

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY EZELL WILLIAMSON,

Defendant-Appellant.

UNPUBLISHED

June 12, 1998

No. 188810

Recorder's Court

LC No. 94-012006-FH

Before: Hood, P.J., and Markman and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of attempted felonious assault, MCL 750.82; MSA 28.277; MCL 750.92; MSA 28.287, and his sentence of one to two years' imprisonment, which is to run consecutively to a prior sentence that defendant was serving at the time of this sentencing hearing. Defendant's conviction was the result of a guilty plea entered pursuant to an agreement that contained a charge reduction as well as the dismissal of an habitual offender information. We affirm.

In October 1994, defendant and co-defendant were in the custody of the Michigan Department of Corrections, living in a half-way house and working pursuant to a work-release program. On October 12, 1994, defendant and co-defendant attempted to get a third employee to fight with them. When the employee asked them to leave him alone, defendant picked up a chisel and handed it to co-defendant. Co-defendant then stabbed the employee in the right temple. Defendant grabbed the employee from behind and held him until several other people separated them. Defendant and co-defendant were found in the restroom after the assault, washing blood from their hands.

First, defendant argues that because the court did not comply with all the requirements of MCR 6.302, which governs the entry of guilty pleas, his plea was not voluntary. However, defendant's challenge to the validity of his plea was not properly preserved for appeal because he did not move to withdraw the plea in the trial court. MCR 6.311(C) and (D). Moreover, a de novo review of the record confirms that the trial court complied in form and substance with MCR 6.302. *People v Pena*, 224 Mich App 650, 657; 569 NW2d 871 (1997). Therefore, defendant's argument is without merit.

Next, defendant contends that his sentence violates the principle of proportionality and that the trial court failed to individualize his sentence because the court, at the time of sentencing, made reference to the criminal background of his co-defendant, an individual who defendant alleges to be a more hardened criminal. The policy of this state favors individualized sentencing of every defendant. *People v Adams*, 430 Mich 679, 686; 425 NW2d 437 (1988). Provided that permissible factors are considered, appellate review is limited to whether the sentencing court abused its discretion. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *Id.* at 635-36.

Here, we do not find that the trial court failed to individualize defendant's sentence. Defendant and his co-defendant, while participating in a work-release program through the Department of Corrections, acted together to bring about an injury to the complainant. In making reference to the co-defendant during defendant's sentencing, the court was simply describing the crime. *People v Hunter*, 176 Mich App 319, 321; 439 NW2d 334 (1989). Nor do we find defendant's sentence to be disproportionate. The recommended guidelines range for defendant's conviction was nine to sixteen months. Defendant was sentenced to one to two years' imprisonment. This sentence is presumed to be proportionate because it is within the recommended guidelines range. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has failed to present any unusual circumstances here that would overcome the presumption of proportionality. *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995).

Next, defendant claims that the district court judge presiding over the preliminary examination and the Recorder's Court judge entertaining his plea and sentencing were biased against him. Defendant did not object on this issue at the trial court level, *Meagher v Wayne State University*, 222 Mich App 700, 726; 565 NW2d 401 (1997), or move for disqualification, thereby failing to preserve his claims of judicial bias for appeal. *People v Ensign (On Rehearing)*, 112 Mich App 286; 315 NW2d 570 (1982). Since defendant has not demonstrated any prejudice or unusual circumstances that would mandate review by this Court, we decline to review this issue. *Peterman v Dept of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994).

Finally, defendant argues that he was denied the effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must also be prejudicial to the defendant. *Id.* Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant first contends that he was denied the effective assistance of counsel when his trial counsel failed to file a motion to quash on the grounds that there was insufficient evidence to bind him over on the original charge. After pleading guilty, a defendant may raise on appeal only those defenses and rights which would preclude the state from obtaining a valid conviction against the defendant. *People v New*, 427 Mich 482, 491; 398 NW2d 358 (1986). In contrast, where the defense or right

asserted by a defendant relates solely to the capacity of the state to prove defendant's factual guilt, it is subsumed by the defendant's guilty plea, *id*, and the ineffective assistance claim relating to those actions is also waived. *People v Vonins*, 203 Mich App 173, 176; 511 NW2d 706 (1994). A claim that a conviction ought to be reversed because there was insufficient evidence of the crime to bind over relates solely to the state's capacity to prove defendant's guilt; therefore, this claim and the related ineffective assistance claim are waived by defendant's guilty plea. *Id*.

Next, defendant argues that his attorney's failure to file a motion to disqualify the lower court judges denied him effective assistance of counsel. Where there appears to be no grounds for filing such a motion, trial counsel did not err in failing to bring such a motion. Trial counsel is not required to raise a meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Therefore, there is no merit to this argument.

Defendant also contends that trial counsel coerced him into accepting the plea agreement by "threatening" him that he would receive thirteen to twenty years should he go to trial and not prevail. At the time of the plea, defendant specifically testified that no threats were made. Thus, this claim of error is unsupported by the existing record. In addition, advising defendant in this regard would seem to be required of defense counsel so that defendant could intelligently weigh his options. See, e.g., *People v Haynes (After Remand)*, 221 Mich App 551, 558; 562 NW2d 241 (1997); *People v Swirles (After Remand)*, 218 Mich App 133, 138; 554 NW2d 25 (1996).

Lastly, defendant contends that his attorney was ineffective because he failed to file a motion to correct the presentence investigation report. However, defendant indicated to the trial court at sentencing that he had reviewed the PSIR with his attorney and he was satisfied that the report was accurate. Defendant has presented nothing on appeal to confirm its inaccuracy. Even assuming that the report was inaccurate as described by defendant, he has not presented any evidence or argument as to how the inaccuracy may have prejudiced him. *Daniel, supra* at 58. Defendant therefore has failed to overcome the presumption that he received the effective assistance of counsel.

Affirmed.

/s/ Harold Hood

/s/ Stephen J. Markman

/s/ Michael J. Talbot