

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE WAYNE BEST,

Defendant-Appellant.

UNPUBLISHED

May 21, 2002

No. 228168

Cass Circuit Court

LC Nos. 99-009900-FH

99-009901-FH

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon, MCL 750.227, driving under the influence of intoxicating liquor (third offense), MCL 257.625(1), and possessing a controlled substance (marijuana), MCL 333.7403(2)(d). He was sentenced to 270 days in jail and three years' probation. Defendant appeals as of right. We affirm in part and reverse in part.

I. Ineffective Assistance of Counsel

Defendant argues that the trial court abused its discretion in denying defendant's motion for a new trial because defendant was deprived the effective assistance of counsel based on three errors. We disagree. During defendant's *Ginther*¹ hearing, defendant not only argued his position as to each of the claimed grounds for ineffective assistance, but offered the testimony of both his trial counsel and Scott Best, a witness whose testimony was excluded, providing us with a full record as to each of defendant's claims of ineffective assistance of counsel. See *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989), citing *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

A trial court's ruling on a motion for a new trial is reviewed for an abuse of discretion. *People v Torres*, 452 Mich 43, 50; 549 NW2d 540 (1996). In order for this Court to reverse an otherwise valid conviction due to the ineffective assistance of counsel, the defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that, but for counsel's error, the result of the proceedings would have been different. *People v Noble*,

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

238 Mich App 647, 662; 608 NW2d 123 (1999), citing *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *Id.* Furthermore, the defendant must overcome a strong presumption that the assistance of counsel was sound trial strategy, because this Court will not second-guess counsel regarding matters of trial strategy, even if counsel was ultimately mistaken. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Nor will it assess counsel’s competence with the benefit of hindsight. *Id.* at 445.

Defendant first argues that his counsel was ineffective in failing to properly list Scott Best as a witness, which resulted in the exclusion of his testimony. Failure to call witnesses constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). However, defendant was not deprived of a substantial defense and has failed to establish that he was prejudiced by trial counsel’s failure to present this witness. The record makes clear that Scott’s proposed testimony contradicted defendant’s theory of the case, as well as defendant’s own testimony at trial, and was either cumulative in nature, insignificant, or adverse to defendant. As such, the failure to list Scott as a witness did not constitute ineffective assistance of counsel.

Defendant next argues that his counsel was ineffective in failing to object to the admission of all the evidence against defendant because it was unlawfully obtained as part of a pretextual traffic stop. This argument is without merit. Contrary to defendant’s argument, there was in fact reasonable suspicion for the stop in this case. The officers’ testimony, as the trial court found, established that defendant’s vehicle crossed over the centerline and was observed driving erratically. This evidence presented reasonable grounds for suspecting that defendant was unlawfully intoxicated so as to justify the officer’s investigatory stop of defendant’s vehicle. See *People v Christie (On Remand)*, 206 Mich App 304, 309; 520 NW2d 647 (1994); *People v Chinn*, 141 Mich App 92, 97; 366 NW2d 83 (1985). Trial counsel is not required to make meritless motions or objections. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Accordingly, the trial court’s determination that defendant was not denied the effective assistance of counsel on this ground was proper.

Last, defendant claims that his counsel was ineffective in failing to object to the prosecution’s irrelevant and highly prejudicial questions regarding defendant’s procurement of an Indiana driver’s license when his Michigan driver’s license was suspended. Where a witness’ credibility is at issue, it is proper under MRE 608(b) to inquire into specific instances of conduct concerning the witness’ untruthfulness. Obtaining a driver’s license under false pretenses involves untruthfulness. Thus, we cannot find that trial counsel’s failure to object to this line of questioning demonstrated ineffective assistance of counsel. Furthermore, defendant has failed to overcome the presumption that trial counsel’s failure to object was sound trial strategy. *Rice, supra.*

II. Suppression of Evidence

Due to the foregoing resolution of defendant’s claims of ineffective assistance of counsel, it is unnecessary to address defendant’s next issue regarding the suppression of evidence based on an alleged pretextual traffic stop. Because as previously discussed, there was reasonable

suspicion to support the traffic stop, the trial court's failure to exclude evidence was not an abuse of discretion. See *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

III. Exclusion of Testimony

Similarly, our analysis of the question of ineffective assistance of counsel negates the need for a separate discussion of whether the trial court erred in excluding the testimony of Scott Best. Because we determined that defendant was not prejudiced by trial counsel's failure to properly list Scott as a witness, any abuse of discretion on the part of the trial court was harmless and does not require reversal.

IV. Admission of Prejudicial Photograph

Defendant also argues that the trial court abused its discretion in admitting into evidence a photograph of defendant taken shortly after his arrest. We disagree. The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *Lukity, supra*. Generally, all relevant evidence is admissible and although relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice" MRE 402; MRE 403. The photograph in this case was clearly relevant to the question of defendant's intoxication, as it showed his physical state a short time after the alleged offense. Moreover, defendant has failed to establish that its probative value for this purpose was substantially outweighed by any danger of unfair prejudice. Defendant has referred to the photograph as a "mug shot," but the jury heard this characterization only because defendant himself testified before the jury that this is what it was. The jury had ample opportunity to hear defendant's explanations that any appearance of bloodshot eyes in the photograph was the result of having been crying just before it was taken rather than from his being intoxicated, and that a poor photographic reproduction process had falsified his skin tones in the photograph. The jury was able to consider this evidence in weighing what probative value to give to the photograph and in making any credibility determinations necessitated by it and by defendant's testimony. Therefore, the probative value of the photograph was not substantially outweighed by the danger of unfair prejudice and the trial court did not abuse its discretion in admitting it into evidence.

V. Prosecutorial Misconduct

Defendant alleges that he was denied a fair trial when the prosecution engaged in misconduct by questioning defendant's girlfriend about his drinking habits, counseling for alcohol abuse, and participation in Alcoholics Anonymous, all in violation of MRE 404, which prohibits the introduction into evidence of prior bad acts or character to show action in conformity therewith. However, defendant failed to object to the alleged misconduct on this ground at trial. *People v Mitchell*, 223 Mich App 395, 400; 566 NW2d 312 (1997); See also MRE 103(a)(1). This Court reviews unpreserved constitutional issues for plain error affecting substantial rights, which generally requires a showing of prejudice. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find that defendant has failed to satisfy his burden with respect to prejudice. Thus, we find no error affecting the outcome of the proceedings. *Id.* Defendant did not dispute that he consumed alcohol on the day he was arrested. In fact, he affirmatively admitted to having consumed eight beers in the course of the afternoon, including three beers immediately prior to his arrest. This testimony combined with the evidence of defendant's failed field sobriety and breathalyzer tests was sufficient evidence of defendant's

guilt, and therefore, the evidence regarding defendant's past drinking habits and alcohol abuse did not prejudice him or affect the outcome of the trial. Accordingly, no plain error affecting substantial rights occurred and reversal on this ground is not warranted.

VI. Sentencing Fees

Finally, defendant objects to certain fees he claims were improperly assessed as part of his sentence. First, defendant argues that he was improperly assessed two probation supervision fees and two crime victim's rights fees. We agree.² This issue raises questions of statutory interpretation, which this Court reviews de novo. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). The fundamental rule of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature as gathered from the specific language of the statute itself. *People v Venticinque*, 459 Mich 90, 99-100; 586 NW2d 732 (1998). If the statutory language is clear and unambiguous, the statute must be enforced as written. *Id.* MCL 771.3c(1) states, in pertinent part, that "[a] person shall not be subject to more than 1 supervision fee at the same time." Thus, under the clear and unambiguous language of the statute, defendant was unlawfully assessed two probation supervision fees. On remand the trial court shall waive one of the two fees, since both were probationary periods of equal duration. MCL 771.3c(1).

Similarly, in regard to the crime victim's rights fee, MCL 780.905(1) provides, in pertinent part, that "[t]he court shall order a defendant to pay only 1 assessment . . . per criminal case." Again, under the clear language of the statute, defendant was improperly assessed two crime victim's rights fees for one criminal case. Accordingly, one of the two fees ordered by the trial court as conditions of defendant's probation must be vacated.

Defendant also claims that he was improperly assessed two forensic lab fees when no forensic tests were performed in this case. However, a review of the record reveals that the trial court waived the \$150 forensic lab fee for the OUIL conviction, leaving defendant to pay only one forensic lab fee. Contrary to defendant's argument, a forensic lab test was performed in this case on the marijuana found in defendant's possession. Thus, the fee was properly assessed under MCL 12.206.

Affirmed in part, reversed in part, and remanded to the lower court with directions to vacate and waive defendant's sentencing fees consistent with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Christopher M. Murray

² At oral argument before this Court, the prosecutor also agreed that defendant was improperly assessed two fees under both MCL 771.3c(1) and 780.905(1).