

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK DARNELL BOOKER,

Defendant-Appellant.

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UNPUBLISHED

April 20, 1999

No. 206444

Ingham Circuit Court

LC No. 96-071314 FH

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of second-degree home invasion, MCL 750.110a(3); MSA 28.305(a)(3). Defendant was sentenced as an habitual offender third offense, MCL 769.11; MSA 28.1083, to five to twenty years' imprisonment. We affirm.

Defendant argues that the trial court abused its discretion in denying his motion for new trial based on a claim of ineffective assistance of counsel. At the *Ginther*<sup>1</sup> hearing, defendant argued that his attorney unreasonably refused to impeach prosecution witness Victor Mildton with evidence that Mildton was on parole at the time the crime was committed. We disagree.

We review a trial court's decision regarding a motion for new trial for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993); *People v Leonard*, 224 Mich App 569, 578, 580; 569 NW2d 663 (1997). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Torres (On Remand)*, 222 Mich 411, 415; 564 NW2d 149 (1997).

When reviewing an ineffective assistance of counsel claim, an appellate court must determine whether defendant has shown that counsel's performance fell below an objective standard of reasonableness, and whether the representation so prejudiced defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To satisfy this test, the defendant must show that counsel made errors so serious that he or she was not functioning as the counsel guaranteed by the Sixth Amendment. *People v Mitchell*, 454 Mich 145, 164-165; 560 NW2d 600 (1997). In addition, defendant must show that but for counsel's deficient representation,

there is a reasonable probability that the outcome would have been different. *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998).

Defense counsel's performance must be measured against an objective standard of reasonableness. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Effective assistance of counsel is presumed, and defendant has the burden of proving otherwise. *Eloby, supra* at 476. Decisions regarding what evidence to present and whether to call or question witnesses are generally presumed to be matters of trial strategy. *Mitchell, supra* at 163. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

In this case, we find that counsel's decision not to impeach Mildton with his parole status at trial was objectively reasonable. First, the record shows that, except for Mildton's testimony that defendant was with him on the day of the break-in, Mildton provided testimony favorable to defendant by testifying that defendant left the area first and that he did not see defendant carrying anything away. Mildton also testified that he never saw defendant with a tire iron and that defendant had never before asked Mildton to participate in any crime. Mildton further testified that when he left his car for a short time, the trunk in which the tire iron was located was locked. Given this testimony, we find that the trial court properly concluded that there was no reason for defense counsel to impeach a witness that had provided favorable testimony for his client.

Second, the record establishes that Mildton was on parole for his involvement in the commission of a drug offense. At trial, Mildton testified that he used to associate with defendant and that he had known him for several years. Defense counsel properly reasoned that impeaching Mildton with his parole status might cause the jury to look unfavorably on defendant for associating with an individual with a criminal history. Accordingly, counsel's decision not to introduce evidence of his parole status was sound trial strategy. *Pickens, supra* at 338.

Lastly, impeaching Mildton with his parole status would not have strengthened defendant's theory that Mildton falsely identified defendant as the offender in order to shift suspicion away from himself, and possibly an associate, as the perpetrator. Defendant posited that Mildton's motive for naming defendant as the offender was to avoid being the subject of further police inquiry, and to protect himself from potentially damaging testimony by an alleged accomplice who may have implicated Mildton in the offense. We agree with the trial court that defendant's theory is based entirely on speculation without any factual support. Moreover, attacking Mildton's credibility with his parole status would have done nothing to explain why Mildton testified to defendant's presence in the first place. On this record, we find that defendant has failed to overcome the presumption that defense counsel's representation was sound trial

strategy, and has failed to show that counsel's performance fell below an objective standard of reasonableness. *Pickens, supra* at 338.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ Mark J. Cavanagh  
/s/ Brian K. Zahra

<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 822 (1973).