STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBERT LEWIS,

Defendant-Appellant.

UNPUBLISHED
August 30, 1996

No. 178717
LC No. 93-63385-FH

Before: Doctoroff, C.J., and Wahls and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v). He then pleaded guilty to being an habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant was sentenced to one to four years incarceration, to be served consecutively to the sentence defendant was serving for a prior conviction of delivery of a controlled substance, less than fifty grams, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). He appeals as of right. We affirm.

A previous panel of this Court granted defendant's motion to remand this case to the trial court and permitted defendant to file a motion to suppress, motion for a new trial, and a motion for a recalculation of defendant's sentence pursuant to *People v Young*, 206 Mich App 144; 521 NW2d 340 (1994). Following a hearing, the trial court determined that the search of defendant was neither consensual nor a valid search incident to arrest, and thus granted defendant's motion to suppress. The court further determined that the failure of defendant's trial counsel to pursue a motion to suppress constituted ineffective assistance of counsel.

Plaintiff filed a motion for reconsideration, and, at the hearing on the motion, the trial court stated that it based his earlier ruling on the mistaken assumption that drugs were not found on the premises. Because drugs were found on the premises, the trial court determined that the inevitable discovery doctrine applied in this case. The trial judge thus denied defendant's motions to suppress and for a new trial.

I

Defendant argues that it was error to deny his motion to suppress the evidence of the drugs discovered in his pants pocket and the lining of his hat pursuant to a warrantless search. We disagree. This Court will not reverse a trial court's denial of a motion to suppress unless it is clearly erroneous. *People v Chambers*, 195 Mich App 118, 121; 489 NW2d 168 (1991); *People v Burrell*, 417 Mich 439, 448; 339 NW2d 403 (1983). A decision is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Chambers*, *supra*.

We find no clear error in the denial of defendant's motion to suppress. When the police arrived to execute the search warrant, they discovered defendant and two other people on the porch. In order to ensure the officers' safety, defendant and his companions were properly frisked for weapons and handcuffed. *People v Jackson*, 180 Mich App 339, 344-345; 446 NW2d 891 (1989). The discovery of cocaine and drug paraphernalia on the premises, together with the knowledge that the house was being used as an illegal drug distribution site, and the fact that defendant stood up and "looked like he was going to run like the others," was sufficient to give the officers probable cause to arrest defendant for loitering in a place of illegal occupation or business, MCL 750.167(j); MSA 28.364(j). *People v Arterberry*, 431 Mich 381, 383, n 3; 429 NW2d 574 (1988). The facts that the police did not arrive at the house with the intent to arrest anyone for loitering, and that defendant was the only person who was arrested, do not change the conclusion that the search of defendant was a constitutionally valid search incident to arrest. *Id.*, 383-384.

Defendant contends that the search was invalid because, at the time he was searched, no other contraband had been discovered on the premises. However, defendant's argument ignores the well-established inevitable discovery rule, which allows the admission of otherwise tainted evidence which ultimately would have been obtained in a constitutionally accepted manner. *People v Kroll*, 179 Mich App 423, 429; 446 NW2d 317 (1989). The discovery of the cocaine and contraband, which in turn gave rise to probable cause to arrest defendant, was the inevitable result of the officers' execution of the search warrant. The fact that the cocaine may have been discovered on the premises after defendant was searched does not render the search invalid. *Id*. The trial court's denial of defendant's motion to suppress was not clearly erroneous.

II

Defendant contends that he was denied the effective assistance of counsel. Counsel is presumed to have provided effective assistance and the defendant bears a heavy burden to prove otherwise. *People v Wilson*, 180 Mich App 12, 17; 446 NW2d 571 (1989). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). We review trial counsel's performance de novo. *Id*.

Defendant argues that his trial counsel was ineffective because he withdrew the motion to suppress he filed on defendant's behalf. As we have determined above, the search of defendant was valid and the cocaine seized from defendant was properly admitted at trial. Defense counsel will not be deemed ineffective for failing to pursue a meritless claim. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986). Defendant was not denied the effective assistance of counsel.

III

Defendant next challenges the trial court's decision to permit plaintiff to present certain testimony on rebuttal. The rebuttal testimony in question regarded cocaine and drug paraphernalia discovered on the premises and the common use of pagers in the illegal drug trade. Rebuttal evidence may be used to contradict, repel, explain, or disprove evidence presented by the other party in an attempt to weaken and impeach it. *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985); *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991). We will not disturb a trial court's decision to admit evidence on rebuttal absent an abuse of discretion. *People v Bettistea*, 173 Mich App 106, 126; 434 NW2d 138 (1988).

Defendant's theory was that the police officers planted the cocaine on him. In furtherance of this theory, defendant testified that he had no cocaine in his pocket, that the pager did not belong to him, and that the police tried to take his picture next to cocaine and drug paraphernalia found on the premises. During his cross-examination of the police officer, defendant also elicited testimony that other drugs were discovered on the premises. The trial court properly permitted plaintiff to present rebuttal evidence regarding the items seized during the search warrant, as defendant himself opened the area of inquiry. *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991).

Regarding the testimony that pagers are commonly used by drug dealers, we note that the trial court had previously ruled that plaintiff could not present this evidence in its case-in-chief, as its probative value was outweighed by its prejudicial effect. However, upon hearing defendant's testimony and cross-examination of plaintiff's rebuttal witnesses, which suggested that the cocaine was planted on defendant, the trial court determined that the police should have the opportunity "to defend themselves." We agree with the trial court's determination. Having opened the door to the question of whether he knowingly possessed the cocaine recovered from his pocket, defendant cannot now be heard to complain when plaintiff was allowed to present a fuller picture of the events. *People v Lipps*, 167 Mich App 99, 108; 421 NW2d 586 (1988).

We further reject defendant's claim that the police officer's testimony should have been excluded pursuant to MRE 401 and 403, as it was relevant to the issue of whether defendant "knowingly" possessed cocaine. Furthermore, the jury was repeatedly admonished and cautioned regarding the proper use of this testimony. Accordingly, the trial court's admission of this evidence did not constitute an abuse of discretion. *Bettistea, supra*, 126.

IV

Defendant argues that, in calculating his sentence, the Department of Corrections erred in retroactively applying this Court's decision in *People v Young*, 206 Mich App 144; 521 NW2d 340 (1994). However, at the hearing on defendant's motion for clarification of sentence, defendant chose not to present any evidence in support of this claim. By electing not to pursue a challenge to the propriety of his sentence, defendant has abandoned this issue. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). "The purpose of appellate preservation requirements is to induce litigants to do everything they can in the trial court to prevent error, eliminate its prejudice, or at least create a record of the error and its prejudice." *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Myron H. Wahls
/s/ Michael R. Smolenski