

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MOHAMED ABRAHAM ALRFIFEH,

Defendant-Appellant.

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UNPUBLISHED

August 4, 2000

No. 213262

Recorder's Court

LC No. 97-007470

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of violating the Michigan Tobacco Tax Act, MCL 205.428(2); MSA 7.411(38)(2), and was sentenced to two to five years' imprisonment. Defendant appeals as of right, and we affirm.

On May 21, 1997, Sergeant John Moore of the Michigan State Police was working with the unit enforcing the tobacco tax act. He had been observing a residence located at 6503 Rutherford in Detroit. Sergeant Moore was in his vehicle following a suspect who had previously been arrested for violations of the tax act. The man drove by 6503 Rutherford. Sergeant Moore looked at the residence and saw defendant standing with the garage door open. There were boxes of cigarettes stacked on top of each other in the garage. Sergeant Moore spoke to defendant who denied that there were cigarettes in the garage. While they were speaking, Ahmad Mohammad arrived at the home. When Moore saw Mohammad and another man behind the garage, he went to see what they were doing. Mohammad said that he neither lived at nor owned the premises and left the scene. Defendant later gave his consent to search the location and 2,013 cartons of cigarettes were found in the house and garage. Although Mohammad had denied ownership of the home, police learned that he did, in fact, own the residence. Defendant and Mohammad were both charged with violating the tobacco tax act. Prior to the commencement of trial, defendant and Mohammad acknowledged that they were represented by the same attorney, but asserted that a conflict of interest was not presented because of the different theories. Specifically, Mohammad alleged that he leased the premises to a tenant and another man. These men brought the cigarettes to the home without Mohammad's knowledge or permission. Defendant alleged that he did not constructively possess the cigarettes as he was only at the premises to visit. Defendant expressly acknowledged that any issue regarding the joint representation was waived.

on appeal. At trial, Mohammad testified on his own behalf, blamed his tenant for the cigarettes, and denied any responsibility. Defendant did not testify. The jury acquitted Mohammad of the charge. Defendant was convicted and sentenced to two to five years' imprisonment.

Defendant first argues that he was denied effective assistance of counsel based upon the joint representation that created a conflict of interest. We disagree. Representation of multiple codefendants by one attorney can present a conflict of interest that deprives them of effective assistance of counsel. *People v Lafay*, 182 Mich App 528, 530; 452 NW2d 852 (1990). The conflict is not presumed or implied. *Id.* The defendant bears the burden of establishing ineffective assistance of counsel by showing that an actual conflict of interest existed and adversely affected the adequacy of his representation. *Id.* In the present case, defendant failed to meet this burden. Mohammad did not implicate defendant in his testimony. Rather, he placed blame on his tenant and a man named Mustafa. While Mohammad acknowledged that defendant knew the men, he did not know to what extent and did not place blame on defendant. Defendant's theory was that he was merely visiting the residence and did not constructively possess the cigarettes.

Defendant also contends that MCR 6.005(F) requires that the trial court, on its own initiative, inquire into a potential conflict. While the trial court expressly acknowledged that it did not know how to proceed in light of the joint representation, defendant and Mohammad were duly sworn and acknowledged that they agreed to the joint representation. The prosecutor was not satisfied and requested additional information. At that time, defense counsel delineated the theories to be raised by each client and noted that they would not conflict. Accordingly, defendant's reliance on the trial court's failure to initiate the process of complying with MCR 6.005(F) is without merit. Ultimately through the questioning of defense counsel and the concerns raised by the prosecutor, the requirements of MCR 6.055(F) were set forth on the record and satisfied. Furthermore, defendant expressly acknowledged that he understood the issue regarding the potential for conflict of interest and waived any claim of appeal on this issue. A defendant may not waive objection to an issue before the trial court, then raise it as an error on appeal. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). To hold otherwise would allow defendant to harbor error as an appellate parachute. *Id.*

Defendant next argues that he is entitled to a new trial because he did not personally waive his right to testify on the record. We disagree. The trial court has no duty to obtain a waiver of the right to testify on the record. *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995).

Defendant next argues that the sentence imposed was disproportionate. We agree, but this issue has been rendered moot. We review the sentence imposed for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999). A sentence constitutes an abuse of discretion if it violates the principle of proportionality. *Id.* That is, a sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). According to the PSIR, defendant had not been convicted of any prior crime and was a married father of six who was thirteen credits from receiving an engineering degree. While the probation department recommended a sentence of probation and the prosecutor concurred in the proposed sentence, the trial court concluded that defendant participated in a major cigarette smuggling operation. However, there was no evidence to that effect presented at trial or in the

PSIR. Because there is no evidentiary basis for the trial court's conclusion that defendant was a participant in a major smuggling operation, we would remand for resentencing based on the principle of proportionality. However, defendant has served his sentence and been released from prison. Where a subsequent event renders it impossible for us to fashion a remedy, the issue becomes moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Affirmed.

/s/ Harold Hood

/s/ David H. Sawyer

/s/ Mark J. Cavanagh