STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2009
v	No. 283675 Wayne Circuit Court
DAMON PARHAM, Defendant-Appellant.	LC No. 99-008710-FH

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Following a bench trial, defendant appeals as of right from his conviction of delivery of 225 or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii). Defendant was sentenced to 7 to 30 years of imprisonment. He raises two issues on appeal. In his first issue, defendant challenges the validity of a traffic stop and subsequent pat-down search. In asserting this argument, defendant also claims that his trial counsel was ineffective for failing to challenge the stop and the pat-down search. In his second issue raised on appeal, defendant maintains that the waiver of his constitutional right to a jury trial was improper because the trial court failed to establish that defendant voluntarily and intelligently relinquished this right. For the reasons set forth below, we conclude there is no merit to either issue raised by respondent. We affirm.

I. Basic Facts and Procedure

On August 2, 1999, the police stopped a vehicle driven by defendant.[1] Officer Diaz testified that she approached the vehicle from the driver's side and ordered defendant to step out. Officer Diaz searched defendant for weapons and, in his right front pants pocket, "felt a hard object which I believe was narcotics." According to Officer Diaz, "it was a hard object and I think in plastic. So based on my previous experience,[2] I believed it to be narcotics." Officer Diaz reached into defendant's pocket and pulled out a baggy containing a lumpy white substance

[1] The trial testimony did not describe the reason for the stop other than mentioning that the vehicle was "wanted."

[2] At the time of the stop, Officer Diaz had approximately one year of experience in narcotics investigation.

that was similar to crack cocaine. The total weight of the substance was 250.79 grams. Officer Diaz also siezed $212 from defendant and $721 from a passenger in the vehicle. A digital scale and other narcotics were later discovered in the vehicle, but defendant was acquitted of additional charges relating to the other contraband. In a statement, defendant indicated that he obtained the vehicle from a friend and denied knowing that it was wanted. He admitted that he possessed approximately 200 to 250 grams of cocaine.

II. The Stop and Search

Defendant argues that the vehicle stop and ensuing search of his pants pocket was unconstitutional, and that his trial counsel was ineffective for failing to move to suppress the evidence. Because the alleged error is unpreserved, it is subject to review for plain error under *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999).

> To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Id*., p 763 (citations omitted).]

Here, because defendant did not challenge the legality of the stop in the circuit court, testimony concerning the reason for the stop was not developed.[3] From the available record, there is no basis for finding a plain error with respect to the stop of the vehicle.

With regard to the search and seizure of narcotics of his pocket, defendant argues that Officer Diaz exceeded the parameters of a permissible patdown search. Specifically, defendant argues that it could not have been "immediately apparent" to Officer Diaz that the item she felt was contraband. "[P]olice cannot manipulate an object in order to determine if it is contraband; it must be immediately apparent from plain view or plain feel that the object is contraband." *People v Custer*, 465 Mich 319, 336; 630 NW2d 870 (2001) (Markman, J.).[4] However, the record does not show that Officer Diaz manipulated the material in defendant's pocket before determining that the contents were incriminating. Cf. *Minnesota v Dickerson*, 508 US 366; 113

[3] In his opening statement, defense counsel noted that the vehicle was "wanted for failure to return a rental vehicle."

[4] As noted in *People v Fletcher*, 260 Mich App 531, 548 n 8; 679 NW2d 127 (2004), , a majority of our Supreme Court concurred in Justice Markman's opinion on this point.

S Ct 2130; 124 L Ed 2d 334 (1993) (officer detected small lump during patdown, but did not have probable cause to believe the lump was contraband until he put his hand in the pocket and manipulated the item with his fingers). Defendant argues that Officer Diaz could not have distinguished the contraband from other innocuous items such as rock candy, pebbles, sand, or baking powder. However, "it is not necessary to show that the officer *knew* that the object was contraband before [s]he seized it. Rather, it is *only* necessary . . . to show that a reasonably cautious person in the circumstances would have been warranted in the belief that the object was contraband." *Custer, supra*, p 339 (citation omitted). Here, Officer Diaz testified that, based on her experience as a narcotics officer, immediately upon feeling defendant's front pocket she believed that defendant illegally possessed narcotics. On this record, there is no basis for finding a "plain error" in the admission of the evidence.

Defendant also contends that trial counsel was ineffective for failing to move to suppress the evidence. In the absence of an evidentiary hearing, this Court's review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). Defendant must show that counsel's representation "fell below an objective standard of reasonableness" and demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id.*, pp 302-303 (citations and internal quotation marks omitted); *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Because the record does not show that the stop or search was illegal, there is no basis for concluding that defense counsel's failure to file a motion to suppress was objectively unreasonable or prejudicial. Defense counsel is not ineffective for failing to bring a motion that would have been futile. *People v Flowers*, 222 Mich App 732, 737-738; 565 NW2d 12 (1997) .[5]

III. Defendant's Waiver of His Right to a Jury Trial

Defendant also argues that his jury waiver was invalid because the trial court failed to establish that it was voluntarily and intelligently made. He contends that the trial court never advised him of his right to a jury trial and did not explicitly obtain his waiver of that right. We disagree.

After the trial court engaged in a lengthy colloquy with defendant concerning his dissatisfaction with defense counsel and other matters, the trial court addressed defendant as follows:

> But why don't you sit down and talk with your lawyer for a second. Because he's told me a couple things in regards to how you want to proceed to

[5] Defendant alternatively requests that this Court remand this case for an evidentiary hearing to develop the record regarding the stop and subsequent patdown search. This Court previously denied defendant's motion to remand with respect to this issue. Defendant has not supported his request with an affidavit or other offer of proof regarding the facts to be established at the hearing. MCR 7.211(C)(1)(a). Therefore, we again decline defendant's request for a remand. *People v Williams*, 275 Mich App 194, 200; 737 NW2d 797 (2007) (2007).

trial. He says that you had asked him to ask the prosecutor if he would have no objections to you waiving your right to a jury trial. And again, you need to be certain, because it's your case and it's your decision about the type of trial that you want.

* * *

So why don't you all talk about it. And then tell me if you want to have that trial without a jury and we'll decide based on that. . . .

After a break in the proceedings, the court and defendant discussed defendant's choice as follows:

THE COURT: I've given you an opportunity to talk with your lawyer about how you wanted to proceed today in terms of a trial without a jury or a trial with a jury. Did you get enough time?

DEFENDANT: Yes.

THE COURT: And your decision in this regard is to do what, sir?

DEFENDANT: Bench trial.

THE COURT: Now, I know that you think that I have threatened you and I might have thought that it might have come across.

The other thing I was telling you is if you had wanted and I granted it, I would have had to secedule [sic] your trial in February. But I didn't intend to keep you locked up until then. And not meaning that you would get a bond, but that's when I'm setting trial dates.

So, has anybody forced you or threatened you to get you to give up your right to a trial by jury?

DEFENDANT: No.

THE COURT: This decision has been thoroughly discussed with your lawyer?

DEFENDANT: Yes.

THE COURT: Do you have any questions that you would like to ask?

DEFENDANT: No.

THE COURT: I'll find that the Waiver was freely and voluntarily made and I will see you all at 12:15.

In the presence of a deputy court clerk, defendant executed a waiver of trial by jury form, acknowledging, "I fully understand that I have a constitutional right to trial by jury," and

"voluntarily waive ansd [sic] relinquish my right to trial by jury and elect to be tried by a judge . . ."

"The adequacy of jury trial waiver is a mixed question of fact and law." *People v Cook*, ___ Mich App ___; ___ NW2d ___ (Docket No. 280600, issued August 27, 2009), slip op, p 2. In order for a waiver of the constitutional right to a jury trial to be valid, it must be both knowingly and voluntarily made. *Id*.; MCR 6.402(B); *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998). MCR 6.402(B) states:

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

"By complying with the requirements of MCR 6.402(B), a trial court ensures that a defendant's waiver is knowing and voluntary." *Cook, supra*, slip op, p 2.

In this case, the trial court twice noted defendant's right to a jury trial and ascertained that defendant understood that right by confirming that counsel had discussed it with him and that he did not have any questions regarding it. Defendant affirmatively chose a bench trial, and the court made sure that defendant was not forced or threatened in his decision. The court complied with MCR 6.402(B), and the record shows that the waiver was knowingly and voluntarily made. Cf. *People v Reddick*, 187 Mich App 547, 548-550; 468 NW2d 278 (1991).

Affirmed.

/s/ William B. Murphy
/s/ Kathleen Jansen
/s/ Brian K. Zahra