

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

BRANDON G. ROBINSON,

Defendant-Appellant.

UNPUBLISHED

January 27, 2004

No. 239980

Wayne Circuit Court

LC No. 01-004256

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of third-degree fleeing and eluding, MCL 750.479a(3), entered after a jury trial. Because defendant's challenges to the in court identification and secondary position of ineffective assistance of counsel are without merit, we affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

An identification procedure can be so suggestive and conducive to irreparable misidentification that it denies a defendant due process. To establish that an identification procedure resulted in the denial of due process, a defendant must show that the procedure was so suggestive under the totality of the circumstances that it lead to a substantial likelihood of misidentification. *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001). If a witness is exposed to an impermissibly suggestive pretrial identification procedure, his in-court identification of the defendant will not be allowed unless the prosecutor establishes by clear and convincing evidence that the in-court identification has an untainted, independent basis. *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998).

Defendant argues that he was denied due process by the introduction of a state trooper's in-court identification of him because a pretrial identification made at the preliminary examination was unduly suggestive. We disagree. Defendant did not move to suppress the in-court identification or object at trial; absent plain error, he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The trooper observed defendant's features on several occasions during vehicle and foot pursuits, and at one point was three feet away from defendant. These observations occurred before the vehicle owner identified defendant. The pretrial identification of defendant was not unduly suggestive. Because the pretrial identification was proper, there was no need to establish an independent basis for the in-court identification. *People v McElhaney*, 215 Mich App 269, 287-288; 545 NW2d 18 (1996). No plain error occurred. *Carines, supra*.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.*, 600.

Defendant argues that trial counsel rendered ineffective assistance by failing to challenge the in-court identification. We disagree. The identification made at the preliminary examination was not improper, and a challenge to the in-court identification would not have succeeded. No prejudice occurred. *Id.* Counsel was not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard A. Griffin
/s/ Kathleen Jansen