

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH FREMONT CASADAY,

Defendant-Appellant.

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UNPUBLISHED

June 27, 1997

No. 175764

Ingham Circuit Court

LC No. 94-066989 FH

Before: Reilly, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for resisting and obstructing a police officer in violation of MCL 750.479; MSA 28.747. He was sentenced as an habitual offender third offense, MCL 769.12; MSA 28.1084, to two to four years in prison. We affirm but remand to correct the judgment of sentence to reflect defendant's conviction of habitual offender third offense.

Defendant first argues that the trial court abused its discretion in sentencing him to four times the sentencing guidelines minimum sentence. We disagree. As an habitual offender, the sentencing guidelines do not apply to defendant. *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). Our review of his sentence is limited to considering whether it violates the principle of proportionality. *Id.* In determining whether a defendant's sentence violates the principle of proportionality, we review the sentence for an abuse of discretion in light of the defendant's prior record and the offense for which he was convicted. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

After a review of the record, we are of the opinion that defendant's criminal history, the fact that he was on parole when he committed the instant offense, as well as his behavior in and the circumstances surrounding the instant offense indicate an unwillingness to obey the law or respect its enforcement. Defendant's sentence is proportionate.

Defendant next argues that he was denied the effective assistance of counsel at trial. In order to prevail on this claim, defendant must prove both incompetence and prejudice based on

the factors enunciated in *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052, 2066; 80 L Ed 2d 674 reh den 467 US 1267; 104 S Ct 3562; 82 L Ed 2d 864 (1984). *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). To overcome the presumption of effective assistance, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, in the absence of counsel's error, the outcome would have been different. *Id.* at 309, 314. Defendant alleges that there were three instances of incompetence on the part of defense counsel that denied him a fair trial.

First, defendant argues that his attorney failed to subpoena and call witnesses who would have testified that he was sitting on his bed peaceably when officers attempted to arrest him. Defendant argues that this error was so egregious that it cannot be excused as trial strategy. The failure to call witnesses at trial results in ineffective assistance of counsel if the failure deprived the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995) vacated in part on other grounds 453 Mich 900 (1996). Put another way, a defendant experiences prejudice requiring reversal if the calling of the witnesses would have made a difference in the outcome of the trial. *Id.*, 710-711. The record indicates that the only persons in defendant's apartment other than himself were Patricia Simpson and the arresting officers. Defendant has provided no other names, descriptions or evidence of the existence of the witnesses; only that these witnesses saw him acting peaceably. Therefore, we find that defendant has failed to make a showing that he was denied effective assistance by counsel's failure to call the alleged witnesses.

Defendant next alleges that his counsel was ineffective for failing to cross-examine the complaining witness about her schizophrenia. However, she recanted her preliminary examination testimony in which she had incriminated defendant. Moreover, during direct examination, she made several references to her emotional problems, saying she "had been in treatment" and had "a relapse." By continually making reference to her emotional problems, she undercut her own testimony. An extensive cross-examination would not have uncovered anything the jury did not already know. Since she was a witness favorable to defendant, an aggressive cross-examination by counsel could have hurt his case. We are persuaded that the decision whether to cross-examine the complainant was a matter of trial strategy and we are loath to substitute our judgment for that of defense counsel at trial. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990)

Finally, defendant argues that defense counsel's failure to move for a directed verdict was prejudicial. He argues that such motions are routine, and that had the motion been made, he would have likely been acquitted of the resisting and obstructing charge. The evidence in this matter established all the elements of the crime charged. See *People v Julkowski*, 124 Mich App 379, 383; 335 NW2d 47 (1983). Defendant admitted to knowing that the persons attempting to apprehend him were police officers. The officers testified that defendant was informed that he was under arrest. Further, the testimony at trial established that as the officers attempted to arrest him, he struggled, resisted, and shouted profanities at them. At one point, defendant bit one of the officers. Viewing these facts in a light most favorable to the prosecution, any motion for a directed verdict would have been futile. Therefore, defendant has failed to show that there is a reasonable probability that the outcome of the

trial would have been different had counsel moved for a directed verdict. As a result, defendant was not denied effective assistance of counsel.

The record reflects that following the jury trial conviction, defendant pled guilty to habitual offender third offense. However, the judgment of sentence fails to reflect this conviction. Accordingly, we affirm the conviction and sentence, but remand to correct the judgment of sentence.

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Maureen Pulte Reilly

/s/ Harold Hood

/s/ William B. Murphy