

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO T. GASKIN,

Defendant-Appellant.

UNPUBLISHED

December 26, 2000

No. 218210

Wayne Circuit Court

LC No. 98-009029

Before: Doctoroff, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant was convicted in a bench trial of possession of less than twenty-five grams of a controlled substance, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(20)(a)(v), and the trial court sentenced him to one to four years' imprisonment. He appeals as of right. We affirm.

Defendant argues that he was denied the effective assistance of counsel. Because no testimonial record was developed through a *Ginther*¹ hearing, our review is limited to the facts in the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Review of the record leads to the conclusion that defendant's claim is without merit.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that trial counsel's performance was objectively unreasonable, and the defective performance so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997); *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). If the defendant succeeds in proving that counsel's performance was objectively unreasonable, he must then show that, but for counsel's errors, the result of the proceedings would have been different. *Mitchell*, *supra* at 167.

Defendant alleges four ways that defense counsel's performance fell below the required standard. In his first allegation, defendant argues that counsel's failure to make an opening

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

statement constituted ineffective assistance. The decision to give or not give an opening statement is a matter of trial tactics. *People v Hempton*, 43 Mich App 618, 624; 204 NW2d 684 (1972). Failure to make an opening statement does not demonstrate that counsel was ineffective without a showing of prejudice. *Id.*; *People v Harlan*, 129 Mich App 769, 779; 344 NW2d 300 (1983). Because defendant did not demonstrate how the lack of an opening statement prejudiced him, this argument must fail.

Next, defendant argues that counsel was unreasonable and unprofessional when he referred to defendant as “El-stupid.” Counsel made the remark while cross-examining a police officer who testified that he saw defendant throw down a bag of suspected narcotics as defendant emerged from his car. Reviewing the comment in context, it is apparent that counsel was trying to show how ridiculous it would be for defendant to pass up a number of opportunities to discard the bag and wait until the car door was opened and the police were watching him to throw away the bag. This comment comported with counsel’s theory that if defendant was carrying incriminating contraband, he would have disposed of it before the police apprehended him. Defendant has not overcome the presumption that counsel’s comment was sound trial strategy, and his argument is without merit.

Defendant also accuses his counsel of failing to listen to cross-examination testimony. The prosecutor asked a witness, “You don’t do drugs, do you?” Three questions later, defense counsel asked the same witness, “You do dope?” and then, “Didn’t ask you that, did he?” Defendant admitted in his brief that this alleged error was “probably not” prejudicial, and we agree that no prejudice was shown. In the absence of prejudice, this alleged unreasonable conduct cannot constitute ineffective assistance of counsel.

Finally, defendant asserts that the violation of a sequestration order by the two defense witnesses “could have” resulted in the trial court punishing defendant by preventing one of those witnesses from testifying. Because defendant failed to show actual prejudice resulting from this error, this argument cannot support a claim of ineffective assistance.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter