Court of Appeals, State of Michigan

ORDER

People of MI v Jamie E Pierce

Docket No. 244276

LC No. 01-014270

Mark J. Cavanagh
Presiding Judge

Hilda R. Gage

Brian K. Zahra
Judges

The Court orders that the motion for clarification is GRANTED, and this Court's opinion issued March 9, 2004, is hereby VACATED. A new opinion is attached to this order which, again, remands this matter to the trial court only for resentencing on the ground that defendant's sentence violated MCL 769.9(2).

Mark Cavanagh

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

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COURT OF APPEALS

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Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2004
v	No. 244276 Wayne Circuit Court
JAMIE E. PIERCE, Defendant-Appellant.	LC No. 01-014270

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant was convicted by a jury of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b). He was sentenced as a fourth habitual offender, MCL 769.12, to a prison term of ten years to life. We affirm, but remand for resentencing.

Defendant first argues that reversal is required because of the admission of a prior "mug shot" of him which was irrelevant and unduly prejudicial since it revealed that he had previously been arrested. However, defendant acknowledged during his direct examination testimony that he had previously pleaded guilty to a breaking and entering charge. Thus, assuming that defendant's "mug shot" argument is properly preserved, we conclude that any error in its admission does not warrant appellate relief because it is not more probable than not that it was outcome determinative, inasmuch as defendant's own testimony made clear that he had a prior criminal record. See *People v Phillips*, 469 Mich 390, 396; 666 NW2d 657 (2003).

Next, defendant argues that the admission of Lieutenant Lawrence Newton's testimony regarding his failure to attend a scheduled polygraph examination denied him a fair trial. However, the first mention of defendant's failure to take a scheduled polygraph examination occurred during defense counsel's cross-examination of Lieutenant Newton:

Q. So about a little over 2 months it took to get a warrant on this case?

A. Yes.

Q. Is that unusual?

A. Due to the circumstances, no it is not.

Q. What do you mean circumstances?

A. I attempted to get [defendant] to take a polygraph for me? [sic]

Q. That was never done?

A. No, he never showed up.

In light of this exchange, we reject defendant's characterization of Lieutenant Newton's reference to the scheduled polygraph examination as "unresponsive." Rather, his reference to his attempt to get defendant to take a polygraph examination was directly responsive to defense counsel's inquiry of what he meant in his preceding answer by referring to "circumstances." Indeed, it appears that Lieutenant Newton would have been unable to provide an honest and meaningful answer to defense counsel's question about what he meant by "circumstances" without stating that fact. In *People v Riley*, 465 Mich 442, 448; 636 NW2d 514 (2001), our Supreme Court found that any error in the admission of incriminating testimony was waived where the witness was called by the defense and the defendant knowingly took the risk that the witness might incriminate him. Likewise, in this case, defense counsel asked Lieutenant Newton about the circumstances leading to the delay between the report of the incident and defendant's arrest. In light of defendant's testimony on direct examination acknowledging that a polygraph examination had been scheduled, it is apparent that defendant knew of this examination having been scheduled in this time period. Thus, the defense waived any claim of error based on Lieutenant Newton mentioning the scheduled polygraph examination by undertaking questioning that required him to explain the circumstances of the delay.

Moreover, later during defense counsel's cross-examination of Lieutenant Newton, the following exchange occurred:

Q. Did you offer him [defendant] a polygraph, at that point?

A. I believe I offered him a polygraph on two different occasions. At one point it was scheduled and he failed to show.

Q. And the other time?

A. I'm not sure of the date.

Q. Did you offer him a second time?

A. Yes, I did.

Q. None were ever administered?

A. That's correct.

This questioning by defense counsel, directly eliciting testimony about Lieutenant Newton offering defendant a polygraph examination, further supports our conclusion that defendant waived any claim of error regarding Lieutenant Newton's testimony concerning this matter. Notably, the prosecutor asked no question of Lieutenant Newton during either direct or redirect

examination that in any way referenced his request to defendant to take a polygraph examination, or defendant's response to it. Thus, there is no basis for the representation in defendant's brief on appeal that the prosecutor offered testimony that defendant refused a polygraph examination.

Defendant also asserts that the prosecutor improperly referenced his refusal to take a polygraph examination in closing argument. In the remarks in question, which did not receive an objection below, the prosecutor stated that the police "waited two months before they went out to pick [defendant] up" and referred to the police as "giving him the opportunity to exonerate himself." Defendant asserts that this was clearly an implicit reference to his failure to submit to a polygraph examination. However, in context, the prosecutor also referred to the police taking statements from defendant and appeared to question defendant's assertion that he fled because he was afraid of the police. Accordingly, the pertinent argument could reasonably be understood as attacking defendant's explanation for why he fled rather than referencing his refusal or failure to take a polygraph examination. Thus, there was no plain error affecting defendant's substantial rights so as to warrant appellate relief for this unpreserved matter. See *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001).

Next, defendant argues, and the prosecution agrees, that his sentence of ten years to life imprisonment is improper. We agree. This sentence is improper because it violates MCL 769.9(2), which provides that "[t]he court shall not impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence."[1] A sentence is invalid when it is based on "a misconception of law." Thus, resentencing is required. See *People v Foy*, 124 Mich App 107, 113; 333 NW2d 596 (1983) (remanding for resentencing with regard to an invalid sentence of ten years to life).

Defendant also attacks the trial court's decision to depart from the sentencing guidelines and argues that a sentence of life imprisonment in this case constitutes cruel and unusual punishment. However, because defendant's sentence is invalid and resentencing is required, it is premature to reach those issues. In particular, we do not know if the trial court will opt to impose an indeterminate sentence or a life sentence. Further, at resentencing, the trial court may consider additional aggravating or mitigating information about defendant based on events that have occurred since the initial sentencing, or other information that was not available at the original sentencing. See *People v Lyons (After Remand)*, 222 Mich App 319, 323-324; 564 NW2d 114 (1997).

Defendant also requests that this Court order resentencing before a different judge. However, we conclude that resentencing before a different judge is not required. In deciding whether resentencing should occur before a different judge, we consider (1) whether the original judge would reasonably be expected on remand to have substantial difficulty in putting aside previously expressed views or findings determined to be erroneous or based on evidence that

[1] We note that defendant was not sentenced as a sexually delinquent person. Thus, this Court's holding in *People v Vronko*, 228 Mich App 649, 658; 579 NW2d 138 (1998), that a sentence of one day to life imprisonment on a defendant found to be a sexually delinquent person does not violate MCL 769.9(2), is inapplicable.

must be rejected, (2) whether reassignment is advisable for the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

Here, there is no reason to expect that the original judge would have difficulty complying with our directive to either impose an indeterminate sentence or a life sentence on remand. Further, the record does not disclose any indication of inappropriate bias against defendant that would require resentencing before a different judge. While the trial court referred to defendant as a "dangerous predator," that characterization was justified in light of defendant's prior convictions in two separate incidents of attempted CSC III, together with his CSC III conviction in this case. While defendant also criticizes the trial court's reliance on information in a presentence report for a separate case in which defendant had sexual relations with minors, we see no reason why this calls into question the trial court's fairness. We also find no basis for ordering resentencing before a different judge based on the trial court's remark that it was "curious and dismayed that a young woman's mother would write a letter supporting this defendant with the background that is on paper." This remark was apparently directed at a letter written by defendant's mother-in-law. It was not unreasonable for the trial court to indicate that it would not consider that letter as a mitigating factor, or to further express dismay and concern that the mother of defendant's wife would voice support for him in light of his prior criminal record for attempted sexual assault offenses.

Finally, defendant advances claims of ineffective assistance of counsel. First, defendant requests a remand to establish factual support for his claim that trial counsel failed to investigate and call possible exculpatory witnesses. After review of the motion for remand and its supportive documentation, we deny that a remand for an evidentiary hearing is warranted. The proffered testimony via the affidavits supporting the motion only accounts for defendant's whereabouts before 8:00 p.m. and after 9:15 p.m., leaving a period of time consistent with the victim's testimony in which defendant could have committed the crime. Further, the affidavits only offer inadmissible hearsay evidence that the victim allegedly falsely accused another person of criminal sexual conduct. Accordingly, remand is not necessary. See MCR 7.211(C)(1).

Defendant also argues that trial counsel was ineffective for failing to timely object to Lieutenant Newton's testimony regarding defendant's failure to submit to a polygraph examination, and for failing to object to the prosecutor's alleged references to this matter in her closing argument. Because there was no evidentiary hearing regarding this matter, our review is limited to errors apparent on the record. *People v Wilson*, 257 Mich App 337, 363; 668 NW2d 371 (2003).

To establish a claim of ineffective assistance of counsel, a defendant must show (1) that counsel made errors so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment and (2) a reasonable probability that the outcome of the proceeding would have been different but for counsel's error. *Id.* at 362. There is a strong presumption that counsel's performance constituted sound trial strategy. *Id.* With regard to trial counsel's failure

to object to Lieutenant Newton's testimony referencing defendant's failure to attend a scheduled polygraph examination, we conclude that defendant has not overcome the presumption that this was reasonable trial strategy. As previously discussed, Lieutenant Newton's reference to this matter was responsive to questioning by trial counsel.[2] Trial counsel could reasonably have concluded that objecting to the reference to the polygraph examination under these circumstances would have made it appear to the jury that the defense feared this information, which had already been placed before the jury. Rather, trial counsel appears to have attempted to dispel any potential prejudice by eliciting testimony from defendant that he did not go to the scheduled polygraph examination because he did not have an attorney. Defendant has not overcome the presumption of reasonable trial strategy. With regard to the prosecutor's closing argument, she never expressly referred to defendant's scheduled polygraph examination. Presumably, defendant is referencing the prosecutor's remark discussed earlier, in which she referred to the police giving defendant an opportunity to "exonerate" himself. As we concluded previously, considered in context, it is not clear that this remark was intended to or would have been understood by the jury as referring to defendant's failure to attend a polygraph examination. Accordingly, trial counsel's failure to object to the prosecutor's remarks was in the realm of reasonable trial strategy, i.e., to avoid drawing further attention to the matter. In sum, defendant has not established that counsel was ineffective.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Hilda R. Gage
/s/ Brian K. Zahra

[2] We note that defendant does not argue that trial counsel was ineffective for asking the questions that led to Lieutenant Newton's references to the scheduled polygraph examination.