STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 30, 2009
v	No. 282013 Macomb Circuit Court
ROBERT K. BURKOWSKI, Defendant-Appellant.	LC No. 07-000587-FC

Before: Talbot, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, second offense (felony-firearm), MCL 750.227b. Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to serve concurrent prison terms of 552 to 900 months for assault with intent to commit murder, 72 to 120 months for felon in possession of a firearm, and 72 to 120 months for CCW. Defendant was also ordered to serve a consecutive 24 months in prison for felony-firearm. We affirm.

Defendant's convictions arose from a shooting that occurred late at night on October 24, 2006 into the early morning hours of October 25, 2006. The victim of the shooting is the ex-husband of defendant's girlfriend. The victim testified that after returning home from work, he spent most of the evening watching television while sitting on a love seat in his living room. Sometime after 11:00 p.m., the victim closed the living room blinds and moved to the couch. While the victim was watching the news, he was startled by gunfire and shattered glass entering the home from the living room window. When the gunfire ceased, the victim looked out the window and saw defendant's vehicle leaving the scene. Tests performed on a bullet lodged in the victim's love seat confirmed that it was fired from the five-shot revolver that was later recovered from defendant's vehicle. In addition, following his arrest, defendant's hands tested positive for the presence of gunshot residue.

Defendant initially contends that he is entitled to resentencing because the habitual offender notice was not timely filed. We disagree. This argument appears to be predicated on an error by defendant regarding dates of the relevant procedural events. Defendant was arraigned on February 14, 2007. A habitual offender notice was filed on March 7, 2007, which is 21 days

following the date of the arraignment. Consequently, the notice filed by the prosecutor was within the time requirements of MCL 769.13.

We also reject defendant's contention that he was denied the effective assistance of counsel. In order to prevail on a claim of ineffective assistance of counsel, defendant must show: (1) "counsel's performance fell below an objective standard of reasonableness under prevailing professional norms"; (2) there is "a reasonable probability that, but for counsel's error, the result of the proceedings would have been different"; and (3) the resultant "proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must also "overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Because defendant did not request a new trial or an evidentiary hearing after trial, *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000), our review is limited to mistakes apparent on the record, *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Defendant argues that counsel was ineffective for failing to file a notice of alibi or attempting to call alibi witnesses. Defendant specifically asserts that counsel should have called James Dunn and an unnamed barmaid to testify that he was at a bar at the time of the shooting. MCL 768.20(1) requires a criminal defendant to provide notice of his intent to present an alibi defense not less than ten days before trial. Such notice must include specific information regarding the place defendant claims to have been at the time of the alleged offense. *Id*.

Defendant asserts that Dunn and the unidentified barmaid would have testified that he was elsewhere at the time of the shooting. However, defendant has failed to provide affidavits to support his contention regarding the anticipated testimony. Indeed, defendant has not even provided the name of the barmaid or any indication of the substance of her anticipated testimony. Thus, defendant has failed to establish the factual predicate for his claim. *Carbin, supra* at 601. Defendant's summation of what Dunn would have testified to also fails to establish an alibi. Defendant merely indicates that Dunn would have testified that "[h]e saw defendant . . . at the tavern over an extended period of time that evening, and can corroborate the story of the barmaid there that defendant . . . used the tavern's business phone . . . to call [the victim's] ex-wife . . . , in which conversation he was informed that the police were looking for him." While this purported testimony establishes that defendant was at the bar, it fails to demonstrate that he was there at the time of the shooting.

Defendant also argues that counsel was ineffective for failing to file a witness list, which resulted in him being prevented from calling several witnesses. We have been unable to find a witness list filed by defendant in the lower court file, and there is no indication on the lower court docket that a filing occurred. Nevertheless, there is no indication that the trial court prevented defendant from calling any witness, or that the prosecutor attempted to have discovery sanctions imposed pursuant to MCR 6.201(J) or have the mandates of MCL 767.94a(3) followed. Therefore, even though counsel failed to file a formal witness list, such error did not serve to prejudice defendant.

Defendant also contends counsel was ineffective for failing to call several additional witnesses at trial. Defendant specifically asserts that trial counsel should have called three men who were inmates with defendant, as well as numerous others who could testify regarding

defendant's character. Defendant has failed to provide any support for his contention regarding the substance of the expected testimony from several of the proposed witnesses, and thereby failed to meet his burden to provide the factual predicate for his ineffective assistance claim pertaining to those witnesses. *Carbin, supra* at 601.

Defendant has provided copies of letters in support of his claims pertaining to the expected testimony for several of the proposed witnesses. However, our review of the lower court record does not support defendant's assertion that any of the people identified would have testified or offered the testimony defendant asserts.[1] Nor does the record establish what "substantial defense" defendant was denied by trial counsel's decision. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).[2] Further, we do not find that a different result would have been likely without the alleged errors given the overwhelming evidence of defendant's guilt. *Rodgers, supra* at 714.

Finally, pursuant to this Court's order[3], defendant was permitted to submit an amended brief to raise an additional issue on appeal. Citing to the recent decision of the Supreme Court in *Gant v Arizona*, ___ US ___; 129 S Ct 1710; 173 L Ed 2d 485 (2009), defendant contends his right to due process was violated by the warrantless police search of his automobile glove compartment following his arrest and that such violation necessitated the suppression of the handgun and other related evidence, which resulted from the search of his vehicle. "This Court reviews a trial court's findings at a suppression hearing for clear error. But the application of constitutional standards regarding searches and seizures to essentially uncontested facts is entitled to less deference; for this reason, we review de novo the trial court's ultimate ruling on the motion to suppress." *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005) (citations omitted).

Specifically, defendant contends that police were precluded from conducting a warrantless search of his automobile glove compartment because defendant was already physically removed from the vehicle and could not possibly physically access the interior or compartment area of the automobile. Defendant relies on the ruling in *Gant* pertaining to the interpretation and application of *New York v Belton*, 453 US 454; 101 S Ct 2860; 69 L Ed 2d 768 (1981), to "not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." *Gant, supra* at 1714. In

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[1] Of the potential witnesses identified, seven are character witnesses. However, it is unclear from the summations provided by defendant what "pertinent trait of character" these witnesses could have testified. MRE 404(a)(1). Assertions that defendant's family was hard working and honest, and that defendant donated time to his church are irrelevant to the crimes charged. Further as a matter of trial strategy, counsel may have decided not to admit character evidence to prevent rebuttal evidence offered by the prosecution, especially seeking to avoid the potential testimony of the other acts witnesses. *Dixon, supra* at 398.

[2] "A substantial defense is one which might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

[3] *People v Burkowski*, unpublished order of the Court of Appeals, entered June 12, 2009 (Docket No. 282013).

addition, defendant asserts the search by police of the interior compartment was not authorized because defendant was arrested for the traffic offense of driving on a suspended license and, in accordance with *Gant,* "[b]ecause police could not reasonably have believed either that [defendant] could have accessed his car at the time of the search or that evidence of the offense for which he was arrested might have been found therein, the search . . . was unreasonable." *Id.* at 1719.

At best, defendant's argument on this issue is disingenuous. At worst, it comprises both a purposeful omission of a pertinent portion of the *Gant* ruling and a mischaracterization of the factual circumstances of defendant's arrest. While it is accurate that defendant was arrested for driving on a suspended license, this was incidental to the reason police were waiting for defendant to arrive at his home and for his arrest. A shooting had occurred locally and the victim of that shooting visually identified defendant's vehicle leaving the scene. Police were also familiar with defendant pertaining to a previous violent incident involving defendant and the shooting victim. Police went to defendant's home and awaited his arrival, based on the information they had received regarding the shooting and defendant's suspected involvement. Police observed defendant driving his vehicle when he arrived at his home. When police approached defendant it was for the purpose of investigating the recent shooting and not for a traffic stop as defendant seems to imply. While in the process of investigating defendant's involvement in the shooting, it was determined that he had a suspended license. While the suspended license violation comprises a legitimate basis for defendant's arrest it was not the sole reason for police presence at his home or the subsequent actions of the police in searching the vehicle.

While defendant is correct that *Gant* serves to limit police authorization "to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search," *id.* at 1719, defendant ignores the remainder of the ruling in *Gant* as applied to the factual circumstances of this case. Although limiting *Belton,* the Supreme Court continued to recognize "that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* (citations omitted). Specifically, the Court emphasized that based on the factual circumstances of the case, "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Id.* In this instance, police were investigating a shooting that had recently occurred where defendant's vehicle was observed leaving the scene. These factual circumstances clearly, in accordance with *Gant,* provided police with a reasonable belief to search the vehicle for evidence pertaining to the shooting. Contrary to defendant's contention, the police search had no relationship to defendant's incidental arrest for driving on a suspended license. As such, the evidence secured need not be suppressed and defendant's right to due process was not violated. Defendant also cites to the recent ruling in *US v Lopez*, 567 F3d 755 (CA 6, 2009) in support of his position. However, *Lopez* is factually distinguishable because it solely relates to the portion of the *Gant* ruling pertaining to the interior search of an automobile once a suspect is removed from the vehicle following his arrest for a traffic offense. In addition, we note that the Michigan Supreme Court has recently vacated this Court's judgment in *People v Mungo,* 277 Mich App 577; 747 NW2d 875 (2008), and remanded that case for reconsideration in accordance with *Gant. People v Mungo*, ___ Mich ___; ___ NW2d ___ (2009). We find it

unnecessary to hold the instant matter in abeyance pending a ruling on *Mungo* following remand based on our reading of *Gant* and the factual circumstances of this case.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra