

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP BRUCE PAYNE,

Defendant-Appellant.

UNPUBLISHED

May 13, 2008

No. 277107

St Joseph Circuit Court

LC No. 06-013839-FH

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant was found guilty by a jury of resisting arrest (two counts), MCL 750.81d(1), and malicious destruction of police property, MCL 750.377b, for which he was sentenced as a second habitual offender, MCL 769.10, to concurrent terms of nine months in jail. He appeals as of right. We affirm. We decide this appeal without oral argument under MCR 7.214(E).

I. FACTS

During the evening of October 5, 2006, two police officers from the Village of Constantine went to a hospital in Three Rivers. After interviewing a person there, they determined to return to Constantine and arrest defendant on a charge of domestic violence. The officers went to defendant's home and repeatedly and loudly knocked on the door but there was no answer. Through a nearby window, they observed defendant lying on the couch. His body was partially obscured from view. Despite additional attempts to rouse defendant by knocking on both the door and the window, defendant lay completely motionless and unresponsive. After phoning their superior and describing the situation, the officers were instructed to forcibly enter the home, which they did.

When they entered the home, they shook defendant and spoke loudly to him. Defendant was initially unresponsive but eventually began to rouse. At that point, the officers realized that he was extremely intoxicated. As defendant awoke from his intoxicated stupor, he cursed the officers several times and became more and more agitated over their presence in his home. At that point, one of the officers peppered-sprayed defendant because the officer feared he would become physically aggressive.

When the officers attempted to handcuff defendant, he fell to the floor and thrashed about. After a brief struggle, the officers managed to restrain defendant but had to pick him up

underneath the arms and literally drag him to a police car. On the way to jail, defendant repeatedly kicked the Plexiglas divider and the wire screens covering the windows, damaging both.

II. STANDARD OF REVIEW

Defendant failed to move for a new trial or a *Ginther*¹ hearing in the trial court on his claim of ineffective assistance of counsel; therefore, this Court's review is limited to the existing record. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review questions of constitutional law de novo. *Id.*

III. ANALYSIS

"Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). To overcome this presumption, defendant must show: (1) "that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms" and (2) "that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." *Id.*

Defendant first claims that his trial counsel was ineffective for not moving to exclude the officers' testimony of their observations of events inside the home on the ground that his Fourth Amendment rights were violated because of their illegal warrantless entry into the home. We disagree.

The police officers were justified in entering defendant's home without a warrant under the emergency-aid exception to the warrant requirement. *Brigham City, Utah v Stuart*, 547 US 398, 403; 126 S Ct 1943; 164 L Ed 2d 650 (2006); *People v Davis*, 442 Mich 1, 20, 25-26; 497 NW2d 910 (1993); *People v Tierney*, 266 Mich App 687, 704; 703 NW2d 204 (2005). When viewed objectively, the circumstances justified the officers' actions because they could reasonably infer that defendant was in need of medical attention given his complete lack of response to their attempts to rouse him. *Brigham City, supra* at 404. Moreover, after entering the home, they did no more than was reasonably necessary to determine whether defendant needed assistance and to provide that assistance to him. *Davis, supra* at 26. That defendant was ultimately discovered to be merely intoxicated and not more seriously injured is of no consequence to the legal question whether the warrantless entry was justified. The officers were legally in the home; therefore, they were entitled to effectuate defendant's arrest based on probable cause that he committed a domestic violence incident.² Accordingly, because

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

² The facts of the underlying domestic violence incident are not clear from the record. However, defendant does not argue that the officers did not have probable cause to arrest him on the
(continued...)

defendant's Fourth Amendment rights were not violated, there was no basis for seeking to suppress the police officers' testimony. Trial counsel was not ineffective for failing to make a futile motion. *Thomas, supra* at 457; *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

Defendant next argues that trial counsel was ineffective because counsel did not request a jury instruction indicating that defendant had a right to resist the excessive force used by the officers. We also disagree.

In *People v Ventura*, 262 Mich App 370; 686 NW2d 748 (2004), this Court held that a person charged with violating MCL 750.81d may not forcibly resist an arrest by a police officer who is performing his duties even if the arrest is illegal. Further, the record does not support defendant's claim that the police officers used excessive force against him. Although an officer pepper-sprayed defendant before any physical resistance from him, the record establishes he was extremely intoxicated, was belligerent, and was becoming increasingly agitated. The officer used the pepper-spray preemptively in an attempt to avoid a physical escalation of the situation. Under the circumstances, the officer's actions were justified. Given the holding in *Ventura* and the fact that there was no excess force in this case, defendant's ineffective assistance claim must fail because it would have been futile for defense counsel to request an instruction that defendant could lawfully resist his arrest. *Thomas, supra* at 457; *Ish, supra* at 118-119.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette

(...continued)

charge.