STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 28, 2008
v	No. 275710 Macomb Circuit Court
CECIL HOWARD, Defendant-Appellant.	LC No. 2006-001447-FH

Before: White, P.J., and Hoekstra and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of resisting or obstructing a police officer, MCL 750.81d(1), and sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of six months to 15 years. He appeals as of right. Because we conclude that defense counsel was not ineffective for failing to raise an insanity defense or investigate an alleged alibi witness, that the trial court did not abuse its discretion or otherwise deprive defendant of a defense in failing to adjourn trial in order to permit defendant to secure an alibi witness and police patrol car video, and that defendant was not entitled to a missing evidence instruction or to credit against his sentence, we affirm.

I. Basic Facts

On February 13, 2006, at about 2:30 a.m., Warren police responded to a report of an alarm at a gas station. The front door had been pried open, items were strewn around, and the cash register had been opened and emptied of all the bills. No one was inside the building or in the immediate area. When the owner arrived, he advised the police that approximately $370 was missing from the cash register. Upon leaving the gas station, Officer Randall Richardson observed defendant riding a bike in the middle of the road within a half-mile of the gas station. Using a loud speaker, the officer ordered defendant to pull over. Richardson, who was in full uniform, noted that as he approached defendant and began talking to him, defendant appeared "very nervous" and quickly unzipped his jacket. The officer noticed a crowbar and "a large wad of money" protruding from the inside of defendant's jacket, and that defendant was wearing brown work gloves. As the officer attempted to handcuff defendant, defendant broke free and fled on foot. After an unsuccessful attempt to catch defendant on foot, Richardson returned to his patrol car and continued to pursue defendant while calling for assistance. During the chase, defendant discarded his jacket.

Officers subsequently located defendant hiding in the backseat of a car. A jacket and gloves were found in the area, but a crowbar was not recovered. After a struggle, the officers were able to subdue and arrest defendant. Defendant was charged with breaking and entering with intent to commit larceny and resisting or obstructing a police officer. Upon searching defendant, the police found $370 in his pocket. Defendant was acquitted of the breaking and entering charge, but convicted of resisting or obstructing a police officer.

II. Effective Assistance of Counsel

Defendant first argues that defense counsel was ineffective for failing to investigate and argue an insanity defense, and for failing to investigate and subpoena an alibi witness. We disagree. Defendant failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, and this Court denied his motion to remand to move for an evidentiary hearing for failure to satisfy the requirements of MCR 7.211(C); therefore, our review is limited to errors apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); see also *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

A. Insanity Defense

"A defendant is entitled to have his counsel investigate, prepare, and present all substantial defenses." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A criminal defendant is denied the effective assistance of counsel by his attorney's failure to investigate and present a meritorious insanity defense. See *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988), and *People v Parker*, 133 Mich App 358, 363; 349 NW2d 514 (1984). When a claim of ineffective assistance of counsel is based on the failure to present a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present that defense and that the defense was substantial. *Ayres, supra*.

The test for criminal insanity is found in MCL 768.21a(1), which provides that "[a]n individual is legally insane if, as a result of mental illness . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law."[1] "Mental illness . . . does not otherwise constitute a defense of legal insanity." *Id*. The defendant has the burden of proving the affirmative defense of insanity by a preponderance of the evidence. MCL 768.21a(3).

[1] Mental illness is "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 330.1400(g).

Defendant contends that he has a history of substance abuse and might have mental health issues, but he was never evaluated to make such a determination. Regardless, there is no evidence that defendant made a good-faith effort to avail himself of the right to present an insanity defense at trial. Even on appeal, defendant has not provided any affidavits or other documentation indicating that he had any medical or psychological condition at the time of the offense to support that exploration of insanity might have been reasonable. Moreover, defendant does not argue that he lacked the capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the law, but has consistently maintained his innocence and asserted a defense of misidentification at trial.

With regard to substance abuse, defendant relies on references in the presentence investigation report (PSIR) to support his contention that he has a substance abuse problem. In particular, the PSIR indicates that defendant was under the influence of alcohol at the time of the offense, occasionally consumes alcohol, and has a history of substance abuse. These statements do not provide the basis for an insanity defense. Voluntary intoxication cannot form the basis for an insanity defense, MCL 768.21a(2). And, although defendant also mentions involuntary intoxication, he proffered no evidence that he suffered from involuntary intoxication. Because there is no basis for concluding that an insanity defense was a substantial defense, defendant cannot establish a claim of ineffective assistance of counsel. *Ayres*, *supra*; see also *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("[t]rial counsel is not required to advocate a meritless position").

B. Alibi Witness

Defendant also claims that defense counsel was ineffective for failing to sufficiently investigate and subpoena an alibi witness who could have supported an alibi defense. However, defendant has not provided a witness affidavit or identified any evidence of record establishing that the proposed witness's testimony would have yielded valuable evidence that would have affected the outcome of trial. See MCR 7.210(A)(1). Defendant's unsupported assertion in his brief that the witness would have supported his alibi is insufficient to demonstrate that he was deprived of a substantial defense. *Ayres, supra*.

III. Adjournment

Defendant further argues that the trial court abused its discretion when it denied his motion for a 30-day adjournment of trial in order to secure an alibi witness and the police patrol car videotape. We disagree.

A. Standard of Review

"No adjournments, continuances or delays of criminal causes shall be granted by any court except for good cause shown . . . ." MCL 768.2. A trial court's ruling on a motion for an adjournment is reviewed for an abuse of discretion. *Snider*, *supra* at 421. When deciding whether the trial court abused its discretion, this Court considers whether the defendant asserted a constitutional right, had a legitimate reason for asserting the right, had been negligent, and had requested previous adjournments. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). A defendant must also show prejudice as a result of the trial court's alleged abuse of discretion in denying an adjournment. *Snider*, *supra*.

B. Alibi Witness

On the first day of trial, defendant moved for a 30-day adjournment of trial in order to secure an alibi witness. Defendant argued that the proposed alibi witness would testify "as to [defendant's] whereabouts" on the evening of the offense. Defendant stated that he wrote the witness a letter from jail "last night" and mailed it to the witness. Defendant requested the adjournment "so the witness could be contacted and brought to court and testify on his behalf." The prosecution argued that it never received notification of a potential witness as required by the applicable court rules, that the request was untimely, and that defendant had not even spoken to the witness. The trial court denied defendant's motion on this basis, noting that it was untimely and that defendant only sent a letter to the witness on the previous day. However, the court obtained the name and address of the witness and directed an officer to go to the witness's residence and "if [the witness] is there, bring him in. If he's not there, don't worry about it." The court agreed with the prosecutor that the witness should not be forced to appear. The prosecutor later stated on the record that the officer had gone to the address provided and no one was there.

We find no abuse of discretion. Although defendant claims that he needed more time to "secure attendance at trial of his chief witness," the record shows that defendant was notified of the trial date on July 5, 2006, nearly three months before trial. Defendant never notified the prosecution of the alibi witness. Rather, defendant waited until the day of trial to request an adjournment to secure the proposed witness. As noted on the record, defendant had not spoken to the proposed witness, but only mailed him a letter on the night before the first day of trial requesting that he testify. Furthermore, apart from making a general statement that the witness would testify on his behalf, defendant did not make an offer of proof below, nor has he provided a witness affidavit or identified any evidence of record establishing that the witness would have actually testified on defendant's behalf, what his testimony would have been, or that the testimony would have been helpful.

C. Police Videotape

Defendant also requested the 30-day adjournment in order for the prosecution to produce any videotape from the police patrol car. While requesting the adjournment, defendant also requested that the court compel the production of the tape, arguing that it "maybe" could prove that defendant did not have a crowbar. The prosecution informed the trial court that there are no tapes and, even if one existed, the patrol car videotapes "are recycled every 45 days." The trial court denied defendant's motion, noting that it was untimely and that there are no tapes for the prosecution to produce.

Again, we find no abuse of discretion. Defendant's request for the videotape, made eight months after the incident, was untimely. Furthermore, there was no evidence that a videotape of the incident was actually made and, as the trial court noted, the prosecution could not produce evidence it did not have. Under these circumstances, the trial court did not abuse its discretion by denying defendant's request for a 30-day adjournment of trial.

D. Right to Present a Defense

Defendant also makes a general claim that the trial court's denial of an adjournment deprived him of his constitutional right to present a defense. We review this constitutional question de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

Although a defendant has a constitutional right to present a defense, *People v Kurr*, 253 Mich App 317, 326; 654 NW2d 651 (2002), he must still comply with procedural and evidentiary rules established to assure fairness and reliability in the verdict, *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). Here, the trial court did not preclude defendant from presenting an alibi defense, but prevented him from delaying trial for a month to find a witness whom he had not previously mentioned and whose whereabouts were unknown. Further, contrary to defendant's statement, the trial court did not "bar" production or admission of the police videotape. Rather, granting an adjournment would do nothing toward obtaining a videotape that did not exist. Moreover, contrary to defendant's implication, evidentiary rulings do not ordinarily rise to the level of a constitutional violation. See *Crane v Kentucky*, 476 US 683, 689-690; 106 S Ct 2142; 90 L Ed 2d 636 (1986). Consequently, reversal is not warranted on this basis.

IV. Missing Evidence Instruction

Defendant also argues that he is entitled to a new trial because the trial court failed to sua sponte instruct the jury regarding the missing videotape. We decline to review defendant's challenge to the jury instructions because the record reflects that trial counsel expressed satisfaction with the court's instructions. Defense counsel's affirmative approval of the instructions waived any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2001).

In a related claim, defendant argues that defense counsel was ineffective for failing to request the instruction. Defendant has failed to demonstrate that, had defense counsel requested the instruction, there is a reasonable probability it would have been successful. A defendant is entitled to an adverse inference instruction regarding the loss or destruction of potentially exculpatory evidence only upon a showing of bad faith. *People v Davis*, 199 Mich App 502, 514-515; 503 NW2d 457 (1993). The fact that police destroyed the evidence intentionally does not automatically demonstrate bad faith, and even actions that could be considered "short-sighted or even negligent" do not satisfy the bad-faith requirement. See *id*.; *United States v Garza*, 435 F3d 73, 75 (CA 1, 2006). Rather, there must be a showing of an improper motivation. *Id*.

Here, there is no basis for concluding that the police or the prosecution acted in bad faith. Rather, the record shows that if a videotape of the incident existed, it would have been recycled in 45 days pursuant to routine procedure. There was no evidence that the police acted in bad faith in employing this routine practice. See *id.* at 76 ("[t]hat the evidence was destroyed in the course of implementing routine procedures militates against a finding of bad faith"). Furthermore, defendant has not demonstrated that the evidence was exculpatory. Rather, his assertion that the videotape could have exonerated him is entirely speculative.[2] Because

[2] Defendant argued that the videotape "maybe" could "provide exoneration for him for the fact that he did not have this particular crowbar."

defendant has not shown that he was entitled to an adverse inference instruction, he has not shown that counsel was ineffective for failing to request the instruction. See *Snider*, *supra* at 425.

V. Sufficiency of the Evidence

Defendant further argues that the evidence was insufficient to sustain his conviction. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Rather, "a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *Nowack*, *supra* at 400.

In accordance with MCL 750.81d(1), "[a]n individual who . . . resists, obstructs, opposes, . . . a person who the individual knows or has reason to know is performing his or her duties" is guilty of resisting or obstructing a police officer. *People v Ventura*, 262 Mich App 370, 375; 686 NW2d 748 (2004). MCL 750.81d(7)(a) defines the term "obstruct" to include "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." Failure to obey a police officer's order to stop, flight from the scene, and wrestling with a police officer amount to conduct constituting resisting or obstructing a police officer. See *People v Nichols*, 262 Mich App 408, 411-412; 686 NW2d 502 (2004), *People v Wess*, 235 Mich App 241, 242, 247; 597 NW2d 215 (1999), and *People v Pohl*, 207 Mich App 332, 333; 523 NW2d 634 (1994). In addition, a defendant knows or has reason to know a police officer is acting in the performance of his duties when he ignores or resists the persistent commands of a police officer in full uniform with a marked patrol vehicle. *Nichols*, *supra* at 413.

Viewed in a light most favorable to the prosecution, the evidence was sufficient to permit a rational jury to conclude that defendant resisted and obstructed a police officer. The evidence showed that Richardson was in uniform and approached defendant in a marked police patrol car. There was testimony that Richardson observed defendant riding a bike in the middle of the road and ordered him to pull over using a loud speaker. Richardson approached defendant, began talking to him, and subsequently noticed a crowbar and "a large wad of money" protruding from the inside of defendant's jacket. As Richardson attempted to handcuff defendant, defendant broke free and fled on foot. Richardson gave chase and called for assistance. Officers subsequently located defendant hiding in the backseat of a car. Officers Richardson, Charles Younkin, and David Bonacorsi all testified that defendant did not comply with their repeated orders to exit the car. Rather, as two officers tried to extract defendant from the car, defendant "kept kicking and hanging onto the seat cushion." When the officers "finally" got defendant out of the car and onto the ground, defendant "continued to fight with [them] . . . pushing up off the ground trying to break free from [them]." After using pepper spray on defendant and striking defendant's shoulder with a flashlight, Richardson and a second officer were able to subdue and handcuff defendant. This evidence was sufficient to establish that defendant's conduct amounted to resisting or obstructing a police officer.

VI. Sentence

A. *Blakely v Washington*

Defendant contends that he must be resentenced because the trial court's factual findings supporting its scoring of the sentencing guidelines were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme, in which a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), cert den ___ US ___; 127 S Ct 592; 166 L Ed 2d 440 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Consequently, defendant's argument is without merit.

B. Proportionality

Defendant also argues that even though he was sentenced within the sentencing guidelines range, he is entitled to resentencing because his sentence is disproportionate. Defendant's sentence of six months to 15 years is at the lower end of the sentencing guidelines range of 5 to 46 months. This Court must affirm a sentence within the guidelines range absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). On appeal, defendant has not demonstrated that the guidelines were erroneously scored or that the trial court relied on inaccurate information. Therefore, we must affirm his sentence.

C. Jail Credit

Defendant's final argument is that the trial court erred by failing to award him credit against his new minimum sentence for the time he served in jail before his sentence for the instant crime, which he committed while on parole. We disagree. Because defendant did not object at sentencing, this issue is not preserved. *People v Meshell*, 265 Mich App 616, 638; 696 NW2d 754 (2005). We therefore review this claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

> When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense. MCL 791.238(2). A parole detainee who is convicted of a new criminal offense is entitled, under MCL 791.238(2), to credit for time served in jail as a parole detainee, but that credit may only be applied to the sentence for which the parole was granted. A parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he serves the term imposed for the subsequent offense. MCL 768.7a(2). [*People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004) (citation omitted).]

Defendant was on parole from a prior offense when he committed the present offense on February 13, 2006. According to the PSIR, defendant was granted a three-year parole term to expire on May 5, 2006. On February 15, 2006, defendant was served parole violation charges and waived a preliminary parole violation hearing. Defendant was convicted in the instant case on October 20, 2006, and sentenced on November 29, 2006. At the sentencing hearing, defense counsel acknowledged that defendant "does not receive credit for any time that he served, because of a parole hold." Contrary to defendant's claim on appeal, the days he served in jail before his sentence for the instant crime were not merely "dead time." Rather, defendant was continuing to serve the remaining portion of his sentence for the prior offense while awaiting trial in the instant case. Consequently, defendant is not entitled to sentence credit against his new minimum sentence.

Defendant also claims that the credit he seeks is constitutionally required as a matter of due process, equal protection, and the double jeopardy right to not be subjected to more punishment than the Legislature intended. Again, we disagree. In *People v Stewart*, 203 Mich App 432, 434; 513 NW2d 147 (1994), this Court stated that the fact that parolees are precluded under MCL 791.238 from receiving credit for time served while being held on parole detainer does not violate a defendant's right to equal protection or due process. The fact that MCL 791.238 prevents defendant from receiving the requested credit also demonstrates that the Legislature did not intend that he receive such credit. Accordingly, his failure to receive the requested credit also does not violate double jeopardy. See, e.g., *People v Calloway*, 469 Mich 448, 451; 671 NW2d 733 (2003) (the purpose of the double jeopardy protection against multiple punishments for the same offense is to protect the defendant's interest in not enduring more punishment than was intended by the Legislature). The trial court did not, therefore, plainly err by failing to award defendant credit against his new minimum sentence for the time he served in jail before his sentence for the instant crime.

Affirmed.

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Bill Schuette