

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NOSAKHARE N. ONUMONU,

Defendant-Appellant.

UNPUBLISHED
November 9, 2004

No. 249106
Ionia Circuit Court
LC No. 02-012288-FH

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction for prisoner in possession of a weapon, MCL 800.283(4). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant first claims that he was denied due process of law when the trial court denied his request for substitute counsel. An indigent defendant is guaranteed the right to counsel, but he is not entitled to have an appointed attorney replaced simply by making such a request. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). Appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with respect to a fundamental trial tactic. *Id.* The filing of a grievance against counsel by itself does not justify substitution of counsel. *People v Mitchell*, 454 Mich 145, 170 n 30; 560 NW2d 600 (1997). A trial court's decision regarding substitution of counsel will not be disturbed absent an abuse of discretion. *Traylor*, *supra* at 462.

Defendant never explained the nature of his conflict with appointed counsel. Although three years earlier the court had granted counsel's motion to withdraw in a prior representation of defendant, defendant provided no information concerning that case. A prior conflict regarding trial strategy in another case does not in itself show that counsel could not represent defendant under other circumstances. Therefore, there is no showing that the court abused its discretion.

Defendant also asserts that he was denied the effective assistance of counsel where his attorney failed to object to evidence concerning defendant's prior prison escape. To establish an ineffective assistance of counsel claim, defendant first must 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 show 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, 302-303; 521 NW2d 797 (1994).

A prosecution witness testified that he was part of an emergency response team that recovered defendant after an escape. The testimony did not reveal that defendant was convicted of prison escape, and defense counsel may have reasonably determined that an objection would be more damaging than the testimony. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Moreover, where the evidence of defendant's guilt was overwhelming, defendant was not prejudiced by the admission of the evidence or by the inaction of counsel, and we fail to see any prejudice as the jury already knew of defendant's prisoner status. See *People v Reed*, 449 Mich 375, 401; 535 NW2d 496 (1995).

Finally, in his supplemental brief, defendant argues that the trial court erred in scoring offense variables 9 and 19 in light of the United States Supreme Court's recent decision in *Blakely v Washington*, 542 US ____; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, in *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004), the Michigan Supreme Court noted that *Blakely* is inapplicable to Michigan's sentencing system stating, "Accordingly, the Michigan system is unaffected by the holding in *Blakely* that was designed to protect the defendant from a higher sentence based on facts not found by the jury in violation of the Sixth Amendment." Defendant contends that this language in *Claypool* is mere dicta and not binding on this Court. In *People v Dorhan*, ____ Mich App ____; ____ NW2d ____ (Docket No. 249995, decided October 12, 2004), slip op at 7 n 4, the defendant raised the exact same issue in his supplemental brief regarding *Blakely* that defendant does in his supplemental brief in this case and this Court rejected the assertion that the statement from *Claypool* pertaining to *Blakely* is not binding precedent. Pursuant to MCR 7.215(C)(2), *Dorhan* is binding precedent and controls in this case. Defendant does not object on appeal to the scoring of offense variables 9 and 19 on any other basis.

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Michael R. Smolenski