STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 30, 2007
v	No. 272780 Wayne Circuit Court
IRVIN DEVELLE WEST, Defendant-Appellant.	LC No. 06-005496-01

Before: Zahra, P.J., and White and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, felon in possession of a firearm, MCL 750.224f, third-degree fleeing or eluding a police officer, MCL 750.479a(3), and intentionally discharging a firearm at a dwelling, MCL 750.234b(1). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 35 to 60 years for the armed robbery conviction, 20 to 40 years each for the felon in possession and fleeing or eluding convictions, and 5 to 15 years for the intentional discharge of a firearm conviction, and a consecutive 5-year prison term for the felony firearm conviction. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts

The convictions arose from defendant's robbery of a video game store, followed by a police chase to an apartment building, where police found defendant in a utility closet holding a gun to his head. Prior to his surrender, police heard two shots fired from the closet. The police also heard defendant, evidently engaged in a cell phone call, admit to committing an armed robbery.

II. Analysis

Defendant contends that he was denied a fair trial because he was tried while attired in jail clothing. We conclude there is no merit to this argument.

Defendant had other clothes available but chose not to wear them because he claimed that he saw a coffee stain on the collar and the front of the shirt and "it didn't look too presentable to wear." On the second day of trial, defendant reiterated his choice to wear jail attire. The Court

inquired "[s]o, but you choose to wear what you have on, right?" and defendant responded, "[y]es, because there's no sense in me sitting there with a coffee stain dripping down on my shirt."

A defendant is entitled to wear civilian clothing rather than identifiable prison garb while in the presence of the jury. *People v Shaw*, 381 Mich 467, 474-475; 164 NW2d 7 (1969). "[T]he particular evil proscribed is *compelling* a defendant, against his will, to be tried in jail attire." *Estelle v Williams*, 425 US 501, 507; 96 S Ct 169; 148 L Ed 2d 126 (1976) (emphasis added). "The reason for this judicial focus upon compulsion is simple; instances frequently arise where a defendant prefers to stand trial before his peers in prison garments. The cases show, for example, that it is not an uncommon defense tactic to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury." *Id.* at 507-508. Accordingly, the defendant's failure to object to being tried in such clothes "is sufficient to negate the presence of compulsion necessary to establish a constitutional violation." *Id*. at 512-513; see also *Shaw, supra*.

While he objected that the shirt had coffee stains, he did not request any action to correct the situation, and instead chose to wear the prison garb. The record does not support his claim of a constitutional violation.

Defendant argues that his trial counsel was ineffective for failing to object to the clothing and to secure another shirt. However, as noted in *Estelle, supra* at 507-508, appearing before the jury in prison garb is a recognized defense tactic used in hope of eliciting sympathy. Defendant failed to overcome the presumption that counsel's actions constituted sound trial strategy and that the representation fell below an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Finally, defendant notes that the prosecution "capitalized upon the problem" by stating during closing argument, "Ladies and gentlemen, the Court's going to read to you an instruction, and I'm going to sit down and shut up, that you are not to let sympathy weigh into your decision. We heard that certain people made their own decision on attire. That decision is made to play on your sympathy." Because defense counsel did not object to the remark, we review for plain error pursuant to *People v Carines*, 460 Mich 750, 764-767; 597 NW2d 130 (1999), reh den 461 Mich 1205 (1999). Defendant has not shown plain error affecting his substantial rights.

Affirmed.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Peter D. O'Connell