STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 25, 2007
v	No. 265704 Oakland Circuit Court
SAMUEL BERNARD PROFFITT, Defendant-Appellant.	LC No. 2005-201445-FC

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of armed robbery, MCL 750.529. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Sara Moreton and Allison Metz were robbed at gunpoint in a parking lot. Defendant allegedly robbed Moreton, while his accomplice confronted Metz. Moreton testified that she looked extensively at defendant during the robbery, trying to memorize his face, as the other robber made a number of trips between the victims and his vehicle while he placed the victims' belongings into his Dodge Durango. She stated that she was able to observe defendant for about four or five minutes from a very short distance, that she felt "pretty calm" throughout the robbery, and that the lighting in the parking lot was good. As the men left, she recorded their license plate number, and subsequently called the police. Police later found a Dodge Durango with the license plate Moreton had memorized. Items belonging to the victims were found therein. On June 15, 2004, Oakland County Sheriff deputies searched defendant's home in an unrelated drug case, and found Moreton's and Metz' identification cards in the home. Defendant was arrested on the unrelated drug charge.

On July 7, 2004, the victims were separately shown a photo array that included defendant's photo. Sara Moreton identified defendant as the man who robbed her. Moreton also identified defendant at the preliminary examination and at trial. Metz could not identify defendant, though she claimed to have been robbed by the other perpetrator. According to the officer who transported defendant from the District Court after his preliminary examination, defendant asked the officer if the sketch of the robbery suspect had facial hair and then stated, "just because I was driving the truck doesn't mean I robbed anyone."

Defendant now maintains that his trial counsel was ineffective for failing to object to the introduction of the photographic showup where the police made no effort to conduct a corporeal lineup.

A defendant seeking to establish ineffective assistance of counsel must overcome a strong presumption that counsel's performance constituted sound trial strategy, and must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the results of the proceedings would have been different. *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001); *People v Snider*, 239 Mich App 393, 423-424; 608 NW2d 502 (2000). Because this Court denied defendant's motion to remand for a *Ginther*[1] hearing, our review of defendant's claim that he was denied the effective assistance of counsel is limited to mistakes apparent on the record. *Id*. at 423. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id*.

When an accused is in custody or can be compelled to appear, identification by photographic showup should not be made unless a legitimate reason for doing so exists. *People v Kurylczyk*, 443 Mich 289, 298 (Griffin, J.), 318 (Boyle, J.); 505 NW2d 528 (1993); *People v Anderson*, 389 Mich 155, 186-187; 205 NW2d 461 (1973), overruled in part on other grds in *People v Hickman*, 470 Mich 602; 684 NW2d 267 (2004); *People v Strand*, 213 Mich App 100, 104; 539 NW2d 739 (1995). In general, circumstances which might justify use of a photographic showup include: (1) the impossibility of arranging a proper lineup; (2) an insufficient number of persons available with the accused's physical characteristics; (3) the case requires immediate identification; (4) the witnesses are distant from the location of the accused; and (5) the accused refuses to participate in a lineup and by his actions seeks to destroy the value of the identification. *Anderson, supra* at 186-187 n 22; *People v Davis*, 146 Mich App 537, 546; 381 NW2d 759 (1985).

Defendant cannot show that counsel acted unreasonably for failing to object to the introduction of the photographic showup on the grounds that it should have not been conducted because he was available to participate in a corporeal lineup. Defendant provides no evidence to support a claim that he was actually in custody for any offense in any jurisdiction at the time his photograph was shown to the victims. Instead, he simply maintains that he was "in custody" somewhere during the time the photographic showup was conducted. The record presented to this Court does not substantiate defendant's claim. It is unclear whether defendant was incarcerated or on bond during the photographic showup. In addition, in so far as defendant's admissions on appeal indicate that he was incarcerated in Wayne County at the time of the showup, he was not in "custody" for the purposes of the analysis under *Anderson, supra*. *People v Wyngaard*, 151 Mich App 107, 113; 390 NW2d 694 (1986).

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

On appeal, defendant has abandoned his previous argument that the photographic showup was unduly suggestive by failing to provide any supporting argument in his brief on appeal. We need not address the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). In addition, the array furnished to us does not support a claim that defendant's photograph was somehow substantially distinguishable from the others.

Defendant has failed to show that counsel was ineffective for failing to challenge the introduction of the photograph showup rather than pursuing a strategy of arguing to the jury that the identification was flawed. Counsel is not ineffective for failing to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Nor can defendant meet his burden of showing that, if not for counsel's error, the outcome of the trial would likely have been different. Defendant has presented nothing on the record to indicate that the showup was suggestive, either in the array itself or in the manner of its presentation to the victims. Defendant thus cannot show that the court would have struck the photograph identification evidence had counsel objected to its introduction. Nor can he show that the court would also have refused to admit the subsequent in-court identification, which, given the testimony presented at trial, would likely have been found to have an independent basis. See *People v Gray*, 457 Mich 107, 115-116; 577 NW2d 92 (1998). Additionally, we note that the other evidence against defendant, including the physical evidence found in his home and his inculpatory statements, was substantial. Thus, we find that defendant has not met his burden of proving ineffective assistance of counsel.

We affirm.

/s/ Donald S. Owens
/s/ Richard A. Bandstra
/s/ Alton T. Davis