STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2007
v	No. 272630 Wayne Circuit Court
CARLOS DURRELL SIMMONS, Defendant-Appellant.	LC No. 06-003041-01

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f) (force or coercion used to accomplish sexual penetration resulting in personal injury), and one count of second degree criminal sexual conduct (CSC II), MCL 750.520c(1)(f) (force or coercion used to accomplish sexual contact resulting in personal injury). Defendant was sentenced as a second habitual offender, MCL 769.10, to twenty-one to fifty years' imprisonment for each of his CSC I convictions, and one to fifteen years' imprisonment for his CSC II conviction. We affirm.

Defendant first asserts that he was denied the effective assistance of counsel by trial counsel's failure to seek suppression of 1) defendant's statement to police, 2) the victim's identification of defendant's photo in a photo array held without counsel, and 3) the DNA evidence seized from defendant pursuant to a defective search warrant. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's errors, the result of the proceedings would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Because there was no hearing below, our review is limited to mistakes apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

In making his arguments, defendant focuses on counsel's failure to make a record and obtain rulings from the trial court. We conclude, however, that such efforts would have been futile. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant provides no factual support for the assertion that his statements were involuntary or coerced, and Detective James Hines testified that defendant insisted that Hines

"hear him out" after Hines informed defendant that they could not talk outside of the presence of defendant's attorney, and that anything defendant said could be used against him in court. Thus, the record supports that defendant initiated the conversations with Hines, and that defendant's statements were the product of a free and deliberate choice rather than intimidation, coercion or deception, or a failure to honor his request for counsel. See *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000). There is no reason to believe that the court would have accepted a different version of the events had counsel challenged the admissibility of the statements before trial. Additionally, a Sixth Amendment challenge would have been futile because adversarial judicial proceedings had not yet commenced. *People v Hickman*, 470 Mich 602, 607-608; 684 NW2d 267 (2004). Regarding the photo array, the record is somewhat unclear, but it appears that a photographic lineup was held because defendant refused to participate in a live lineup without his counsel, and his counsel was not available. In any event, defendant's reliance on *People v Anderson*, 389 Mich 155, 187 n 22; 205 NW2d 461 (1973), overruled in part *Hickman, supra*, is misplaced in light of *Hickman, supra.* Further, the victim positively identified defendant in court, and clearly had an independent basis for doing so. Most important, identity was not an issue at trial; rather, the issue was consent. Thus, defense counsel's performance with respect to this issue was neither objectively unreasonable nor outcome determinative.

Nor is defendant entitled to relief on the basis of counsel's failure to challenge the search warrant permitting the police to collect a DNA sample from defendant based on probable cause established through the allegedly improper photographic lineup identification. The photographic lineup was not infirm. Further, although the DNA evidence was conclusive on the issue of identity, it could not have affected the outcome of the trial because defendant admitted to engaging in the sexual acts with the victim, and defended the case on the basis that the victim was a prostitute who had agreed to engage in the acts.

Defendant next argues that his sentences constitute cruel and unusual punishment. We disagree. This Court reviews an unpreserved sentencing challenge and constitutional claim for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002). Both the United States and Michigan Constitutions prohibit cruel and unusual punishment. US Const, Am VIII (cruel and unusual); Const 1963, art 1, § 16 (cruel or unusual). A proportionate sentence does not constitute cruel or unusual punishment, and a sentence that falls within the appropriate sentencing guidelines range is presumptively proportionate. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004). Because defendant's sentences fell within the appropriate guidelines they do not constitute cruel and unusual punishment. We further observe that separate and apart from the guidelines, we do not find the sentences disproportionate or excessive.[1]

Finally, defendant submitted a Standard 4 brief in which he asserts additional bases for his ineffective assistance of counsel claim. Defendant contends that counsel should have investigated what time the victim's class ended before the assault, and whether she attended

[1] To the extent that defendant argues that the court's sentences were based on inadmissible evidence that counsel failed to challenge, we observe that the court's comments are supported by the victim's account of the assault.

school at all, because her written statement to the police was inconsistent with her trial testimony. Defendant also complains of counsel's failure to produce witnesses who observed defendant's initial interaction with the victim, and witnesses who were in the building behind which the sexual activity took place. We reject these claims.

No evidence was presented at trial concerning inconsistencies between the victim's written statement and her testimony. Thus, defendant has failed to establish a factual predicate supporting his claim. Further, the time the victim left school, and whether she even attended school, were not facts material to the real issue in this case, consent. Thus, reasonable professional judgment supported defense counsel's decision not to investigate these matters, and defendant was not prejudiced by counsel's decision.

Defendant also asserts that defense counsel was ineffective in failing to interview employees at the adult novelty store where he claimed to have met the victim and the Blackwell Civic Center, where the sexual acts occurred. No evidence was presented in reference to any witnesses at either the adult novelty store or the Blackwell Civic Center. We are thus unable to determine whether counsel was unreasonable in failing to investigate such witnesses, or whether, if they existed, their testimony would have affected the outcome of the case. Defendant has failed to sustain his claim.

Lastly, defendant contends that his counsel failed to obtain the surveillance video recorded by security cameras outside the Blackwell Civic Center. However, there was no evidence presented below concerning the existence of any security cameras, or what any recordings would show. Thus, defendant has failed to establish a factual predicate showing that he was denied the effective assistance of counsel. *People v Hoag*, 460 Mich 1, 6-7; 594 NW2d 57 (1999).

Affirmed.

/s/ William C. Whitbeck
/s/ Helene N. White
/s/ Brian K. Zahra