STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 9, 2000
v	No. 216241 Menominee Circuit Court
GARY EUGENE NICOLL, Defendant-Appellant.	LC No. 98-002378-FH

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of fourth-degree fleeing and eluding, MCL 750.479a(2); MSA 28.747(1)(2), and was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084,[1] to a term of three to eight years' imprisonment. He appeals as of right. We affirm defendant's conviction and remand for correction of the presentence investigation report and judgment of sentence.

First, defendant argues that the court infringed on his due process right to present a defense when it refused to grant him a continuance to secure the presence of an alibi witness. We review a trial court's decision to grant or deny a continuance for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999); *People v Peña*, 224 Mich App 650, 660; 569 NW2d 871 (1997), modified on other grounds 457 Mich 885 (1998). An abuse of discretion occurs when the result 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. *Echavarria*, *supra* at 368; *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

Before trial, defendant filed a notice of intent to present an alibi defense, naming two witnesses whom he proposed to present to establish his alibi defense. The first witness did not testify regarding defendant's whereabouts at the time of the alleged incident. Defendant's second alibi witness, Stacy Vitkovic, attended the morning of the first day of trial, but left the courthouse during that day without being released from her subpoena and left behind the message that she did not intend to return to the trial. Defense counsel sought a continuance to compel her presence. The trial court released the jury,

giving defendant until the following morning to obtain his witness. The next morning, Vitkovic did not return to court and defendant again requested a continuance but the trial court denied his motion.

Defendant had a right to call witnesses in his defense, and had a constitutional right to compulsory process to obtain witnesses in his favor. US Const, Am VI; Const 1963, art 1, § 20; *People v Pullins*, 145 Mich App 414, 417-418; 378 NW2d 502 (1985). However, MCL 768.2; MSA 28.1025 provides:

> No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown in the manner provided by law for adjournments, continuances and delays in the trial of civil causes in courts of record: Provided, That no court shall adjourn, continue or delay the trial of any criminal cause by the consent of the prosecution and accused unless in his discretion it shall clearly appear by a sufficient showing to said court to be entered upon the record, that the reasons for such consent are founded upon strict necessity and that the trial of said cause cannot be then had without a manifest injustice being done.

In reviewing a trial court's denial of a continuance for an abuse of discretion, we consider several factors, including whether the defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) was negligent, (4) had requested previous adjournments, and (5) demonstrated prejudice. *Echavarria*, *supra* at 369; *Peña*, *supra* at 661; *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

Accepting that defendant asserted a constitutional right and had a legitimate reason for making that assertion, defendant failed to use available process for obtaining the presence of his witness at trial. Before trial, he subpoenaed Vitkovic in Wisconsin with a Michigan subpoena. A Michigan subpoena has no force in any jurisdiction beyond Michigan's border. *People v Nieto*, 33 Mich App 535, 538 n 7; 190 NW2d 579 (1971). However, under MCL 767.91 *et seq.*; MSA 28.1023(191) *et seq*., a Michigan court may issue a certificate stating the facts and anticipated number of days of litigation, and may also recommend that the witness be taken into custody and delivered to the Michigan court. MCL 767.939(1); MSA 28.1023(193)(1). A similar statute permits a court in Wisconsin to review the certificate to determine that the witness is material and necessary, and that the witness will not face undue hardship. The Wisconsin court may then issue a summons directing the witness to attend the trial, or may take the witness into custody and deliver her to an officer of the requesting state. Wis Stat 976.02(2)(a)-(c). Defendant was negligent in failing to make use of this compulsory process. *Echavarria*, *supra* at 369.

Defendant also requested previous adjournments, including one that the court denied before trial and the one that the court granted near the end of the first day of trial. *Id*. More significant, defendant never demonstrated prejudice from the absence of Vitkovic. In the abstract, anyone who alleges that he was unable to present his only alibi witness has a claim of prejudice. However, defendant has not demonstrated any actual, specific prejudice from Vitkovic's departure from court. *People v Snider*, ___ Mich App ___; ___ NW2d ___ (Docket No. 203328, issued 1/14/2000), slip op, 13; *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995). Defendant has also not addressed the

implication inherent in Vitkivic's sudden departure and her comment to the court clerk that she could not or would not testify as he wished. Considering defendant's failure to obtain the presence of his witness, his failure to demonstrate particularized harm from her absence, and the uncertainty regarding the delay necessary to obtain her cooperation, along with the inconvenience of his request, we conclude that the trial court did not abuse its discretion when it denied his motion for a continuance. *Echavarria*, *supra* at 368; *Peña*, *supra* at 660.

Next, defendant argues that he was denied the effective assistance of counsel by his attorney's failure to invoke the spousal privilege at the preliminary examination. US Const, Am VI; Const 1963, art 1, § 20. Because defendant raises this issue for the first time on appeal, we are limited to reviewing the alleged deficiency on the existing record. *People v Hoag*, 460 Mich 1, 6-7; 594 NW2d 57 (1999). To establish his claim of ineffective assistance of counsel, defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the result of the proceeding was fundamentally unfair or unreliable. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996). Additionally, defendant must overcome the presumption that the challenged action was part of the trial strategy. *Hoag*, *supra* at 6.

At the preliminary examination, defendant faced bindover on two counts of fleeing and eluding arising out of incidents on June 8 and June 11, 1998. The testimony of defendant's wife, Tracy Parrish Nicoll, supported the district court's finding that insufficient evidence supported the charge arising out of the June 8 incident. Tracy's testimony regarding the June 11 incident was substantially exculpatory, tending to imply that defendant could not have been the driver of the car on that night because he called her when he was unable to find the car or its keys. At trial, defendant invoked the marital privilege, MCL 600.2162; MSA 27A.2162, with the knowledge that the prosecution intended to seek admission of her preliminary examination testimony as former testimony by an unavailable witness under MRE 804(a)(1) and (b)(1). As we held in *People v Whalen*, 129 Mich App 732, 737; 342 NW2d 917 (1983), the testimony of a spouse, given at a preliminary examination where the defendant did not assert the marital privilege, is admissible at trial even if the defendant asserts the marital privilege. *Id*.

The record suggests that defense counsel expected that Tracy's testimony would support defendant's position that he was not the driver of the car that fled from the police on June 11, 1998. To the extent that her testimony may have prejudiced defendant, that prejudice flowed from her lack of credibility rather than any damaging assertion of fact. Defendant also benefited from her testimony to the extent that it helped him avoid being bound over on the fleeing and eluding charge arising out of the June 8 incident. In light of the expected and realized benefits, defense counsel's decision to permit her testimony at the preliminary examination was not objectively unreasonable.

Furthermore, defendant has not demonstrated any likelihood that but for the admission of Tracy's testimony he would have been acquitted. *Hoag, supra* at 6; *Stanaway, supra* at 687-688. Menominee police officer Eric Burmeister testified extensively regarding his pursuit of defendant on June 11, 1998, and affirmatively identified him to the dispatcher that night as the driver of defendant's wife's car. The chase ended in a collision of the vehicle into a garage within a few blocks of defendant's

residence. Shortly after the crash, Tracy, who appeared distraught, asked investigating officers if they had found "Gary" or "him" yet. This nontestimonial statement was admitted by the trial court as not within the spousal privilege and certainly prejudiced defendant. Thus, defendant has failed to surmount the presumption that he received the effective assistance of counsel. *Stanaway, supra* at 687-688.

Defendant argues that we must remand for correction of his presentence investigation report (PSIR). We agree. Defendant challenged the accuracy of one Illinois fleeing and eluding misdemeanor conviction from 1985 reported in his PSIR, claiming that he had never been convicted of fleeing and eluding before the instant offense. The trial court agreed not to consider the challenged information in sentencing defendant, although it declined to strike the information from the PSIR. MCR 6.425(D)(3) provides:

> If any information in the presentence report is challenged, the court must make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing. If the court finds merit in the challenge *or determines that it will not take the challenged information into account in sentencing*, it must direct the probation officer to
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> (a) correct or delete the challenged information in the report, whichever is appropriate, and
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> (b) provide defendant's lawyer with an opportunity to review the corrected report before it is sent to the Department of Corrections. [Emphasis added.]

Thus, if a sentencing court disregards the challenged information as inaccurate, the court effectively determines that the information is irrelevant and the defendant is entitled to have the information stricken from the report. See *People v Carino*, 456 Mich 865; 568 NW2d 683 (1997); *People v Grove*, 455 Mich 439, 452, 477; 566 NW2d 547 (1997); *People v Sharp*, 192 Mich App 501, 508; 481 NW2d 773 (1992).

Because it is clear that the challenged conviction did not enter into the sentencing decision, on remand the trial court need only strike the disputed matter from the presentence report and forward a corrected PSIR to the Department of Corrections. *People v Landis*, 197 Mich App 217, 219; 494 NW2d 865 (1992); *People v Thompson*, 189 Mich App 85, 88; 472 NW2d 11 (1991).

The length of defendant's sentence indicates that he was sentenced under MCL 769.12; MSA 28.1084, and not under MCL 769.11; MSA 28.1083, as indicated on his judgment of sentence. Defendant was convicted under MCL 750.479a(2); MSA 28.747(1)(2), which prior to October 1, 1999, provided in relevant part:

> Except as provided in subsection (3), (4), or (5), an individual who violates subsection (1) is guilty of fourth-degree fleeing and eluding, a felony punishable by imprisonment for not more than 2 years or a fine of not more than $500.00, or both.

The enhancement statute cited by the sentencing court in defendant's judgment of conviction, MCL 769.11; MSA 28.1083, provided for a doubling of the statutory maximum for a defendant found to have committed two or more previous felonies. Defendant's eight-year maximum sentence exceeds the maximum authorized by MCL 769.11; MSA 28.1083 for his offense. However, defendant received a notice of enhancement under MCL 769.12; MSA 28.1084, which provides for a maximum term of fifteen years for a felony of this class by a felon with three or more prior felonies. At sentencing, the trial court found three prior felonies available for enhancement purposes and sentenced defendant accordingly. Thus, we also remand for the ministerial task of correcting defendant's judgment of sentence to indicate that defendant was sentenced as an habitual offender pursuant to MCL 769.12; MSA 28.1083. *People v Avant*, 235 Mich App 499, 521-522; 597 NW2d 864 (1999); *People v Maxson*, 163 Mich App 467, 470-471; 415 NW2d 247 (1987).

Affirmed and remanded for correction of the PSIR and judgment of sentence. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[1] The judgment of sentence indicates that defendant was sentenced pursuant to MCL 769.11; MSA 28.10843 However, for reasons discussed later in this opinion, the citation is erroneous. Defendant was actually sentenced pursuant to MCL 769.12; MSA 28.1084.