STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2008
v	No. 278585 Wayne Circuit Court
MICHAEL LEE GOBEL, Defendant-Appellant.	LC No. 07-003670-01

Before: Meter, P.J., and Talbot and Murray, JJ.

PER CURIAM.

Defendant Michael Lee Gobel appeals as of right his conviction after a bench trial for armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 42 months to 16 years' imprisonment for his armed robbery conviction and two years' imprisonment, with credit for 23 days, for his felony-firearm conviction, with the sentences to run concurrently.

I. Facts

On August 24, 2005, at approximately 9:40 a.m., three Little Ceasars' restaurant employees, Charles Balagna, Ashley Moxie and Shane White, left a Little Ceasars' restaurant in Dearborn Heights to make a $2,000 bank deposit. Balagna was holding the bank deposit. While Balagna, Moxie and White were walking to Moxie's car, Moxie noticed a man sitting on the curb on the side of the Little Ceasars' building. As Balagna, Moxie and White were getting into Moxie's car, the man got up, walked over to them, and pulled a gun on them. The robber stood next to Balagna and pointed a black revolver at his face. The robber said, "Give me the money." Balagna replied, "What." The robber then pulled the hammer of the gun back and repeated, "Give me the money." The robber then started counting. Balagna gave the robber the bank deposit and the robber left. Balagna testified that the whole incident lasted about 30 seconds.

One year later, Balagna identified defendant as the robber in a photographic lineup. There were six photographs in the photographic lineup. Balagna testified that it only took him a couple seconds to pick defendant out of the lineup. Balagna also testified that he was "pretty positive" that the person he picked out of the photographic lineup was the robber.

The Dearborn police, in conjunction with some robberies in Dearborn, subsequently arrested defendant. After the investigation in Dearborn, defendant was brought to the Romulus police department because defendant was a suspect in some armed robberies that occurred in the city of Romulus. Defendant was in custody at this time. Detective Dwayne DeCaires of the Romulus police department spoke with defendant about his potential involvement in the Romulus robberies. There is no evidence in the record that indicates that defendant was given *Miranda*[1] warnings before Detective DeCaires spoke with him. Detective DeCaires testified that:

> I went back to see if he wanted to talk and give a statement. The only thing he would tell me was that he didn't do our robbery and he didn't want to make a statement to it. And I said, "That's fine. When you're -- when we're done with you here, you'll be going to Dearborn Heights." He asked me for what and I said, "I really don't know what you're going there for," and he made the statement that, "Well, they must be trying to pin one of those pizza robberies on me."

Detective DeCaires testified that he never discussed a "pizza robbery" with defendant. He only told defendant that the Dearborn Heights police department was interested in talking with him.[2]

After defendant waived his right to a jury trial, the trial court indicated that the understanding was that defendant agreed to submit to a polygraph examination. Therefore, the bench trial was adjourned for a month in order for defendant to submit to the polygraph examination. When the trial resumed, the polygraph was mentioned only when the prosecutor interrupted defense counsel's questioning of a police witness to make sure the results of the polygraph was not discussed.

At trial, Balagna identified defendant as the robber in court and indicated that there was no doubt in his mind that defendant was the robber. Moxie identified defendant as the robber in court as well and indicated that she was 98 percent sure that defendant was the robber. Defendant testified that he was at his apartment in Romulus at the time the robbery occurred. His apartment was six or seven miles from the Little Ceasars' restaurant in Dearborn Heights. He specifically denied any involvement in the robbery.

When the trial court rendered its verdict, it made no reference to the polygraph examination in its findings of fact. Rather, the trial court emphasized in its findings of fact the identifications by Balagna and Moxie that defendant was the robber. After the trial court found defendant guilty, defense counsel indicated that a motion for new trial may be filed and that the results of the polygraph examination may be admissible with regard to that motion. During the discussions that followed, which were still on the record, the trial court twice indicated that

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] During the trial court's findings of fact when the trial court was commenting on this statement made by defendant, defendant interjected and argued that the reason he knew that there were some pizza robberies is because his attorney already told him that Dearborn Heights was interested in talking to him about some pizza robberies.

polygraph examinations were not admissible. Further, the trial court specifically indicated that "that's why polygraphs are not admissible. They can be passed and they're still not –."

II. Analysis

Defendant first argues that his trial counsel was ineffective for not moving to suppress defendant's incriminating statement made when he was in custody, and for making repeated references to the trial court that defendant was scheduled to take a polygraph examination, and later failing to clarify that defendant passed the examination.

"To preserve the issue of effective assistance of counsel, a defendant must move for a new trial or an evidentiary hearing before the trial court. Failure to move for a new trial or *Ginther*[3] hearing usually forecloses appellate review unless the appellate record contains sufficient detail to support defendant's claims. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989) (citations omitted; footnote added). Defendant did not move for a new trial or seek an evidentiary hearing in the trial court.[4] Review is therefore "limited to mistakes apparent on the record." *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007).

In order to establish ineffective assistance of trial counsel, defendant must show that his trial counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; that but for his counsel's errors, there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To establish that his trial counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma*, *supra* at 302. "Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Further, counsel is not ineffective for failing to make objections that would be futile. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

We hold that defense counsel was not ineffective for failing to suppress defendant's incriminating statement because there was no custodial interrogation, and thus no *Miranda* violation. Defense counsel was also not ineffective for indicating to the trial court that defendant was scheduled to take a polygraph examination because defendant is unable to show that it is more probable than not that the trial court's verdict would have been different if the reference to the polygraph examination were not made.

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

[4] However, defendant filed a timely motion to remand with this Court seeking to expand the evidentiary record on this issue. This Court denied defendant's motion to remand. *People v Gobel*, unpublished order of the Court of Appeals, entered February 5, 2008 (Docket No. 278585).

With respect to the first issue, defendant argues that Detective DeCaires did not give him *Miranda* warnings and that Detective DeCaires initiated the conversation in a manner reasonably calculated to elicit an incriminating response. In *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), the United States Supreme Court held:

> [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.

In *Rhode Island v Innis*, 446 US 291, 300-302; 100 S Ct 1682; 64 L Ed 2d 297 (1980), the Court set forth the following test to determine whether custodial conversations between a suspect and the police constituted interrogation subject to *Miranda* warnings:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation. But, since the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response. [Emphasis in original.]

In *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997), the defendant was in custody, but not *Mirandized*, and was in the backseat of a patrol car when police officers began conversing with him. After an officer informed the defendant that questioning regarding the Raymond Jablonski murder would commence at the police station, the defendant blurted out that he shot Jablonski. *Id*. The Court held that the apparent purpose of the officers' conversation

with the defendant "was to provide information, rather than elicit a response." *Id*. at 480. therefore, the defendant was not under interrogation when he made his statement. *Id*. at 481.

Similarly, in this case, although defendant was in custody and not given *Miranda* warnings, there was no *Miranda* violation because there was no custodial interrogation. *Id*; *Innis*, *supra* at 300-302. Detective DeCaires was merely providing information to defendant about what was going to happen before defendant made his incriminating statement. Defendant then, of his own accord, responded to the statement made by Detective DeCaires. Volunteered statements of any kind are not barred by the Fifth Amendment of the United States Constitution, US Const, Am V, and are admissible. *Miranda*, *supra* at 478; *Innis*, *supra* at 300. Because counsel is not ineffective for failing to make objections that would be futile, defense counsel's performance did not fall below an objective standard of reasonableness. *Toma*, *supra* at 302; *Milstead*, *supra* at 401, *Rodgers*, *supra* at 714. Therefore, defendant has failed to carry his burden of demonstrating ineffective assistance of counsel on this issue. *Solmonson*, *supra* at 663.

Defendant also argues that defense counsel was ineffective for making repeated references to the trial court that defendant was scheduled to take a polygraph examination and later failing to clarify that defendant passed the examination.

On the first day of trial, the trial court indicated that defendant agreed to submit to the polygraph examination. Subsequently, when the bench trial resumed, defense counsel asked Detective Gurka about his interview with defendant. The prosecutor intervened, and the following colloquy occurred:

> MS. GUIRGUIS [prosecutor]: Judge, if this is going to be about the polygraph –
>
> THE COURT: Yeah.
>
> MS. SLOMSKI [defense counsel]: I'm not – I wasn't going to that specifically. All right.
>
> THE COURT: Yeah. You can go ahead and talk about –
>
> MS. SLOMSKI: Anything other than the results of that polygraph. I understand I can't go there, I know.
>
> THE COURT: All right. Go ahead.

Although defendant asserts that defense counsel elicited an improper reference to the polygraph examination, this colloquy indicates that the prosecutor raised the issue of a polygraph examination, not defense counsel. Thus, it does not appear that counsel's actions fell below an objective standard of reasonableness. *Toma*, *supra* at 302-303. Moreover, if any implication is to be made from this colloquy, it is not that defendant failed the polygraph examination, but that the defendant passed the polygraph examination because the prosecutor, not defense counsel, was trying to ensure that the results of the polygraph examination were not admitted.

"[I]t is a bright-line rule that reference to taking or passing a polygraph test is error." *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). Thus, mention of the polygraph test constituted error. However, reference to a polygraph examination "does not always constitute error requiring reversal." *Id*. at 98. To determine whether reversal is required in a jury trial, the following factors are considered: "1) whether the defendant objected and/or sought a cautionary instruction; 2) whether the reference was inadvertent; 3) whether there were repeated references; 4) whether the reference was an attempt to bolster the witness's credibility; and 5) whether the results of the test were admitted rather than merely the fact that an examination had been conducted." *Id*. at 98 (quotations and citations omitted). In this case, defendant was tried before a judge, not a jury, and the judge, on defendant's agreement, adjourned trial for purposes of the polygraph. Thus, most of the general factors do not apply. And, the mention of the polygraph was not repeated or brought up in an attempt to bolster any witness's credibility. Further, "[a] judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001) (quotation and citation omitted).

It is apparent from the record that the trial court understood that reference to a polygraph examination and its results were not permissible. The polygraph test results were not admitted in this case, and the trial court did not refer to the polygraph test in its findings of fact. It appears, however, that the trial court was aware that defendant passed the examination. The trial court emphasized in its findings of fact the identifications by Balagna and Moxie that defendant was the robber. Under the circumstances, defendant is unable to show that, but for the references to the polygraph examination, there was a reasonable probability that the outcome of trial would have been different. *Toma, supra,* at 302-303. Therefore, defense counsel was not ineffective.

Defendant's final argument is that the trial court should not have ordered defendant to pay attorney fees because he is indigent. In the alternative, because the trial court never considered at sentencing defendant's foreseeable ability to pay, defendant argues that this Court should remand this matter to the trial court so defendant's foreseeable ability to pay can be considered.

Defense counsel failed to object to the imposition of attorney fees at the time of sentencing, so this issue is not preserved. *People v Connor*, 209 Mich App 419, 422; 531 NW2d 734 (1995). This Court reviews this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). In proving plain error, defendant must establish that an error occurred, the error was plain, i.e. clear and obvious, and the error affected defendant's substantial rights by affecting the outcome of the trial court proceedings. *Id*.

In addressing a trial court's decision to impose costs on a defendant, the Court in *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004), explained:

> The crux of defendant's claim appears to be that the trial court should have made a specific finding on the record regarding his ability to pay. We do not believe that requiring a court to consider a defendant's financial situation necessitates such a formality, unless the defendant specifically objects to the reimbursement amount at the time it is ordered, although such a finding would

> provide a definitive record of the court's consideration. However, the court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay. The amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's *foreseeable* ability to pay. A defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered. [Emphasis in original; footnote and citations omitted.]

Because defendant did not challenge the imposition of court-appointed attorney fees at the time of sentencing, the trial court was not required to make formal findings of fact regarding defendant's ability to pay. *Id*. However, the trial court did not specifically indicate on the record whether it had considered whether defendant was indigent or considered defendant's ability to pay. At sentencing, the trial court also did not refer to the financial and employment sections of the presentence investigation report or mention defendant's future ability to pay.

Dunbar provides that "the [trial] court does need to provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Dunbar*, *supra*, at 254-255. No statements similar to this were made on the record. And, the order to remit payment for fines, costs, and assessments is not a sufficient indication that ability to pay was considered. Although the order provides that only a fraction of funds will be collected from defendant each month, the order does not contain any statement that this order is based on defendant's past, present, or future employment outlook or on defendant's ability to pay. *Dunbar* is precedentially binding. MCR 7.215(C).[5] The May 22, 2007, order is vacated, and the case is remanded to the trial court pursuant to *Dunbar*.

For these reasons, defendant's convictions are affirmed, the order of attorney fees is vacated, and this case is remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Christopher M. Murray

[5] In *People v Carter*, 480 Mich 938; 741 NW2d 23 (2007), the Michigan Supreme Court requested that the parties brief the issue, "whether the constitutional underpinnings of [*Dunbar*, *supra* at 240] are sound." However, the Court ultimately denied leave to appeal. *People v Carter*, 480 Mich 1063; 743 NW2d 918 (2008). In her dissent, Justice Corrigan indicated that the trial court had no responsibility under the federal or state constitutions to make a preemptive inquiry into the defendant's ability to pay before imposing attorney fees. *Id*. at 1071. Therefore, Justice Corrigan indicated that she would overrule *Dunbar's* contrary holding. *Id*.