STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2005
v	No. 255577 Wayne Circuit Court
RANSOM MURRAY BUTLER, Defendant-Appellant.	LC No. 04-001458

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v), and possession of a firearm during the commission of a felony, MCL 750.227b. He appeals and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant fled from police officers after being ordered to stop, fired a shot at a police officer, and, after being apprehended, was found to have crack cocaine on his person. The trial court convicted defendant of assault with intent to do great bodily harm less than murder as a lesser included offense of assault with intent to commit murder, MCL 750.83, possession of less than twenty-five grams of cocaine, and felony-firearm.

The statutory sentencing guidelines recommended a minimum term range of twenty-nine to fifty-seven months for assault with intent to do great bodily harm less than murder. The trial court scored Offense Variable (OV) 19, MCL 777.49, security threat to penal institution or court or interference with administration of justice, at fifteen points on the ground that defendant used force or the threat of force against a person or property to "interfere with or attempt to interfere with the administration of justice." MCL 777.49(a). Defendant did not object to the scoring of OV 19 at fifteen points. The trial court sentenced defendant to concurrent terms of four years, nine months to twelve years and one to four years for assault with intent to do great bodily harm less than murder and possession of less than twenty-five grams of cocaine, respectively, and to a consecutive two-year term for felony-firearm. Defendant received credit for 108 days.

Defendant argues that he was denied due process and is entitled to be resentenced on the ground that he was sentenced by a different judge than the judge who presided at trial. We disagree.

Defendant did not object to the presence of a different judge at sentencing; therefore, review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "Generally, a defendant should be sentenced by the judge who presided at his trial, provided that the judge is reasonably available." *People v Pierce*, 158 Mich App 113, 115; 404 NW2d 230 (1987). Here, the visiting judge who presided over defendant's trial was not reasonably available to sentence defendant because, apparently, he was no longer assigned to the trial court. See *People v Van Auker (After Remand)*, 132 Mich App 394, 399; 347 NW2d 466 (1984), rev'd in part on other grounds 419 Mich 918 (1984). Moreover, defendant was sentenced within the guidelines as calculated by the trial court. Defendant has not shown that the substitution of judges resulted in prejudice or plain error. *Carines*, *supra*; see also *People v Wilson*, 265 Mich App 386, 389-391; 695 NW2d 351 (2005).

Under the sentencing guidelines act, if a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). A party may not raise on appeal an issue challenging the scoring of the guidelines or challenging the accuracy of information relied upon in determining a sentence which is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. *Id*.

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*. at 600.

Defendant argues that he is entitled to resentencing on his conviction of assault with intent to do great bodily harm less than murder because OV 19 was improperly scored at fifteen points based on evidence that he attempted to evade the police. He contends that trial counsel rendered ineffective assistance by failing to object to the scoring of OV 19.

Defendant's scoring issue is not properly preserved for appeal. *Kimble*, *supra*. However, because defendant contends that trial counsel rendered ineffective assistance by failing to object to the scoring of OV 19 at sentencing, appellate review of the scoring issue as it relates to ineffective assistance of counsel is appropriate. *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001).

This issue is without merit. In *People v Barbee*, 470 Mich 283, 286-288; 681 NW2d 348 (2004), our Supreme Court held that for the purpose of scoring OV 19, interference with the administration of justice includes interfering with the duties of police officers. The *Barbee* Court overruled this Court's decision in *People v Deline*, 254 Mich App 595; 658 NW2d 164 (2002), on which defendant relies, to the extent that it was inconsistent. In this case, the trial court properly scored OV 19 at fifteen points based on evidence that defendant attempted to evade arrest, and in doing so, fired a shot at a police officer. Trial counsel's failure to object to the

scoring of OV 19 at fifteen points did not constitute ineffective assistance because it did not result in prejudice to defendant. *Carines*, *supra*.[1] Defendant is not entitled to resentencing.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter

[1] *Barbee*, *supra*, had not yet been decided at the time of sentencing in this matter. However, at that time, plaintiff's application for leave to appeal in *Deline*, *supra*, was being held in abeyance pending the decision in *Barbee*, *supra*. Defendant cannot show that but for an error by counsel, a different sentence would have been imposed. Even if the trial court had accepted a defense challenge to the scoring of OV 19, a challenge to that decision based on *Barbee*, *supra*, would have been successful.