

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BOBBY RAY EARLEY,

Defendant-Appellant.

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UNPUBLISHED

May 16, 1997

No. 180640

Macomb Circuit Court

LC No. 94000126 FH

Before: Marilyn Kelly, P.J., and Jansen and M. Warshawsky,\* JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial conviction for prisoner in possession of contraband and his bench trial conviction for habitual offender, third offense. MCL 800.281(4); MSA 28.1621(4), MCL 769.11; MSA 28.1083. The trial judge sentenced him to a minimum term of imprisonment of six years, eight months and to a maximum term of ten years.

On appeal, defendant argues that the judge admitted improper prejudicial evidence at trial and improperly instructed the jury. He asserts that he is entitled to resentencing, because the judge failed to give defense counsel an opportunity to speak on his behalf when the sentence was announced. Finally, he claims that his sentence is disproportionate. We affirm.

I

Defendant argues that the trial court abused its discretion by admitting evidence relating to defendant trafficking in marijuana. He asserts that trafficking is not an element of the crime charged, and the evidence was highly prejudicial. Defendant failed to preserve the issue for review by not objecting to admission of the evidence at trial. See *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). Because we do not find manifest injustice, we decline to address the issue. See *Id.*

We note, in addition, that defendant's trial attorney was not constitutionally ineffective for making no objection to the evidence. The prosecution was required to prove defendant's knowledge.

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

The evidence helped establish that defendant knew the drugs were in his locker. It showed that he had a destination and purpose for the contraband. See *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

## II

Defendant next argues that the jury instructions did not adequately protect his rights. Defendant failed to preserve the issue for review by not objecting to the instructions given to the jury at trial. *People v Johnson*, 215 Mich App 658, 672; 547 NW2d 65 (1996). Because we find no error in the instructions, we decline to address the issue. We note that defendant's trial attorney was not constitutionally ineffective for not objecting to the instructions. See *Barclay, supra*.

## III

Next, defendant argues that his trial attorney was constitutionally ineffective for failing to comment on the presentence investigation report or to make a statement on defendant's behalf at sentencing. We disagree.

Review of this issue is limited to the record. *Barclay, supra*. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness. Counsel's representation must have prejudiced the defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

We find that defendant has failed to establish that his trial attorney was constitutionally ineffective for failing to comment on the PSIR or to make a statement on defendant's behalf. Defendant has not informed us what objection his attorney should have made. Consequently, he has failed to carry his burden of showing how he was prejudiced or how his attorney's representation was objectively unreasonable. See *Barclay, supra*. Furthermore, the decision to address the court at sentencing is a tactical one. A difference of opinion as to trial tactics does not amount to ineffective assistance of counsel. *People v Arney*, 138 Mich App 764, 766; 360 NW2d 291 (1984).

## IV

Defendant's final argument is that his sentence violates the concept of proportionality. We do not review habitual offender sentences using the sentencing guidelines. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Review of an habitual offender sentence is limited to whether the sentence violates the principles of proportionality. *Id.* We determine whether the sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

In this case, we find that the trial court did not abuse its discretion in sentencing defendant. The seriousness of the circumstances surrounding the offense and defendant's criminal record justified the sentence. Before his current offense, defendant had been convicted of ten felonies and two misdemeanors. His most recent conviction was for escape from prison. Because the underlying offense on his current conviction was perpetrated in prison, it is evident that defendant has gained no new

resolve to abide by the law. Consequently, we find that his sentence does not violate the principle of proportionality.

Affirmed.

/s/ Marilyn Kelly

/s/ Kathleen Jansen

/s/ Meyer Warshawsky