STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2008
v	No. 272252 Ionia Circuit Court
JOSEPH ERBY FREEMAN, Defendant-Appellant.	LC No. 05-013109-FC

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of assault with intent to murder, MCL 750.83, and two counts of assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 50 to 75 years' imprisonment for the assault with intent to murder conviction and to 6 to 10 years' imprisonment for the other convictions, the sentences to be served concurrently. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise from an incident that occurred on October 3, 2004, while he was incarcerated at the Hanlon Correctional Facility. Defendant and another inmate at the facility, Quincy Bland, brutally attacked a corrections officer, Eric Jefferies. Defendant used a padlock concealed inside a sock to beat Jefferies on and about the head. Defendant struck two other corrections officers who came to Jefferies' aid, Robert Heuer and Michael Manley, with the lock-and-sock device, and indicated to them that he and Quincy intended to kill Jefferies. Defendant also threatened two additional responding officers with the device. Dismantled pieces of a padlock bearing defendant's inmate number were found in the unit's card room, to which defendant and Quincy had retreated following the assault. Jefferies sustained numerous injuries to his head, face, and mouth, including a potentially serious maxilla fracture. Heuer and Manley also sustained several injuries requiring medical treatment.

On appeal, defendant first argues that the trial court abused its discretion in denying his request for the appointment of substitute counsel. This Court reviews a trial court's decision regarding substitute counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). No abuse of discretion occurs when the trial court chooses an outcome that falls within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

" 'An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced.' " *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). A substitution of appointed counsel will be granted only where there is a showing of good cause and the substitution will not unreasonably disrupt the judicial process. *Traylor*, *supra* at 462. " 'Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.' " *Mack*, *supra* at 14.

Defendant's vague and generalized claims concerning the inadequacies of appointed counsel do not demonstrate the existence of a difference of opinion concerning a fundamental trial tactic. See *Traylor*, *supra* at 463. Defendant stated that counsel had failed to file motions on his behalf, but he asserted no bases for these (unspecified) motions. Counsel was not required to file frivolous motions, and his decision not to file certain motions "clearly falls within the categories of professional judgment and trial strategy that are matters entrusted to the attorney" and did not warrant appointment of substitute counsel. *Traylor*, *supra* at 463. Similarly, counsel's "rephrasing" of defendant's questions for witnesses and his decisions regarding how or whether to challenge the prosecution's evidence constituted matters of trial strategy and did not constitute legitimate bases for substitution of appointed counsel. *Mack*, *supra* at 14. Furthermore, although defendant complained below that trial counsel had failed to obtain rulings on several motions, counsel had successfully sought adjournment of those motions pending further discovery, and the trial court ultimately ruled on the motions; thus, defendant suffered no prejudice. See *Traylor*, *supra* at 463. Nor did defendant's unsubstantiated allegations that trial counsel was "unprepared" constitute good cause to appoint substitute counsel. See *id.*

Defendant next argues that counsel's failure to secure the testimony of several alibi witnesses by timely filing a notice of alibi defense denied him his right to the effective assistance of counsel. A defendant claiming ineffective assistance of trial counsel is required to make a motion in the trial court for a new trial or for a *Ginther*[1] hearing in order to preserve the issue for review. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Because defendant failed to move for a new trial or an evidentiary hearing below, his ineffective assistance of counsel claim is limited to the existing record. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

To prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment; i.e., that his performance fell below an objective standard of reasonableness, and (2) that the deficient performance prejudiced the defense; i.e., that but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

This Court will not second guess counsel's trial tactics. *People v Dixon*, 263 Mich App 393, 398; 668 NW2d 308 (2004). Trial counsel's failure to call a particular witness is presumed

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

to be sound trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). "[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *Dixon*, *supra*. 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).

Defendant has failed to demonstrate that he was deprived of a substantial defense by counsel's failure to secure the testimony of the proposed alibi witnesses. The trial court noted several times that defendant's attempts to obtain interviews of these (and more than 100 other) inmates were unsubstantiated by any indication that they had any relevant information. The record contains no indication that any of the proposed witnesses saw the assault take place or that they would testify in accordance with defendant's alibi theory. Indeed, several of the testifying officers reported that they did not see any other inmates in the area of the assault; further, the cells in the immediate area of the incident were secured units, and an inmate in one of those cells would not have been able to see anything going on in the hall, other than what he could see through his food slot or the crack under the door. Defendant presented absolutely no evidence regarding the whereabouts of the proposed witnesses at the time of the occurrence or their ability to provide any useful testimony. In light of the identification of defendant as the assailant by several witnesses and the additional strong evidence against him, he cannot establish that the proposed witnesses' testimony would have made a difference in the outcome of the trial or that he was prejudiced by counsel's alleged deficient performance.

Defendant next claims that he was denied his constitutional right to a speedy trial. We review defendant's claim by balancing 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) the prejudice to the defendant. *Barker v Wingo*, 407 US 514; 92 S Ct 2182; 33 L Ed 2d 101 (1972); *People v Williams*, 475 Mich 245, 261-262; 716 NW2d 208 (2006).

The delay in this case was approximately 18 months. Following a delay of 18 months or more, prejudice is presumed. *Williams*, *supra* at 262. "Under the *Barker* test, a 'presumptively prejudicial delay triggers an inquiry into the other factors to be considered in the balancing of the competing interests to determine whether a defendant has been deprived of the right to a speedy trial.' " *Id*., quoting *People v Wickham*, 200 Mich App 106, 109-110; 503 NW2d 701 (1993).

Turning to the second *Barker* factor, this Court considers the time spent adjudicating motions filed by defendant, as well as adjournments requested by defense counsel. *People v Cain*, 238 Mich App 95, 113; 605 NW2d 28 (1999). Delays inherent in the court system, such as the two-and-one-half-month delay between defendant's October 2004 arrest and the filing of the felony information in January 2005, although technically attributable to the prosecution, "are given a neutral tint and are assigned only minimal weight in determining whether a defendant was denied a speedy trial." *Wickham*, *supra* at 111. Although trial was scheduled to begin on April 21, 2005, the parties stipulated to a dismissal on the basis of the MDOC's failure to comply with the court's discovery orders; thus, the three-month delay between the filing of the information and the April 6, 2005, dismissal without prejudice is equally attributable to defendant and the prosecution. The five-month delay between the dismissal and the prosecution's reinstatement of the charges on September 9, 2005, is not attributed to either party, because there was no charge pending against defendant during that time. *Wickham*, *supra* at 111.

The remaining eight months of delay are largely attributable to adjournments granted at defendant's request and litigation of his various motions. The scheduled January 11, 2006, trial date was adjourned at defendant's request for the purpose of continuing discovery. Several defense motions were reserved at his request pending further discovery. Two weeks before the rescheduled trial date of March 22, 2006, defendant again obtained an adjournment and reservation of his motions for the purpose of continuing discovery, and trial was rescheduled for May 3, 2006. It is evident that none of the delay following the reinstatement of charges is attributable to the prosecution.

We disagree with defendant's suggestion that he is not responsible for the delay resulting from the adjournments that he requested because they were based, "at least in part," on the MDOC's failure to turn over various records. To the extent that the MDOC did not produce the information defendant sought, there is simply no basis for holding the prosecution responsible for the MDOC's conduct. Defendant was seeking information that was not within the prosecution's control or possession. See *People v Leo*, 188 Mich App 417, 427; 470 NW2d 423 (1991) ("The prosecutor's office is not required to undertake discovery on behalf of a defendant."). Moreover, the record reveals that the prosecution and the MDOC did everything possible to comply with defendant's discovery requests, which, as the trial court noted, were little more than a "fishing expedition." On the whole, it is apparent that more than half the 18-month period of delay is attributable to defendant and that the balance of the delay was not substantially the fault of the prosecution. *Cain*, *supra* at 113.

The third factor, whether defendant asserted his right to a speedy trial, also weighs against defendant. Defendant repeatedly obtained adjournments of his speedy trial motion, thereby directly causing the additional delay and resulting in the motion not being addressed until the day before trial. See *People v Collins*, 388 Mich 680, 693-694; 202 NW2d 769 (1972) ("[the defendant's] failure to assert a demand for speedy trial [until the day before trial] was of his own choosing and as a result of his own activity and must be weighed heavily against him.").

Turning to the fourth *Barker* factor, "[t]here are two types of prejudice which a defendant may experience, that is, prejudice to his person and prejudice to the defense." *Collins*, *supra* at 694. Defendant does not assert that he suffered prejudice to his person, as he was already incarcerated for a different offense. Instead, defendant argues that his ability to present an alibi defense was hampered by his not having the assistance of counsel or an investigator during the five-month period between the dismissal of the original charges and their reinstatement. However, there is absolutely no record evidence—despite much wrangling below over the necessity of a private investigator to interview 180 inmates and over the MDOC's responsibility to provide information regarding those inmates—demonstrating the existence of an alibi defense or that any of the inmates in question had any knowledge of the subject events, let alone any exculpatory knowledge. Defendant's vague and unsupported assertion that the assistance of counsel or an investigator following dismissal of the original charges was crucial to his alibi defense is not sufficient to establish prejudice. A lengthy delay, without more, does not rise to the level of prejudice. See *Williams*, *supra* at 264.

Although the 18-month delay in this case is presumptively prejudicial, the trial court did not err in ruling that defendant was not denied his right to a speedy trial. The majority of the delay is directly attributable to defendant, whose repeated requests for adjournments resulted in his speedy-trial motion being considered only the day before trial. Defendant has failed to

demonstrate that the delay was injurious to his defense. Accordingly, the trial court properly denied his motion to dismiss.

Defendant's final argument on appeal is that resentencing is required because the trial court adopted the recommendation of the MDOC in its presentence investigation report (PSIR). Defendant contends that because the MDOC employed the victims in this case, a "conflict of interest" exists based on the MDOC's role in recommending defendant's sentence. Because defendant did not preserve this issue by raising it below, it is reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v McLaughlin*, 258 Mich App 635, 669-670; 672 NW2d 860 (2003).

As required by MCL 771.14, an MDOC probation officer prepared a PSIR containing the relevant sentencing guidelines information and a recommended sentence based on those guidelines. "A sentencing judge must use a presentence report." *People v Hemphill*, 439 Mich 576, 579; 487 NW2d 152 (1992), citing MCL 771.14(1); MCR 6.425(A). A defendant may not waive this legislative requirement. *Hemphill*, *supra* at 580. The trial court, having reviewed the information set forth in defendant's PSIR, imposed the recommended minimum sentence of 50 years' imprisonment, a sentence well within the guidelines' minimum range of 22.5 to 75 years. "If the trial court's sentence is within the appropriate guidelines range, the Court of Appeals must affirm the sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining the defendant's sentence." *Babcock*, *supra* at 261; see MCL 769.34(10).

Defendant does not dispute that his sentence fell within the guidelines range; nor does he contend that the guidelines were improperly scored, that the PSIR contained inaccurate information, or that the trial court, which was solely responsible for imposing sentence, harbored bias against him. Consequently, his claim is "outside the limited scope of review" provided for by MCL 769.34(10), *McLaughlin*, *supra* at 671, and he has failed to establish plain error that affected his substantial rights, *id*. at 670.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ William B. Murphy