

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNEST J. MOORE,

Defendant-Appellant.

UNPUBLISHED

February 28, 1997

No. 186058

Recorder's Court

LC No. 94-007653

Before: Corrigan, C.J., and Doctoroff and R.R. Lamb,* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of receiving and concealing stolen property over \$100, MCL 750.535; MSA 28.803, and failure to stop on the direction of a police officer, MCL 257.602a; MSA 9.2302(1). Defendant was charged as a fourth habitual offender, MCL 769.12; MSA 28.1084, and did not challenge the existence of his prior convictions for purposes of sentence enhancement pursuant to MCL 769.13; MSA 28.1085. For the conviction of receiving and concealing stolen property over \$100, defendant was sentenced to forty to sixty months' imprisonment, but this sentence was vacated. Defendant was sentenced to one year imprisonment for the conviction of failure to stop at the direction of a police officer. Defendant was then sentenced to an enhanced term of five to ten years as a fourth habitual offender. We affirm.

Defendant first argues that he was denied the effective assistance of counsel because his counsel revealed that he was on parole for larceny and that defendant had received traffic tickets. We disagree. Defendant failed to move for a new trial, nor did he request a *Ginther*¹ hearing. Therefore, this Court's review is limited to the extent that counsel's claimed mistakes are apparent on the record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

Effective assistance of counsel is presumed. A defendant bears the burden of proving that counsel's assistance was ineffective. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish that the right to effective assistance of counsel was so undermined that it justifies reversal of an

* Circuit judge, sitting on the Court of Appeals by assignment.

otherwise valid conviction, a defendant must show: (1) that counsel's performance was deficient, falling below an objective standard of reasonableness, and (2) that the representation so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *Nantelle, supra*. The defendant must show that he was deprived of a fair trial with a reliable result and must also show a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *People v Johnnie Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Furthermore, defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). This Court must be highly deferential in scrutinizing counsel's performance. *Strickland, supra*.

We hold that defendant has failed to overcome the presumption that defense counsel's questions to defendant regarding his parole status could be considered sound trial strategy. *Tommolino, supra*. A review of the record demonstrates that defense counsel's strategy was to show: (1) that defendant had been robbed, (2) that the person who robbed defendant was the person who stole the Jeep, (3) that defendant informed numerous people that he had been robbed to substantiate his story, including his fiancée, boss, and parole officer, and (4) that he continued to work and report to his parole officer after the incident because he was not the person who stole the Jeep. Defense counsel did not belabor the fact that defendant had been convicted of a prior larceny; rather, he used the conviction for the purpose of demonstrating that defendant was on parole at the time of incident and had reported the robbery to his parole officer, thereby supporting defendant's theory of the case. On this basis, we conclude that defendant was not denied the effective assistance of counsel.

Defendant further argues that counsel was ineffective because he improperly discussed the evidence of traffic tickets being issued to defendant and should have moved to suppress this evidence. We disagree. A review of the record illustrates that the evidence of traffic tickets was introduced to demonstrate that various pieces of identification were found in a black purse which defendant had dropped. The traffic tickets found in the purse carried by defendant bore defendant's name, address, and other personal information. Defense counsel appeared to be attempting to discredit the police officer's testimony by demonstrating that, in his preliminary complaint report, the officer failed to note the existence of the tickets in the purse. Based upon the record, we conclude that defendant has again failed to overcome the presumption that his counsel was using sound trial strategy. *Tommolino, supra*.

Defendant next argues that the trial court abused its discretion in failing to grant defense counsel a continuance to procure a missing witness, defendant's supervisor at Subway. We disagree. We review a denial of a continuance for an abuse of discretion. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification for the ruling made. *Watkins, supra*. In reviewing a trial court's decision whether to grant a continuance, some factors to be considered are whether defendant: (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments. Defendant must also demonstrate prejudice. *Lawton, supra*.

In the instant case, defendant asserted his right to call witnesses. Further, defense counsel was not negligent in procuring the supervisor, as the witness had been present in court the previous day. However, because the supervisor was an active businessman, he was unable to testify in court at the necessary time. Defense counsel had requested a previous adjournment, which was granted when the trial court allowed the prosecutor to present his rebuttal witnesses before the supervisor's testimony. Following this 90 minute process, the trial court granted an additional ten minute continuance to the defense in case the supervisor arrived.

Defense counsel made an offer of proof to the trial court as to the substance of the supervisor's testimony. The trial court reasoned that the supervisor's testimony would be cumulative and of questionable probative value. In addition, the trial court allowed 90 minutes for the witness to arrive, and waited 10 further minutes before ruling that trial would continue in the supervisor's absence. On these facts, we find no abuse of discretion. *Lawton, supra*.

In addition, we conclude that defendant has failed to demonstrate prejudice. *Lawton, supra*. The trial court found the supervisor's testimony would be cumulative to testimony already introduced into evidence. Defendant himself testified that the day of the incident was a pay day, that, following the incident, he told his supervisor that he had been robbed, and that his supervisor lent him money to get back and forth from his two jobs. Further, defendant testified that his supervisor had occasionally given him a ride. Since the testimony which defense counsel sought to elicit from the supervisor had already been admitted into evidence through defendant's testimony, we hold that the trial court did not abuse its discretion in denying defendant's request for a continuance to procure the supervisor's presence. We further find that defendant was not prejudiced by the failure of the supervisor to testify.

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ Richard R. Lamb

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).