

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY DWAYNE JAMES,

Defendant-Appellant.

UNPUBLISHED

December 20, 2007

No. 270194

Wayne Circuit Court

LC No. 06-001037-01

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 42 months to 15 years for the CCW and felon-in-possession convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right. We affirm.

I. Effective Assistance of Counsel

Defendant first argues that he was denied the effective assistance of counsel because his trial attorney failed to obtain and use fingerprint evidence and failed to call Police Officer James Pierce to testify.

To prevail on a claim of ineffective assistance of counsel, a defendant must first show that defense counsel's performance was deficient such that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *People v Lloyd*, 459 Mich 433, 446; 590 NW2d 738 (1999). Second, the defendant must show that, but for counsel's error, there is a reasonable probability that the result of the proceeding would have been different. *People v Shively*, 230 Mich App 626, 628; 584 NW2d 740 (1998). The defendant must show that counsel's error deprived the defendant of a fair trial or a trial whose result is reliable. *Lloyd, supra*.

Officer Pierce was one of several police officers that were present when defendant was apprehended and arrested. Officers Travis Kostanko and William Zeolla testified at defendant's trial, but defense counsel, after conferring with defendant, waived the testimony of Officer Pierce. Defendant now argues that defense counsel was ineffective for failing to call Officer Pierce at trial.

Decisions regarding whether to call witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). There is no basis in the record for concluding that Officer Pierce could have provided testimony favorable to defendant. Although defendant asserts that he “believes” Officer Pierce would have testified differently than the other two officers, he did not submit any evidence in support of this belief. Further, the record discloses that appellate counsel advised the trial court that she had spoken to Officer Pierce and he advised her that his testimony would not be helpful to defendant. On this record, there is no basis for concluding that trial counsel was ineffective for failing to call officer Pierce, or that remand for an evidentiary hearing on this issue is necessary.

Regarding the lack of fingerprint evidence, Officer Kostanko testified that it was up to the officer in charge, Sergeant Lucaj, to determine whether a weapon should be checked for fingerprints. After the trial court questioned the prosecutor about Sergeant Lucaj’s absence from trial, the prosecutor asked for a brief adjournment to produce him, but then defense counsel agreed to waive Sergeant Lucaj’s testimony “for today’s purposes of trial.” Presumably, this was a matter of trial strategy because immediately afterward, defense counsel moved for a directed verdict based on the prosecutor’s failure to offer the gun into evidence, which would have been accomplished through Sergeant Lucaj who, according to defense counsel, “needed to be here to testify for the gun purposes or to introduce evidence that the gun was recovered.” The trial court denied the motion, relying on the testimony of Officers Kostanko and Zeolla. This Court will not assess counsel’s competence with the benefit of hindsight. *Garza, supra* at 255. The fact that counsel’s strategy was not successful does not render counsel’s representation constitutionally ineffective. Therefore, defendant has not shown that he was deprived of the effective assistance of counsel at trial.

II. Defendant’s Standard 4 Brief

Defendant raises several issues in a pro se Standard 4 brief, none of which have merit.

Defendant’s multiple convictions and sentences for CCW, felon in possession of a firearm, and felony-firearm do not violate the double jeopardy protections against multiple punishments for the same offense. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163, 167; 631 NW2d 755 (2001); *People v Mayfield*, 221 Mich App 656, 662; 562 NW2d 272 (1997).¹

¹ Defendant briefly contends that the multiple charges against him violated his Sixth Amendment right to a unanimous verdict. However, the right to a unanimous verdict is inapplicable in a bench trial. Defendant also appears to challenge the sufficiency of the evidence to support his multiple convictions. However, the police officers testified that they observed defendant pull a handgun from the waistband of his pants and discard the gun while running. The officers testified that they later recovered a gun in the area that defendant threw it. The prosecutor also presented evidence that defendant had a prior felony conviction and was ineligible to possess a gun. Viewed in a light most favorable to the prosecution, the evidence was sufficient to support

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Defendant also challenges the trial court's findings of fact and argues that its verdicts are against the great weight of the evidence. We disagree. Defendant testified at trial and presented a version of events that differed from the account provided by the police officers. To the extent that defendant's testimony conflicted with the testimony of the police officers, this Court gives due regard to the trial court's special opportunity to judge the credibility of the witnesses who appeared before it and will not set the trial court's factual findings aside unless they are clearly erroneous. MCR 2.613(C); MCR 6.001(D). Although defendant contends that Officers Kostanko and Zeolla made conflicting statements in their testimony, those conflicts did not involve material matters. Deferring to the trial court's determinations of credibility, we find no clear error in the trial court's findings, and its finding are not against the great weight of the evidence.

We also reject defendant's argument that he is entitled to a new trial on the basis of newly discovered evidence, that evidence being the testimony of Dennis Carter, the driver of the minivan in which defendant was riding just before he was arrested. Defendant maintains that Carter would testify that the arresting officers' testimony was "fabricated." For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that "(1) the evidence itself, not merely its materiality, was newly discovered (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cox*, 268 Mich App 440, 450; 709 NW2d 152 (2005). Defendant did not raise this issue in his motion for a new trial and he has not met the criteria for a new trial. Although defendant contends that he only knew the driver under the nickname "Big C," he has failed to show that he could not have learned Carter's identity before trial with the exercise of due diligence. Moreover, defendant merely asserts that he "believes" that Carter knows what happened. Defendant has not provided any factual support for this belief. Thus, defendant has failed to show that any testimony Carter could provide would make a different result probable on retrial.

Finally, although defendant claims that trial counsel failed to inform him of a plea offer made by the prosecutor, the record discloses that the prosecutor announced the plea offer on the record in defendant's presence at the final conference proceeding. Thus, defendant was clearly informed of the offer. Therefore, this issue is without merit.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder

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defendant's convictions. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).