

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CASIUS EUGENE CHILDRESS,

Defendant-Appellant.

UNPUBLISHED

May 22, 2001

No. 221487

Genesee Circuit Court

LC No. 98-003496-FH

Before: White, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of conspiracy to commit armed robbery, MCL 750.157(a); MSA 28.354(1) and MCL 750.529; MSA 28.797, and carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423. He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to fifteen to thirty years' imprisonment for the conspiracy conviction and six to ten years' imprisonment for the carrying a dangerous weapon conviction. He now appeals as of right. We affirm.

The evidence at trial indicated that defendant and a codefendant, Kofi Mitchell, agreed to rob a Ramada Inn. When they arrived at the Ramada Inn, defendant was armed with a survival knife, gloves, and wire. Codefendant Mitchell was armed with a .22 caliber handgun and gloves. Fortunately, the police arrived prior to the actual robbery and defendant's plan was foiled.

On appeal, defendant claims that resentencing is required because the sentencing judge considered the statutory sentencing guidelines even though, as all parties acknowledge, those guidelines do not apply because the offense occurred before January 1, 1999.¹ We disagree. The

¹ The judicial sentencing guidelines apply to offenses committed before January 1, 1999, while the statutory guidelines apply to offenses committed on or after January 1, 1999. MCL 769.34(1); MSA 28.1097(3.4)(1); MCL 769.34(2); MSA 28.1097(3.4)(2); *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000); *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000). There is no dispute that the crimes committed in this matter occurred in October 1998. Therefore, the statutory guidelines are not applicable to this case. *People v Oliver*, 242 Mich App 92, 99; 617 NW2d 721 (2000). Moreover, because defendant was

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sentencing judge repeatedly asserted, both at the sentencing hearing and at the hearing on defendant's motion for resentencing, that he was aware that the statutory guidelines did not apply to this case. Additionally, the judge indicated at the hearing on defendant's motion for resentencing that he did not base defendant's sentence on the statutory guidelines. Although he may have considered the guidelines prior to imposing sentence, in response to defense counsel's request that he do so, because the sentencing judge was aware that the guidelines did not apply and indicated that his sentencing decision was not influenced by the guidelines, resentencing is neither necessary nor appropriate.

In a related claim, defendant argues that his trial attorney was ineffective for failing "to detect the misrecording of the sentencing guidelines range, which should have been 108-270 months, but was recorded as 270 months to life." To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *Id.* To establish prejudice, the defendant must show that there was a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

Defendant claims that trial counsel was ineffective for failing to note that the guidelines were "misrecorded," as opposed to being misscored. However, because the trial court indicated that defendant's sentence was not based on the guidelines, defendant has not shown that he was prejudiced by defense counsel's failure to determine that the guidelines were "misrecorded." Specifically, defendant is unable to show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* Hence, defendant has not established that he was denied his right to the effective assistance of counsel.

In a final, related claim, defendant argues that he is entitled to resentencing because he was not afforded his right of allocution at sentencing because he received incorrect information from defense counsel prior to sentencing regarding the statutory guidelines recommended range, and this caused him to forfeit his right to meaningful allocution. MCR 6.425(D)(2)(c) provides that the trial court must, before imposing sentence, give the defendant a reasonable opportunity to advise the court of any circumstances the defendant believes the court should consider when imposing sentence. Our Supreme Court has required strict compliance with this rule, and the trial court must separately ask the defendant whether the defendant wishes to address the court before sentencing. When the trial court fails to comply with this rule, resentencing is required. *People v Berry*, 409 Mich 774, 781; 298 NW2d 434 (1980); *People v Wells*, 238 Mich App 383, 392; 605 NW2d 374 (1999).

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sentenced as a habitual offender, the judicial guidelines also do not apply. *People v Williams*, 223 Mich App 409, 412; 566 NW2d 649 (1997).

Defendant does not indicate what information he would have provided to the Court had he been advised differently. In any event, it is clear from the record that defendant had every opportunity to advise the court of any circumstances he believed the court should consider in imposing sentence. Defendant was afforded his right to meaningful allocution.

Finally, defendant argues that the trial court erred by instructing the jury that the evidence clearly showed that a coconspirator was guilty of conspiracy to commit armed robbery. The jury was instructed in conformity with CJI2d 5.4 and CJI2d 5.6. Although defendant now claims that the trial court erred in instructing the jury with regard to CJI2d 5.4, he did not object to the jury instructions at trial. Indeed, defendant expressed satisfaction on the record with the jury instructions. Therefore, this issue is waived on appeal. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Furthermore, in light of the overwhelming evidence of defendant's guilt, we are satisfied that any error did not effect the outcome. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot