STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 6, 2005
v	No. 256498 St. Clair Circuit Court
KEVIN JAMES LINDKE, Defendant-Appellant.	LC No. K-03-2451-FH

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for felonious assault, MCL 750.82, and assaulting a police officer, MCL 750.81D(1). We affirm.

I. FACTS

In the early morning hours of May 25, 2003, a St. Clair County Sheriff's Deputy observed defendant and 3 other males walking along M-29. The officer observed defendant throw himself against a car. When pursued, defendant fled the scene on foot. Some time later defendant was spotted and the officer again approached and again defendant fled on foot. Two additional officers arrived and the three officers pursued defendant on foot. When searching the area, someone threw a "PVC like lawn ornament" at one of the officers. When one of the officers was patrolling the area in a continued search of the neighborhood, defendant threw a brick in front of the patrol car. In testimony, the officer stated that if he had not "slammed on the brakes he would have hit me right in the windshield". Defendant stated that he threw the brick over the police car in an attempt to distract the driver. Defendant was apprehended and arrested shortly thereafter.

Defendant was charged with two counts of felonious assault, one count of resisting and obstructing a police officer, and one count of malicious destruction of property greater than $200 but less than $1,000, MCL 750.377a(1)(c)(i). Apparently, a preliminary examination scheduled for June 4, 2003 was adjourned because none of the officers appeared. Defendant appeared in court again for a second preliminary examination on June 11, 2003, when the charges were dismissed without prejudice because the officers had again failed to appear. Defendant was not represented by counsel at the June 11 hearing.

The court was later informed that the officers failed to appear on June 11 because of an error in the witness line, which plaintiff represents on appeal is the "phone number they were to call the night before to see if they were needed to testify that day". On June 12, 2003, the charges were reauthorized and a third preliminary examination was scheduled for August 20, 2003. However, the charges were once again dismissed without prejudice at this third scheduled preliminary examination because one of the officers was unable to appear due to having injured his shoulder. Defendant was not represented by counsel during this hearing.

Charges were reauthorized on August 29, 2003. A preliminary examination was held on September 24, 2003, with defendant now represented by counsel. At the conclusion of the hearing, defendant was bound over for trial on two counts of felonious assault, one count of resisting and obstructing a police officer, and one count of malicious destruction of property greater than $200 but less than $1,000.

II. PROSECUTORIAL MISCONDUCT

Defendant argues that the prosecutor violated his due process rights by twice dismissing charges at a scheduled preliminary examination and then reauthorizing the charges. We disagree.

A. Standard of Review

To properly preserve a claim of prosecutorial misconduct, defendant must make a timely, contemporaneous objection. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501. Defendant failed to properly preserve this issue for appellate review. Therefore, we review for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

B. Analysis

This Court has held "that subjecting a defendant to repeated preliminary examinations violates due process if the prosecutor attempts to harass the defendant or engage in 'judge-shopping.'" *People v Robbins*, 223 Mich App 355, 363; 566 NW2d 49 (1997); citing *People v Stafford*, 168 Mich App 247, 251; 423 NW2d 634 (1988), aff'd in part rev'd in part on other grounds 434 Mich 125 (1990); *People v Vargo*, 139 Mich App 573, 578; 362 NW2d 840 (1984). This Court examined a defendant's claim of harassment in *People v George*, 114 Mich App 204, 211-214; 318 NW2d 666 (1982) and *Vargo, supra*. In *George*, the defendants were bound over for trial after preliminary examinations and the circuit court granted their motions to dismiss the action. *Id*. at 207. The prosecutor initially appealed the decision to this Court but moved to dismiss the appeal stating that the claim was not supported by the record. *Id.* After the appeal was dismissed, the prosecution brought identical charges against the defendants. *Id*. The magistrate dismissed the charges concluding that a second preliminary examination without new evidence would violate the defendants due process rights. *Id*. This Court agreed. *Id*. at 214-215. After canvassing the decisions of other jurisdictions and Michigan precedents, this Court concluded that subjecting the defendant to repeated preliminary examinations was a violation of

due process if the facts disclosed harassment or judge shopping. *Id*. at 211-215. This Court concluded that the actions of the prosecution clearly constituted harassment, noting that during the second examination the prosecution merely offered evidence that was properly characterized as cumulative. *Id*. at 214-215. In *Vargo*, this Court refused to find harassment where the defendant's charges were dismissed after a preliminary examination and then reissued sometime later. *Vargo*, *supra* at 578. The *Vargo* panel concluded that a second preliminary examination was not harassment because the prosecution's failure to introduce all available evidence during the first exam was "more a product of neglect than a deliberate attempt to harass defendant." *Id.* at 578.

Here, a review of the record reveals no evidence of judge shopping or harassment on the part of the plaintiff. On all occasions, the charges were dismissed after defendant appeared in court, but prior to the commencement of the preliminary examination or the introduction of any evidence. Accordingly, defendant was not required to "withstand further examination," *Stafford*, *supra* at 249, or be subjected to a second examination with cumulative evidence after the trial court refused to bind the case over, *George*, *supra* at 207. It appears that the officers did not appear for the June 11th examination because of a mistake in the prosecutor's witness notifications system. The case was again dismissed prior to the preliminary exam on August 20th because a critical witness had a torn rotator cuff. These are not circumstances that indicate deliberate harassment on the part of the prosecutor. *Vargo*, *supra* at 578. Moreover, this Court has found good cause to adjourn a preliminary examination under MCL 766.7 where the police officer witnesses were unavailable do to a conflicting court appearance and a scheduled vacation. *People v Horne*, 147 Mich App 375; 383 NW2d 208 (1985). Because the prosecutor was not engaged in judge shopping or harassment, defendant's claim of prosecutorial misconduct must fail.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Next, defendant argues that defense counsel was ineffective for failing to move to dismiss the charges based on prosecutorial misconduct. We disagree.

A. Standard of Review

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

B. Analysis

In light of the above conclusion that the prosecutor did not commit misconduct by subjecting defendant to repeated preliminary examinations, defense counsel's failure move for dismissal is not error. Counsel cannot be faulted for failing to make a meritless request. See *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

Affirmed.

/s/ Michael R. Smolenski
/s/ Bill Schuette
/s/ Stephen L. Borrello