

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ADAM DYER,

Defendant-Appellant.

---

UNPUBLISHED

October 26, 2004

No. 248202

Oakland Circuit Court

LC No. 2002-187347-FH

Before: Griffin, P.J., and Saad and O'Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of larceny between \$1,000 and \$20,000, MCL 750.356(3)(a). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that he was denied the effective assistance of counsel. We disagree.

To establish an ineffective assistance of counsel claim, defendant must first show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome a strong presumption that counsel's actions constituted sound trial strategy. Second, the defendant must establish that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Where no evidentiary hearing was held, review is limited to mistakes apparent on the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

Counsel's decision not to call witnesses is presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). This includes the decision advising defendant not to testify. *People v Shively*, 230 Mich App 626, 629; 584 NW2d 740 (1998). Here, defendant had numerous convictions that could be used to impeach his testimony, and counsel could reasonably advise him not to testify to keep those convictions from the jury. Further, the affidavits of the proposed witnesses do not identify any admissible evidence that could have affected the outcome of the case. Finally, counsel did not concede defendant's guilt in his closing argument. He accepted the basic fact that defendant took the equipment, then argued that defendant did not have the intent to permanently deprive the owners of their

property. This was a reasonable strategic decision given the evidence presented. Counsel did cross-examine the witnesses on inconsistencies in their testimony.

Next, we conclude that defendant waived any challenge to the accuracy of the presentence report when at sentencing he stated that there were no inaccuracies in the report. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). A party may not raise on appeal an issue challenging the accuracy of the presentence report unless the party raised the issue at or before sentencing or demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. MCR 6.429(C); *People v Kimble*, 470 Mich 305, 313; 684 NW2d 669 (2004). Where defendant was found in violation of his parole, the PSIR was essentially accurate when it referred to defendant absconding while on parole.

Affirmed.

/s/ Richard Allen Griffin

/s/ Henry William Saad

/s/ Peter D. O'Connell