

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ALBERT SHELLEY,

Defendant-Appellant.

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UNPUBLISHED

December 14, 2004

No. 250002

Oakland Circuit Court

LC No. 02-183274-FH

Before: Murphy, P.J., and White and Kelly, JJ.

MEMORANDUM.

Defendant was originally charged with one count of attempted unarmed robbery, MCL 750.92; MCL 750.530, and two counts of assault and battery, MCL 750.81. At the conclusion of defendant's preliminary examination, the district court added a count of extortion, MCL 750.213, and dismissed the attempted robbery charge. The circuit court denied defendant's motion to quash the information. Following a bench trial, defendant was convicted of extortion and one count of assault and battery. He was sentenced as an habitual offender, third offense, MCL 769.11, to five to forty years' imprisonment on the extortion conviction and ninety-three days on the assault conviction. Defendant appeals as of right, and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole claim on appeal relates to his bindover on the charge of extortion. Defendant asserts that the district court was without authority to charge defendant with the more serious offense of extortion, and that in doing so it violated the separation of powers doctrine, and that counsel was ineffective in failing to make the separation of powers argument below. We disagree.

A circuit court's ruling on a motion to quash on legal grounds is reviewed for error. *People v Pitts*, 216 Mich App 229, 232; 548 NW2d 688 (1996). The circuit court did not err in denying defendant's motion to quash. The examining magistrate is not limited by the charges alleged in the complaint and may add a count not charged at the close of the proofs, even absent a motion by the prosecutor. *People v Hunt*, 442 Mich 359, 363; 501 NW2d 151 (1993); *People v Gonzalez*, 214 Mich App 513, 517; 543 NW2d 354 (1995). Because defendant was provided a preliminary examination to determine whether there was probable cause to believe he committed an offense and defendant does not contest the sufficiency of the evidence to support the bindover on the added charge, and defendant does not claim that counsel's questioning or strategy at the preliminary examination would have been different had she known a charge of extortion would

be added, the absence of another exam does not result in unfair surprise, inadequate notice, or an insufficient opportunity to defend against the charges. *Hunt, supra* at 364-365; *People v Fortson*, 202 Mich App 13, 17; 507 NW2d 763 (1993).

Defendant contends that trial counsel was ineffective for failing to challenge the magistrate's decision as a violation of separation of powers. We disagree. The *Gonzalez* Court considered and rejected a separation-of-powers argument in connection with the magistrate's decision to bind the defendant over on a different charge than that alleged in the complaint. *Gonzalez, supra* at 516-517. Defense counsel is not ineffective for failing to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ William B. Murphy  
/s/ Helene N. White  
/s/ Kirsten Frank Kelly