that he could see from the door, a man and a women sitting inside the shed, thereafter he entered the shed and placed Shovan under arrest for the hit-and-run. Officer Cook then stated that he was going to perform a protective sweep in order to secure the area and look for potential evidence that was in plain view. Officers Cook and Linebaugh observed in plain view the following: coffee filters, a small corroded valve typically used in the production of methamphetamine, pseudoephredine pills, aluminum foil, and a substance on the table that appeared to be metamphetamine. After securing

the area, officers obtained a search warrant and returned to the shed with the proper equipment to gather evidence and dismantle the methamphetamine lab.

II. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant first argues that his trial counsel was ineffective. We disagree.

A. Standard of Review

The determination of 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).

B. Analysis

To justify reversal under either the federal or state constitutions for ineffective assistance of counsel, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052 (1984). See *People v Pickens* , 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id*. at 690.

"Second, the defendant must show that the deficient performance prejudiced the defense." *Id*. at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id*. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. The defendant bears the burden of demonstrating both deficient performance and prejudice, therefore the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant argues that his counsel was ineffective because she introduced into evidence a letter that he had written to Jay Shovan. Shovan, defendant's neighbor, was present at the time of the drug raid that resulted in defendant's arrest. This letter became an issue at trial when the prosecution was cross examining defendant. The prosecution asked defendant if he had written Shovan a letter in jail, apparently implying that he had urged Shovan to lie at trial, however, it never asked defendant what he had written in the letter. Defendant's counsel then introduced the letter on re-direct examination, and allowed defendant to explain that he had written the letter because Shovan was "talking to everybody [at the Jackson prison] about this case," and defendant was simply trying to get him to tell the truth.

Defendant's counsel was apparently trying to minimize any damage caused by the prosecution's implication that the letter urged Shovan to lie at trial. Regardless, the decision as to what evidence to present is a matter of trial strategy, and this Court will not substitute its

judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42; 687 NW2d 342 (2004). The circumstances surrounding the admission of this letter do not overcome the presumption that defendant's counsel was effective, nor do they show that but for the admission of this letter, the result of the trial would have been different.

Defendant also argues that his counsel was ineffective because she failed to visit the shed where the raid occurred, and that had she done so, she would have been able to impeach the officers at the hearing on defendant's motion to suppress. Specifically, defendant argues that counsel could have impeached the officers regarding their testimony about the road being muddy and blocked by a car. This argument is wholly without merit, given that weather conditions change daily and cars can be moved instantly. Defendant's counsel would have had to visit the shed on the night defendant was arrested (before she had even been retained as counsel) to know whether the road was in fact muddy and blocked by a car. Furthermore, because defendant himself later testified at trial that his car was stalled and blocking the driveway, it seems odd that he now argues on appeal that the officers were lying. Regardless, the condition of the driveway was not a decisive issue at the hearing on defendant's motion to suppress, and even if defense counsel's performance was deemed deficient, defendant cannot show it was outcome determinative.

III. MOTION TO SUPPRESS

Defendant next argues that the trial court erred by finding that exigent circumstances existed that supported a warrantless search of the shed where defendant was arrested. We disagree.

A. Standard of Review

A trial court's ruling on the legal grounds of a motion to suppress is reviewed under the clearly erroneous standard. *People v Burrell,* 417 Mich 439, 448; 339 NW2d 403 (1983). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Kurylczyk,* 443 Mich 289, 303; 505 NW2d 528 (1993).

B. Analysis

The Fourth Amendment of the United States Constitution guarantees the right of the people to be free from unreasonable searches by the government. The remedy for a violation of this right is the suppression of unlawfully obtained evidence. *People v Cartwright,* 454 Mich 550, 557-558; 563 NW2d 208 (1997). Although a warrant is generally required before a home may be searched, police may lawfully enter a home without a warrant if exigent circumstances exist. *Id* at 558. Pursuant to the exigent circumstances exception to the warrant requirement, police may enter a dwelling without a warrant if the officers possess probable cause to believe that a crime was recently committed on the premises and probable cause to believe that the premises contain evidence or perpetrators of the suspected crime. *In re Forfeiture of $176,598,* 443 Mich 261, 271; 505 NW2d 201 (1993). The police must establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or

others, or (3) prevent the escape of a suspect. *Id*. If the police discover evidence of a crime after the warrantless entry, that evidence may be admissible. *Id.*

In this case, the trial court did not clearly err in finding that exigent circumstances existed that supported the warrantless search. At the hearing, the officers testified that they received a tip that a "Jay Shovan" was operating a methamphetamine lab in a shed next to a trailer in a gravel pit at a certain location in Barry County. The officers went to that location and discovered that the tip was accurate; there was in fact a shed there, next to a trailer, in a gravel pit. They then smelled a strong odor of ether, which is commonly associated with methamphetamine labs. Given these circumstances, the trial court correctly found that the officers were reasonable in their belief that they needed to act immediately to prevent the destruction of evidence.

IV. JURY INSTRUCTIONS

Finally, defendant argues that the trial court erred when it denied defendant's request for a jury instruction regarding "use" of methamphetamine. Again, we disagree.

A. Standard of Review

Claims of instructional error are reviewed *de novo*. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002).

B. Analysis

There are two types of lesser included felony offenses: necessarily included offenses and cognate lesser offenses. *People v Marji,* 180 Mich App 525, 530; 447 NW2d 835 (1989). A necessarily included offense is one which must be committed as part of the greater offense; it would be impossible to commit the greater offense without first having committed the lesser. *People v Bearss,* 463 Mich 623, 627; 625 NW2d 10 (2001). A cognate lesser offense is one which shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater. *People v Perry,* 460 Mich 55, 61; 594 NW2d 477 (1999). A requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element which is not part of the lesser included offense and a rational view of the evidence would support it. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002). An instruction on a cognate lesser included offense is not permissible. *Id*.

Since it is possible to possess methamphetamine without using it, the trial court correctly determined that the use of methamphetamine was a cognate lesser offense of possession. Furthermore, at trial, defendant himself denied using any methamphetamine that night. Therefore, the trial court did not err in declining to give the use instruction as a lesser-included offense instruction to the possession charge.

Affirmed.

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