S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2005
v	No. 255238 Oakland Circuit Court
KENNETH GERALD DAVIS, Defendant-Appellant.	LC No. 2003-190579-FH

Before: Gage, P.J., and Whitbeck, C.J., and Saad, J.

PER CURIAM.

A jury convicted defendant of possession with intent to deliver 225 to 649 grams of cocaine, MCL 333.7401(2)(a)(ii),[1] possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v),[2] and two counts of felony-firearm, MCL 750.227b. Defendant also pleaded guilty to a charge of felon in possession of a firearm, MCL 750.224f.[3] Defendant appeals his convictions, and we affirm.

I. Double Jeopardy

Defendant argues that his convictions for two drug possession offenses violate the prohibition against double jeopardy. However, he incorrectly asserts that the jury convicted him of two possession offenses under MCL 333.7403. The prosecutor initially charged defendant with two offenses under MCL 333.7401, but he was ultimately convicted of one offense under §

[1] MCL 333.7401 has since been amended with regard to the amounts of controlled substances.

[2] Defendant was originally charged with possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv).

[3] The trial court sentenced defendant as a third habitual offender to consecutive prison terms of twenty to forty years for the possession with intent to deliver 225 or more but less than 650 grams of cocaine conviction, one to eight years for the possession with intent to deliver less than twenty-five grams of cocaine conviction, and one to ten years for the felon in possession of a firearm conviction, to be served consecutive to two concurrent two-year terms for the felony-firearm convictions.

7401 and one under § 7403. Accordingly, his argument regarding "two convictions for possession of cocaine" under § 7403 is simply misplaced.

Furthermore, a double jeopardy violation does not occur "if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other." *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995); see also *People v Wynn*, 197 Mich App 509, 510; 496 NW2d 799 (1992). In *People v Bartlett*, 197 Mich App 15, 17-18; 494 NW2d 776 (1992), this Court held that double jeopardy did not bar two convictions under § 7401 if the facts showed that two different deliveries occurred at different times and were separately negotiated and paid.

Here, defendant's two possession convictions involved separate and distinct offenses. The jury convicted defendant under § 7401(2)(a)(ii) for his possession of 420.5 grams of cocaine. The evidence established that, when the police seized the cocaine from defendant, he was not in his apartment, but sitting in the driver's seat of a car. The police found the cocaine, along with a loaded handgun, concealed under defendant's pant leg. Further evidence showed that the cocaine, which was separated into seven individual packets, was packaged in a manner that suggested delivery. In contrast, the jury convicted defendant under § 7403(2)(a)(v) based on evidence of his constructive possession of a smaller quantity of cocaine in his apartment. The police found the cocaine inside a shoe in defendant's bedroom and they also found two firearms and a digital scale in the apartment. Accordingly, the cocaine from defendant's apartment was in a different location, and apparently had a different intended purpose.

In sum, the evidence showed that defendant possessed two separate quantities of cocaine, in separate locations, in different contexts, and for different purposes. Therefore, double jeopardy protections did not preclude separate convictions of possession with intent to deliver.[4]

II. Effective Assistance of Counsel

Defendant says that he is entitled to a new trial because he was denied the effective assistance of counsel at trial. Because defendant failed to raise this issue in the trial court through a motion for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).[5]

[4] Defendant also asserts that he was deprived of a fair trial because his counsel failed to raise a double jeopardy claim. However, because no double jeopardy violation occurred, counsel's alleged inaction did not deprive defendant of the effective assistance of counsel. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

[5] Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *Effinger, supra* at 69. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

A. 180-day Rule

We reject defendant's contention that defense counsel erred by failing to move for dismissal under the 180-day rule, MCL 780.131.

It is undisputed that, at the time he committed the offenses in this case, defendant was on lifetime probation for a prior conviction of cocaine possession. After police arrested defendant in this case, his probation was revoked and he was sentenced to a prison term of two to twenty years. The purpose of the 180-day rule is to resolve untried charges against prisoners so that the sentences may run concurrently. *People v Chavies*, 234 Mich App 274, 280; 593 NW2d 655 (1999); *People v Falk*, 244 Mich App 718, 720; 625 NW2d 476 (2001). The rule does not apply to a pending charge that subjects the defendant to mandatory consecutive sentencing upon conviction. *Id*.

The pending charges in this case both required consecutive sentencing under MCL 333.7401(3), which provides that, "[a] term of imprisonment imposed pursuant to subsection (2)(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony." Defendant's prior conviction constituted a felony under MCL 333.7401(2)(a)(iv). Because defendant's sentences in this case had to run consecutively to his prior sentence, the 180-day rule is simply inapplicable. *Chavies*, *supra* at 280-281; *Falk*, *supra* at 721-722. Accordingly, defendant cannot demonstrate that defense counsel's inaction was prejudicial and, therefore, he cannot establish a claim of ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

B. Speedy Trial

We also reject defendant's contention that defense counsel was ineffective for failing to move for dismissal based on a violation of his right to a speedy trial.[6]

Police arrested defendant in October 2002 and, thereafter, his probation for a prior offense was revoked and he was sentenced to a term of imprisonment. His trial on the charges in this case began in January 2004. Accordingly, the delay was less than eighteen months, which requires defendant to prove that he suffered prejudice. See *People v Cain*, 238 Mich App 95, 112; 605 NW2d 28 (1999). Defendant does not specifically allege that he was prejudiced by the delay or that exculpatory evidence was lost because of the wait. Further, because defendant was incarcerated for a prior offense, there was no prejudice to his person. See *People v Gilmore*, 222 Mich App 442, 461-462; 564 NW2d 158 (1997).[7] Accordingly, when balancing the relevant

[6] "In determining whether a defendant has been denied a speedy trial, four factors must be balanced: (1) the length of the delay, (2) the reasons for the delay, (3) whether the defendant asserted his right to a speedy trial, and (4) prejudice to the defendant from the delay." *People v Mackle*, 241 Mich App 583, 602; 617 NW2d 339 (2000) (citations omitted).

[7] We also note that the record shows that at least one delay was caused by defense counsel failing to appear.

factors, defendant's right to a speedy trial was not violated. Because defendant cannot demonstrate that counsel's alleged inaction was deficient or prejudicial, he cannot establish a claim of ineffective assistance of counsel. *Snider*, *supra*.

C. Motion to Quash the Search Warrant

Defendant complains that defense counsel prejudiced him by failing to attack the sufficiency of the search warrant issued for the search of his apartment.[8]

Here, a confidential informant provided information regarding drug trafficking at defendant's apartment. An officer may base a search warrant affidavit on information supplied by a confidential informant if it contains "affirmative allegations from which the magistrate may conclude that the person spoke with personal knowledge of the information and either that the unnamed person is credible or that the information is reliable." MCL 780.653; *People v Poole*, 218 Mich App 702, 706; 555 NW2d 485 (1996).

The affiant, Officer Gary Hembree, stated that the police received information from a confidential informant that "a black male subject name 'Kenneth Davis' . . . as described by informant, light skinned male with long braids," was selling cocaine from 1221 Colony Square, #225. Officer Hembree further stated that the police knew defendant from "prior encounters." The informant also indicated that "larger amounts of quantities of cocaine were being stored at the apartment." Officer Hembree, a member of the Narcotics Bureau, stated that he "knows the informant to be reliable," and that the informant "has provided true and accurate details concerning drug trafficking in Pontiac." Further, to substantiate the informant's statements, the police conducted surveillance of the apartment and saw that defendant matched his description. Moreover, as the police watched, defendant discarded a garbage bag that contained cocaine residue. Officers then approached defendant and found "a large amount of cocaine and a firearm in his pants leg . . . and the key to apartment 225."

Officer Hembree also stated that, based on his "education and experience," he believed that defendant was conducting illegal drug trafficking at the address. An independent police investigation that verifies information provided by an informant can support issuance of a search

[8] A search warrant may not issue unless probable cause exists to justify the search. US Const, Amend IV; Const 1963, art 1, § 11; MCL 780.651. "Probable cause to issue a search warrant exists where there is a 'substantial basis' for inferring a 'fair probability' that contraband or evidence of a crime will be found in a particular place." *People v Kazmierczak*, 461 Mich 411, 417-418; 605 NW2d 667 (2000). The magistrate's findings of probable cause must be based on the facts related within the affidavit. MCL 780.653; *People v Ulman*, 244 Mich App 500, 509; 625 NW2d 429 (2001). In assessing a magistrate's decision with regard to probable cause, a reviewing court must evaluate the search warrant and underlying affidavit in a commonsense and realistic manner, giving deference to the conclusion that probable cause existed, and determine whether a reasonably cautious person could have concluded, under the totality of the circumstances, that there was a substantial basis for a finding of probable cause. *People v Russo*, 439 Mich 584, 603-605; 487 NW2d 698 (1992); *People v Poole*, 218 Mich App 702, 705; 555 NW2d 485 (1996).

warrant. *People v Stumpf*, 196 Mich App 218, 223; 492 NW2d 795 (1992); *People v Harris*, 191 Mich App 422, 425-426; 479 NW2d 6 (1991). Further, an affiant's experience is relevant to establish probable cause. *People v Darwich*, 226 Mich App 635, 639; 575 NW2d 44 (1997).

In sum, the magistrate had a substantial basis to conclude that officers had probable cause to believe that controlled substances would be found inside defendant's apartment. Therefore, defendant cannot demonstrate that his trial counsel erred by failing to challenge the warrant affidavit. *People v Effinger*, 212 Mich App 67; 536 NW2d 809 (1995).

D. Motion to Suppress Evidence from the Patdown Search

Defendant contends that his counsel should have moved to suppress the evidence seized during his patdown search. Police officers may make a valid investigatory stop if they possess "reasonable suspicion" that criminal activity is occurring. *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968); *People v Champion*, 452 Mich 92, 98; 549 NW2d 849 (1996). The detaining officer must have had a "particularized and objective basis for the suspicion of criminal activity." *Id*. at 98-99. "An officer who makes a valid investigatory stop may perform a limited patdown search for weapons if the officer has reasonable suspicion that the individual stopped for questioning is armed and thus poses a danger to the officer." *Id*. at 99. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *People v Custer*, 465 Mich 319, 328; 630 NW2d 870 (2001).

As discussed, the police reasonably suspected that criminal activity was taking place. When the officer approached defendant and asked him to step out of the car, an officer saw a "large lump in [defendant's] left lower leg cuff area," and patted him down "[f]or safety reasons." This, coupled with the police investigation of defendant's participation in drug trafficking, gave the officer probable cause to believe that the "lump" may have been a weapon. Because the police were authorized to stop defendant and perform a limited patdown search, a motion to suppress the evidence seized from the patdown search would have been meritless. As previously indicated, counsel is not required to advocate a meritless position. *Snider*, *supra*. Defendant is not entitled to a new trial on this basis.[9]

III. Prosecutorial Misconduct[10]

[9] Defendant also says that defense counsel should have asked the trial court to sentence him under the amended version of MCL 333.7401. However, that section applies only to crimes committed on or after March 1, 2003. *People v Thomas*, 260 Mich App 450, 458-459; 678 NW2d 631 (2004); *People v Doxey*, 263 Mich App 115, 123; 687 NW2d 360 (2004). Here, defendant committed the crimes on October 15, 2002. Accordingly, defendant cannot demonstrate that defense counsel's inaction was prejudicial and, thus, he cannot establish a claim of ineffective assistance of counsel. *Effinger*, *supra*.

[10] Generally, this Court reviews claims of prosecutorial misconduct to determine whether the defendant was denied a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). But because defendant failed to object to the prosecutor's conduct below,

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Defendant argues that the prosecutor denied him a fair trial when she appealed to the jurors' civic duty. Defendant fails to cite any support for his claim that it is improper or prejudicial for a prosecutor to simply note that he represents the state of Michigan and that the judge is the "gatekeeper" of the law. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (citation omitted). Accordingly, this claim does not warrant reversal.[11]

Defendant also maintains that the prosecutor impermissibly vouched for the credibility of the police officers.[12] The record does not reflect that the prosecutor conveyed to the jury that she had special knowledge that the police officers were testifying truthfully. Further, the challenged remarks were plainly focused on refuting defense counsel's suggestion that the officers acted illegally in seizing the drugs.[13] Moreover, the prosecutor told the jurors that it is their job to decide the facts of the case and she urged them to evaluate the evidence. Accordingly, we reject defendant's claim of prosecutorial misconduct.[14]

IV. Sentence

Defendant says that he is entitled to resentencing because the trial court failed to consider all relevant sentencing factors, relied on findings not determined by a jury, and failed to

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we review his unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

[11] Were we to consider the prosecutor's remarks improper, they were brief and were not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). Further, any alleged prejudice could have been cured by a timely instruction. *Schutte, supra* at 721. Indeed, the trial court instructed the jurors that they were the sole judges of the witnesses' credibility, and that the lawyers' comments are not evidence. Juries are presumed to follow their instructions and the instructions were sufficient to dispel any possible prejudice. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

[12] A prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge or the prestige of her office, *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995), or vouch for the credibility of a witness by conveying that she has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001).

[13] Even improper prosecutorial remarks may not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

[14] Defendant also contends that his trial counsel was ineffective for failing to object to the prosecutor's remarks. Because we hold that no misconduct occurred, counsel's failure to object did not deprive defendant of the effective assistance of counsel. *Effinger*, *supra*.

articulate reasons for the sentence imposed, which defendant maintains is disproportionate and constitutes cruel and unusual punishment. We disagree.

This Court reviews sentencing decisions for an abuse of discretion. *People v Compeau*, 244 Mich App 595, 598; 625 NW2d 120 (2001). There is no abuse of discretion if the sentence is proportionate to the seriousness of the offense and the defendant's prior record. *Id*. "If an habitual offender's underlying felony and criminal history demonstrate that he is unable to conform his conduct to the law, a sentence within the statutory limit is proportionate." *Id*. at 599.

Defendant argues that his minimum sentence of twenty years for his conviction under MCL 333.7403(2)(a)(ii) is disproportionate. However, the trial court sentenced defendant to the mandatory minimum sentence of twenty years, which, as a legislatively mandated sentence, is presumptively proportionate. *People v Williams*, 189 Mich App 400, 404; 473 NW2d 727 (1991).[15] The factors defendant cites, his fatherhood and family support, do not overcome this presumption of proportionality. Further, when he committed these crimes, defendant was on lifetime probation for another drug offence. Defendant has simply failed to show that the trial court erred by imposing the mandatory minimum sentence.[16]

We also reject defendant's claim that he must be resentenced because the trial court, instead of a jury, made findings of fact to support his sentence, contrary to *Blakely v Washington*, 542 US ___; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has ruled that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

Affirmed.

/s/ Hilda R. Gage
/s/ William C. Whitbeck
/s/ Henry William Saad

[15] According to the former MCL 333.7401(2)(a)(ii), the trial court was authorized to impose a minimum sentence of not less than twenty or more than thirty years' imprisonment.

[16] To the extend defendant asserts that his sentences violate the federal constitutional protection against cruel and unusual punishment, this Court has previously rejected this argument. See *People v Nunez*, 242 Mich App 610, 618; 619 NW2d 550 (2000). Further, defendant's claim that the trial court did not adequately articulate its reasons for his sentence is unavailing; "[a] court's reliance on a statutorily required minimum sentence satisfies the articulation requirement," *Id.*, and there is no evidence that the trial court failed to consider relevant mitigating factors in sentencing defendant.