Court of Appeals, State of Michigan

ORDER

People of MI v Joey Jrammel Parker

Docket No. 279246

LC No. 07-004862-01

Kurtis T. Wilder
Presiding Judge

Kathleen Jansen

Donald S. Owens
Judges

The Court orders that the motion for reconsideration is DENIED. On the Court's own motion, the prior opinion issued on October 23, 2008, is VACATED, and the attached opinion is issued.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

DEC 11 2008
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEY JRAMMEL PARKER,

Defendant-Appellant.

UNPUBLISHED
October 23, 2008

No. 279246
Wayne Circuit Court
LC No. 07-004862-01

Before: Wilder, P.J., and Jansen and Owens, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b(1). He was sentenced as a third-felony habitual offender, MCL 769.11, to concurrent prison terms of two to five years for the felon-in-possession conviction and life without parole for the murder conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

Defendant argues that a new trial is required because defense counsel was ineffective for failing to call an expert witness to testify concerning the vagaries of eyewitness testimony. He also argues that defense counsel was ineffective for advising him to waive a jury trial, and for failing to present a defense or call any witnesses.

Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*[1] hearing, our review is limited to mistakes apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000); *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that he was not performing as the attorney guaranteed by the Sixth Amendment. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant

[1] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

must overcome the presumption that the challenged conduct might be considered sound trial strategy and must further show that he was prejudiced by the error in question, i.e., that there is a reasonable probability that but for counsel's error the outcome would have been different. *Id.* at 312-314; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Where counsel's conduct involves a choice of strategies, it is not deficient. *Id.*

I. Failure to Call an Expert Witness

"Decisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In particular, whether to call an expert witness is a trial strategy decision. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003); *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). To overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a difference in the outcome by, for example, depriving defendant of a substantial defense. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997); see also *Cooper*, *supra* at 656-657.

This Court has rejected a defendant's argument that defense counsel was ineffective for failing to "present expert psychological testimony about how the circumstances of the incident could have impaired [the victim's] perception, memory, and ability to recognize the shooter." *Cooper*, *supra* at 658. The Court determined that the defendant failed to overcome the presumption of sound trial strategy, explaining:

> Throughout his cross-examination of [the victim], trial counsel elicited apparent discrepancies and arguable bases for regarding [the victim's] identification of defendant as the shooter to be suspect. Trial counsel may reasonably have been concerned that the jury would react negatively to perhaps lengthy expert testimony that it may have regarded as only stating the obvious: memories and perceptions are sometimes inaccurate. [*Id*.]

In the present case, all four witnesses had an opportunity to observe the perpetrator and identified defendant as the shooter. Rico Bell opened the door for defendant, saw him pull out a weapon, and saw him run out of the house. Niaya Selma saw defendant point a weapon at the victim as she was walking up the stairs. Shawn Gould saw defendant as he walked by Gould in the kitchen. Julius Wilson saw defendant as Wilson came out of the back room to investigate the commotion.

Further, Selma testified that she recognized defendant from the neighborhood. Selma identified defendant as Fluco. The police later showed the four witnesses photographs of a man known as "Fluco," who was not defendant, and none of the witnesses selected that photograph. After learning that defendant was also known as Fluco, the police prepared a photographic lineup with defendant's photograph, and Bell selected defendant's picture.

Defendant has not overcome the presumption that defense counsel chose not to call an expert to testify concerning the vagaries of eyewitness testimony as a matter of strategy, because he believed it would not make a difference. Even if counsel's failure to call an expert witness could be considered objectively unreasonable, however, defendant has failed to show that there

is a reasonable probability that, but for this alleged error, the outcome of trial might have been different. This is not a case that hinged on the questionable testimony of a single eyewitness. Rather, defendant was identified by all four eyewitnesses, each of whom had an opportunity to observe the perpetrator during the offense. Additionally, one of the witnesses knew defendant from the neighborhood. Further, unlike in *Ferensic v Birkett*, 501 F3d 469, 483-484 (CA 6, 2007), the record does not reflect any doubts by the trier of fact with regard to the identification of the perpetrator. On the contrary, the trial court, sitting as the trier of fact, stated that defendant was "identified soundly and surely and clearly and irrevocably as the shooter." The court further stated that "[t]he identification testimony was unwavering and there was no evidence of any inconsistencies, any hesitation, any conflicts, any misidentifications or anything that would cause me to have reasonable doubt about identification." The court stated that it was "very comfortable with the identification evidence in this case." Accordingly, defendant has failed to show that he was prejudiced by defense counsel's failure to call an expert witness.

II. Waiver of Jury Trial

Defendant argues that defense counsel was ineffective for advising him to waive a jury and be tried before the court. Defendant implies that the outcome of his trial might have been different if he had been tried by a jury.

Defendant concedes that the decision to ask for a bench trial rather than a jury trial is a matter of trial strategy. Defendant also concedes that there was a proper waiver of his right to a jury trial. He does not claim that the trial judge was biased or partial, or somehow deprived him of a fair trial. Thus, the only way for defendant to prevail on this issue is to show that counsel's advice (to waive a jury trial) was a serious error because a jury was somehow less likely to convict defendant. Defendant cannot make such a showing, nor is there any basis in the record for concluding that the outcome of trial might have been different if defendant had been tried by a jury rather than a judge. We therefore reject this claim of error.

III. Failure to Present a Defense or Call Witnesses

Defendant also argues that defense counsel was ineffective for failing to present a defense or call any witnesses.

As discussed previously, "[d]ecisions concerning what evidence to present and whether to call or question a witness are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *Davis*, *supra* at 368. To overcome the presumption of sound trial strategy, defendant must show that counsel's alleged error may have made a difference in the outcome of trial by, for example, depriving defendant of a substantial defense. See *Flowers*, *supra* at 737.

Defendant inaccurately asserts that defense counsel failed to present a defense. Rather, he advanced a mistaken identification defense and cross-examined the prosecution's witnesses in an attempt to undermine their identification testimony. Apart from the failure to call an expert witness, which we have already addressed, defendant does not indicate what other witnesses defense counsel should have called, or what other defenses counsel should have been presented. The record shows that, before trial, defense counsel filed a notice of alibi and was granted court assistance in serving his alibi witness. But defendant withdrew this defense before trial and

defendant does not address the alibi issue on appeal. Thus, there is no basis for concluding that defense counsel was ineffective for either failing to call witnesses or failing to pursue a different defense.

IV. Evidentiary Hearing

Defendant lastly argues that this Court should remand this case for an evidentiary hearing on the issues of whether defense counsel was ineffective for advising defendant to waive a jury trial, and for failing to call any witnesses or present a defense. To be entitled to a remand, however, defendant must show (by affidavit or offer of proof) that there are facts to support his claims. See MCR 7.211(C)(1)(a). Defendant must also show that the issues have enough merit to warrant remand for an evidentiary hearing. See *People v LaPlaunt*, 217 Mich App 733, 735-737; 552 NW2d 692 (1996). Defendant has done neither.

Defendant has not submitted an affidavit or offer of proof identifying the defenses he believes counsel should have pursued, the witnesses he believes counsel should have called, or explaining how any additional witnesses or defenses might have affected the outcome. Defendant also failed to submit an affidavit or offer of proof in support of his claim that the outcome of his trial might have bee different if he had been tried by a jury. Therefore, remand is not warranted.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Kathleen Jansen
/s/ Donald S. Owens