

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYAN VINCENT SMIGIELSKI,

Defendant-Appellant.

UNPUBLISHED

December 27, 2007

No. 268418

Oakland Circuit Court

LC No. 2004-199338-FH

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

PER CURIAM.

Defendant appeals as of right his jury convictions of operating a vehicle under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(1), and driving with a suspended license, MCL 257.904(3)(a). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to one to five years' imprisonment for the OUIL conviction, and 93 days for the suspended license conviction. We affirm. We decide this appeal without oral argument under MCR 7.214(E).

Defendant attended a party at a friend's apartment on July 28, 2004. While at the party, defendant called an acquaintance, Anthony Carroll, "to ask to get picked up." Carroll agreed to come to the party, but advised defendant that he planned to consume alcohol, and would not be able to drive them home. Defendant and Carroll consumed considerable amounts of alcohol at the party. Carroll testified that when he and defendant left the party, he gave defendant his Jeep keys. According to Carroll, defendant drove the Jeep "on top of a dirt hill," and the Jeep became stuck in the dirt. Carroll recounted that he and defendant argued about this situation, and that he pushed defendant against the Jeep. According to Carroll, defendant then "[r]an away," leaving the key in the Jeep's ignition. Carroll heard defendant screaming Carroll's name "in the distance, in the darkness" Carroll called his father for help. As Carroll and his father freed the Jeep from the dirt hill, Police Officer Richard Chipman arrived.

Chipman testified that Carroll "told me that the vehicle had hit the dirt pile; that his friend had been driving." Chipman related that during his conversation with Carroll, he saw defendant "wandering by the red [J]eep." Chipman described defendant as appearing intoxicated and "stumbling around the vehicle." Chipman also noted a bleeding injury on defendant's forehead. Chipman questioned defendant, who denied having driven the Jeep. Defendant told Chipman that the wound on his forehead occurred when he hit his forehead with a bowling ball the day before. Defendant also offered two alternate explanations for the forehead laceration. He

claimed that he had injured himself with a hammer while working on his parents' floor, and that "he had been in a fight" the previous day. Chipman examined the Jeep and noticed blood on the top of the steering wheel. He requested that defendant perform field sobriety tests. Defendant failed three tests and refused to perform a fourth. A video recording made by Chipman's scout car equipment, played during the trial, included defendant stating, "I was driving," and "I was driving Tony home." Chipman arrested defendant for drunk driving, and obtained a warrant for blood alcohol analysis. The parties stipulated that defendant had a blood alcohol level of 0.22, and a suspended driver's license.

Brandon Messer, the host of the party, testified that defendant became drunk and belligerent at the party. Messer claimed that he helped carry defendant to Carroll's Jeep, and placed him in the passenger seat. According to Messer, Carroll drove the Jeep away from the apartment. Defendant testified that Carroll drove the Jeep onto the dirt hill. He claimed that he injured his forehead during an altercation with Carroll after the Jeep became lodged in the dirt. Defendant admitted that he provided Chipman with incorrect explanations of his forehead injury, and attributed the inaccuracies to his fear, nervousness, and drunken condition. The jury convicted defendant as charged.

Defendant contends that he should receive a new trial because his counsel was ineffective. The trial court considered defendant's ineffectiveness of counsel arguments, but denied his motion for a new trial or a *Ginther*¹ hearing. We thus limit our review to the existing record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To establish the ineffectiveness of counsel, a defendant must satisfy the two-part test described by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The first part of that test mandates a showing that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, *supra* at 687. The effective assistance of counsel is presumed, and the defendant must overcome a heavy burden to demonstrate otherwise. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). To be entitled to relief, the defendant must rebut a strong presumption that counsel's performance constituted a legitimate trial strategy. *Id.* at 600. The second part of the *Strickland* test requires a showing that counsel's deficient performance prejudiced the defense. "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for the counsel's error, the result of the proceeding would have been different." *Id.*

Defendant first argues that his counsel was ineffective because he failed to interview the person who reported the stuck Jeep to the police. "Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense." *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). The record contains no evidence suggesting that the person who reported the stuck Jeep could have identified the driver of the Jeep. Other

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

than defendant's claim that this witness potentially existed, he has made no showing that the witness' testimony would have benefited the defense. Consequently, this claim of ineffective assistance lacks merit.

Defendant next asserts that his counsel performed ineffectively because he did not bring a motion for dismissal based on the absence of DNA testing of the blood found on the steering wheel. "Absent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process." *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). The prosecution need not "exhaust all scientific means at its disposal." *Id.* Here, defendant had a fresh laceration on his forehead, and Carroll appeared uninjured. Because we find it highly improbable that DNA testing of the blood on the steering wheel would have exculpated defendant under these circumstances, we reject defendant's second ineffective assistance argument.

Defendant also argues that his counsel should have requested a jury instruction regarding the prosecution's "loss" of the blood evidence. An adverse inference instruction is unnecessary unless the defendant shows that the prosecutor acted in bad faith in failing to produce evidence. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). Officer Chipman testified that he had not collected any of the blood present on the steering wheel because he lacked the training "for taking blood samples from a car." Because defendant has failed to demonstrate that the police or the prosecution in fact disposed of the blood sample in bad faith, an adverse inference instruction was not warranted here.

Defendant's lastly contends that his counsel was ineffective for failing to move to dismiss the charges for lack of a speedy trial. Defendant's trial commenced more than 180 days after his arrest. In analyzing a claimed violation of a defendant's constitutional right to a speedy trial, a court should balance the following factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of the right; and (4) prejudice to the defendant. *People v Grimmett*, 388 Mich 590, 605-606; 202 NW2d 278 (1972), overruled on other grounds in *People v White*, 390 Mich 245, 258; 212 NW2d 222 (1973). General allegations of prejudice caused by delay, such as witnesses' loss of memory, do not suffice to demonstrate substantial prejudice. *People v Gilmore*, 222 Mich App 442, 462; 564 NW2d 158 (1997). Defendant has failed to identify the reasons for the delay, and has not presented any specific information relevant to prejudice. Although Messer claimed to have a poor memory of the events at the party, defendant has not demonstrated that the gaps in Messer's memory meaningfully impaired his defense. Because defendant has failed to substantiate a violation of his right to a speedy trial, counsel was not ineffective for failing to seek dismissal on that ground. "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).

Affirmed.

/s/ Bill Schuette
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher