

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN ROUSE,

Defendant-Appellant.

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UNPUBLISHED

November 17, 2005

No. 256494

Wayne Circuit Court

LC No. 03-013270-01

Before: Davis, P.J., and Fitzgerald and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, and carjacking, MCL 750.529a. Defendant was sentenced to 7 to 15 years' imprisonment for the armed robbery conviction, and 7 to 15 years' imprisonment for the carjacking conviction. Defendant appeals his sentence, alleging that he was denied effective assistance of counsel by James O'Donnell, the attorney who represented him at sentencing.<sup>1</sup> Defendant argues that O'Donnell was ineffective because he failed to offer mitigation evidence, failed to prepare, and failed to request a continuance. We affirm.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's findings of fact are reviewed for clear error and questions of law are reviewed de novo. *Id.* Defendant bears a heavy burden of overcoming the presumption that counsel was effective. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To do so, defendant must show that counsel's performance was objectively so deficient that he was not acting as the counsel guaranteed by the Sixth Amendment, that the challenged action could not be considered sound trial strategy, and that defendant was prejudiced by the deficiency. *People v Hurst*, 205 Mich App 634, 640-641; 517 NW2d 858 (1994). We will not "assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

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<sup>1</sup> Defendant's trial counsel was Eric Goze. Goze had a scheduling conflict on the date of sentencing, so he sent another attorney from his office. James O'Donnell represented defendant as substitute counsel at the sentencing. This appeal only concerns O'Donnell's representation.

Defendant argues that O'Donnell was ineffective because he failed to offer mitigation evidence consisting of defendant's mental health history. However, the evidence shows that defendant refused to cooperate with O'Donnell and declined O'Donnell's invitation to discuss the presentence report. Defendant consistently maintained that he did not have a mental health problem. Indeed, the presentence investigation report indicated that defendant had no mental health problems because defendant himself was the source of that information. Furthermore, we decline to find O'Donnell's presentation of the crime as an out of character aberration, rather than the product of an extensive history of problems, to be unsound. A defendant may rationally wish not to appear at sentencing to have a potentially dangerous mental health problem. Given defendant's admissions that he voluntarily discontinued his medications and counseling, and given that defendant's mental health history, including his mother's physical abuse of him, was part of the trial court's file, there is no reasonable likelihood that the trial court would have been persuaded to impose a reduced sentence if O'Donnell had presented that history at sentencing.

We find objectively reasonable O'Donnell's failure to present evidence of defendant's alcohol and marijuana use. Defendant was twenty years old at sentencing. We can find no authority or logic suggesting that counsel might be ineffective for failing to present evidence of other criminal activity.

Defendant next argues that O'Donnell failed to prepare for sentencing. O'Donnell received the case file the day before sentencing and received the presentence report the day of sentencing. There is no indication that this timing was O'Donnell's responsibility. As noted, O'Donnell attempted to discuss the presentence report with defendant, and defendant declined. There is no evidence that any contents of the case file should have prompted O'Donnell to contact defendant's family members, and there is no evidence that they could have affected the sentencing if they had made statements there. O'Donnell's preparation was brief, but it was not so minimal that it constituted ineffective assistance. Under the circumstances, there was little, if anything, more he could do. Defendant argues that O'Donnell should have requested a continuance. However, Goze had unsuccessfully attempted to change the sentencing date at the time the trial court set the date, so there is no reason to believe such a request from O'Donnell would have been granted. O'Donnell felt he was ready to go forward, and there is no evidence that a continuance would have made defendant more cooperative. Thus, defendant fails to show prejudice.

Defendant finally argues that he was denied counsel at a critical stage of the proceedings, even if O'Donnell's representation was not objectively unreasonable. It is unnecessary to show prejudice if "counsel was either totally absent, or prevented from assisting the accused." *United States v Cronin*, 466 US 648, 659 n 25; 104 S Ct 2039; 80 L Ed 2d 657 (1984). A showing of prejudice is also unnecessary where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing . . . ." *Id.*, 659. However, mere substitution of counsel is not sufficient. An indigent defendant is not entitled to choose his own attorney, *People v Ackerman*, 257 Mich App 434, 456; 669 NW2d 818 (2003), and defendant admits that he consented to the substitution, forfeiting any objection. *People v Pottruff*, 116 Mich App 367, 377; 323 NW2d 402 (1982). O'Donnell's presentation of defendant as having acted out of character and as being "stunned" at what had happened to him subjected the prosecution's case to meaningful testing. To the extent that testing could have been more forceful, defendant is responsible for failing to provide O'Donnell with the necessary assistance, and "error requiring reversal cannot be error to

which the aggrieved party contributed by plan or negligence.” *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999).

Affirmed.

/s/ Alton T. Davis

/s/ E. Thomas Fitzgerald

/s/ Jessica R. Cooper