

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

YOSHEYAH THOMAS,

Defendant-Appellant.

UNPUBLISHED

January 15, 2004

No. 242377

Wayne Circuit Court

LC No. 01-010384

Before: Wilder, P.J., and Griffin and Cooper, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of armed robbery, MCL 750.529, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of fifteen to twenty-five years for the armed robbery conviction and twenty-three months to four years for the assault conviction, to be served consecutive to a two-year prison term for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that his counsel's performance was deficient in several respects, thereby depriving him of the effective assistance of counsel. Because defendant did not raise the issue of ineffective assistance of counsel in the trial court, this Court's review is limited to errors apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Although defendant claims that counsel should have called Cornell Humphrey as a witness, defendant has not shown, nor is it apparent from the record, that this witness exists or that his testimony would have been beneficial to defendant. Defendant's mere assertion that the witness would have supported defendant's defense is insufficient to establish ineffective assistance of counsel. *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

Similarly, defendant's claim that counsel "failed to investigate this case properly nor attempt to interview any exculpatory witnesses such as Mr. Humphrey," also lacks factual support. The record does not indicate what investigative efforts were made by counsel.

Defendant also claims that counsel should have cross-examined the police officers concerning whether they found bullets or shell casings in the area where defendant allegedly fired his gun. Defendant has not overcome the presumption that counsel's decision concerning the scope of cross-examination was sound trial strategy. *People v Rockey*, 237 Mich App 74, 76-

78; 601 NW2d 887 (1999); *People v Moreno*, 112 Mich App 631, 638; 317 NW2d 201 (1981). The officers' failure to testify that bullets or casings were found was beneficial to defendant's theory. Had counsel attempted to emphasize that point by asking the officers whether casings or bullets had been found, and what efforts they made to locate them, counsel may have opened the door to damaging information. It is not apparent from the existing record that counsel could have elicited information helpful to defendant's case.

Defendant also argues that counsel should have hired an expert to test the gun and testify that it was inoperable, or ask the police to test the gun. Again, it is not apparent from the record that counsel's performance was deficient in this regard. The record does not indicate what efforts, if any, counsel made to locate an expert whose testimony might have been favorable to defendant. Moreover, it is not apparent that defendant informed trial counsel that the gun allegedly was inoperable. Indeed, defendant testified at trial that he did not fire the gun, but he did not assert that the gun was inoperable. The fact that defendant loaded the gun suggests that he believed it would fire. Ultimately, in order to establish both a serious error by counsel and prejudice, it was incumbent upon defendant to show that, had the gun been tested, the results would have supported his defense. Defendant has not made that showing.

Next, defendant argues that resentencing is required because the sentencing guidelines were erroneously scored. Specifically, defendant asserts that his prior record variable (PRV) score of seventy-two is inaccurate because a prior juvenile matter, which was administratively closed, was erroneously scored as a prior felony conviction. Although defendant did not preserve this issue in an appropriate challenge to the scoring of the sentencing guidelines below, MCL 769.34(10)¹; MCR 6.429(C), this Court has held that an unpreserved scoring issue may be reviewed on appeal for plain error affecting substantial rights. *People v Kimble*, 252 Mich App 269, 277-280; 651 NW2d 798 (2002), lv gtd 468 Mich 870 (2003). Further, defendant also argues that counsel was ineffective for failing to object to the scoring of the guidelines, and this Court has reviewed unpreserved scoring issues raised under the rubric of an ineffective assistance of counsel claim. See *id.*, pp 278-279 n 7; *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001); *People v Wilson*, 252 Mich App 390, 393-397; 652 NW2d 488 (2002).

The record does not support defendant's claim that the juvenile matter listed as "administratively closed" in the presentence report (PSIR) was improperly considered in the scoring of the prior record variables. The juvenile case to which defendant refers is listed as a juvenile matter, but there is no indication that it was counted as a prior juvenile adjudication for purposes of either PRV 3 or PRV 4. Defendant received a score of zero for PRV 3, and defendant's score of two points for PRV 4 (one prior low severity juvenile adjudication) is attributable to his larceny adjudication, for which he was sentenced on December 21, 1993. Nor do we find support for defendant's claim that the juvenile matter was counted as a prior felony conviction for purposes of PRV 1 or PRV 2. Defendant received scores for both PRV 1 (two high severity convictions) and PRV 2 (two low severity convictions), but the PSIR indicates that those scores are attributable to his adult felony convictions in Iowa for "Poss. Of Crack

¹ Because the offenses occurred on August 27, 2001, the legislative sentencing guidelines apply. MCL 769.34.

Cocaine,” for which he was sentenced on May 15, 1995, and “Terrorism,” “Armed W/Intent,” and “Assault W/I to Inflict Serious Injury,” for which he was sentenced on September 27, 1995. There is no indication that the “administratively closed” juvenile matter was considered for purposes of the prior record variable scoring. Because defendant has failed to demonstrate either plain error or deficient performance by counsel, this issue does not warrant appellate relief.

Defendant, in propria persona, additionally argues that his larceny juvenile adjudication should not have been considered in the scoring of the guidelines because he did not have counsel.

Convictions obtained in violation of the right to counsel guaranteed in *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), may not be used to enhance a criminal sentence. *United States v Tucker*, 404 US 443, 449; 92 S Ct 589; 30 L Ed 2d 592 (1972); *Custis v United States*, 511 US 485; 114 S Ct 1732; 128 L Ed 2d 517 (1994); *People v Carpentier*, 446 Mich 19, 28; 521 NW2d 195 (1994). A criminal defendant may assert this collateral challenge to a conviction used in the scoring of the guidelines. See *People v Alexander (After Remand)*, 207 Mich App 227, 229-230; 523 NW2d 653 (1994). A defendant bears the initial burden of establishing that the conviction was obtained in violation of his right to counsel. *Carpentier, supra*, p 31. A defendant may satisfy this burden by: (1) presenting proof, such as a docket entry or a transcript, evidencing that a previous conviction was obtained without counsel; or (2) presenting evidence that the sentencing court either failed to reply to a defendant's request for such records or refused to furnish copies within a reasonable time. *Id.*, citing *People v Moore*, 391 Mich 426, 440-441; 216 NW2d 770 (1974).

Defendant has attached documentation to his brief, which he claims shows that he was not represented by counsel for the juvenile larceny matter. However, the order of disposition concerning this adjudication indicates that defendant had an attorney. Thus, defendant has not presented prima facie proof that his adjudication was obtained in violation of his right to counsel.

Defendant also contends that there was no evidence supporting the juvenile adjudication. This contention is based on defendant's mother's affidavit, dated June 18, 2003, wherein she avers that the 1993 larceny adjudication arose from her report that defendant took two guns from her house, but she has now learned that he did not. This argument is an impermissible collateral attack on the prior juvenile adjudication. *Carpentier, supra*, p 29. Therefore, we reject this claim of error.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Jessica R. Cooper