

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER LOVELACE,

Defendant-Appellant.

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UNPUBLISHED

May 27, 2008

No. 275199

Gratiot Circuit Court

LC No. 06-005233-FH

Before: O’Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of being a prisoner in possession of a weapon, MCL 800.283(4). The trial court sentenced defendant to two to five years’ imprisonment. We affirm, and decide this appeal without oral argument pursuant to MCR 7.214(E).

On April 10, 2006, while walking down a prison building hallway, Corrections Officer Frank Chaffin observed defendant standing by a bookshelf in a prison library. As Chaffin watched through a window that provided an unobstructed view of the library interior, John Harris, another inmate, removed an object from the front of his pants and handed it to defendant. When both inmates noticed Chaffin’s presence in the hallway, he motioned for them to leave the library. According to Chaffin, defendant then placed the object on a bookshelf. Chaffin denied that he could discern “exactly what [the object] was.” He inquired of the inmates regarding “the hygiene,” because “the general library is known for an area to pass soap or other hygiene products as currency.”

Chaffin described that while he entered the library, other nearby correctional officers searched the two inmates in the hallway. Chaffin retrieved the object, “a piece of metal with plastic wrapped around the end of it,” which he determined was a handmade weapon. Chaffin denied having taken his eyes “off the object on the bookshelf” during his encounter with the inmates.

Defendant and Harris disagreed with Chaffin’s version of events, and claimed that Chaffin searched them in the hallway before he entered the library to retrieve the object. Harris asserted responsibility for possession of the weapon and its placement the shelf. Defendant denied ever having touched the weapon. Defendant later received a major misconduct citation, in addition to being charged with the criminal offense.

At the conclusion of the bench trial conducted on September 13, 2006, the trial court explained that, “listening to the witnesses, observing their demeanor, considering any interest, bias or motive they may have to testify in one fashion or another, that the testimony of the corrections officer is more believable.” The trial court found defendant guilty of the charged offense.

On December 22, 2006, defendant filed a claim of appeal. On May 30, 2007, defendant filed a motion to remand for an evidentiary hearing, alleging that (1) the Department of Corrections (DOC) failed to preserve a potentially exculpatory videotape made in the corridor outside the prison library on the day of these events; (2) his counsel was constitutionally ineffective because he failed to seek dismissal of the case based on the prosecution’s failure to produce the video, and (3) a newly discovered witness had come forward, necessitating a new trial. This Court granted the motion to remand on July 12, 2007, and the trial court conducted an evidentiary hearing on August 10, 2007.

The evidence at the August 2007 evidentiary hearing established that defendant requested the video within four days after the library incident, and that the video included only scenes of the hallway, and not the library interior. In his written request for the video, defendant explained that he sought it “to show that the reporting officer took [Harris and defendant] away from the area where the weapon was put down, and that was not what the Officer should have done if he saw a weapon.” Gary Heisler, the hearing referee who conducted defendant’s major misconduct hearing, determined that the video was not “relevant and necessary to prove or disprove the charge” against defendant. Heisler asserted that “because the prisoner was not disputing possession of the weapon, and there is other evidence cited in the report of other persons making statements that he did have it in his hand,” the DOC had no obligation to produce the video. The video subsequently became unavailable because the prison’s recording system automatically records over older information approximately every seven days.

Defendant’s trial attorney admitted at the evidentiary hearing that the video might have been “helpful” regarding the “collateral issue” whether the corrections officer accurately described the sequence of events after he saw defendant place the object on the bookshelf. The attorney denied that his failure to request dismissal based on the missing video qualified as constitutionally deficient representation. Defendant explained at the hearing that he requested the video because he believed it would demonstrate that if the officer “actually saw a knife, he would not take us away from the scene of the crime by himself, then come back and go in the library with five or six other inmates” with a knife still present. The new witness, another inmate, testified that Harris placed the object on the shelf, and that defendant never touched it.

The trial court ruled that defendant’s counsel’s performance did not “[a]ll below recognized normative standards,” and did not result in any prejudice to defendant. The trial court also found that because the video would have recorded only the events that occurred in the hallway outside the library, and not “what the officers could themselves have seen” inside the library, its absence did not constitute a due process violation. According to the trial court, the new witness’ testimony would not have altered the outcome of the bench trial.

Defendant first contends on appeal that the DOC’s failure to preserve the videotape violated his due process rights. We review de novo defendant’s claim of a constitutional due process violation. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007).

In support of his due process argument, defendant relies on *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), in which the United States Supreme Court held that the prosecution's suppression of material evidence favorable to the accused constitutes a due process violation. The necessary elements of a *Brady* violation are "(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different." *Schumacher, supra* at 177, quoting *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). "[U]nless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988). The defendant bears the burden of establishing that the evidence was exculpatory or that the police acted in bad faith. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992).

We agree with the trial court's determination on remand that the videotape did not contain information favorable to defendant, and was of "insignificant relevance" to the case. The hearing witnesses agreed that the video camera could not have recorded the events within the library, and thus would not have depicted Harris' transfer of the object. The video simply would not have shed light on whether Chaffin testified accurately that Harris passed the object to defendant. Therefore, the recording did not qualify as exculpatory evidence. Moreover, because the trial court expressly premised its finding of defendant's guilt at trial on what the court viewed as the credible testimony of Chaffin regarding his direct observation that defendant placed the object on a shelf, we also agree with the trial court's determination that the even if the video had been produced, no reasonable probability exists that a different outcome would have obtained.

Defendant next argues that his trial counsel's failure to seek dismissal based on the absent videotape amounts to constitutionally deficient performance and requires a new trial. We review the trial court's factual findings for clear error, and its constitutional determinations de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

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 justify reversal of a conviction, 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.*

We conclude that the trial court correctly resolved this issue when it found that counsel performed in a manner consistent with normative standards. Counsel observed at the evidentiary hearing that the videotape might have been helpful, but only regarding a collateral issue, and would not have impacted the prosecution's evidence regarding defendant's possession of the

weapon. Given the attenuated relevance of the videotape, counsel was not ineffective for failing to move for dismissal based on its unavailability. Further, defendant has not established that counsel's claimed error prejudiced him because the record contains no evidence that the videotape would have disproved Chaffin's testimony that Harris passed the weapon to defendant.

Defendant also challenges the trial court's denial of his motion for a new trial based on newly discovered evidence. We review for an abuse of discretion a trial court's decision to deny a motion for a new trial. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). A new trial is warranted on the basis of newly discovered evidence if (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. *Id.* at 692.

The hearing testimony of the new witness matched the trial testimony of Harris. According to both inmates, Harris possessed the object and placed it on the shelf without passing it to defendant. Given the trial court's conviction of defendant based on Chaffin's eyewitness testimony, the cumulative evidence provided by the new witness was highly unlikely to have altered the result. Consequently, the trial court did not abuse its discretion by denying defendant's motion for a new trial on the basis of the additional inmate's testimony.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Stephen L. Borrello  
/s/ Elizabeth L. Gleicher