STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 17, 2009
v	No. 285027 Wayne Circuit Court
YUL DARRIUS DUNNING, Defendant-Appellant.	LC No. 07-013331-FH

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions for felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to four years' probation for the felon in possession of a firearm conviction and two years' imprisonment for the felony-firearm conviction. We affirm.

I. Defendant's Right to Testify

Defendant first argues that only being asked his name without further questioning by his trial counsel violated his constitutional right to testify. Defendant contends that he was entitled to testify about his belief that his right to carry a firearm had been restored and that the shotgun did not meet the definition of firearm. We disagree.

An alleged violation of a defendant's right to testify is a question of law subject to de novo review on appeal. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). "A defendant's right to testify in his own defense stems from the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution." *People v Boyd*, 470 Mich 363, 373; 682 NW2d 459 (2004). The right to testify is also entrenched in the Michigan Constitution, Const 1963, art 1, §§17, 20. *People v Simmons*, 140 Mich App 681, 683; 364 NW2d 783 (1985). However, this right is not without limitation and may bow to accommodate other legitimate interests in the criminal trial process. *People v Solomon (Amended Opinion)*, 220 Mich App 527, 534; 560 NW2d 651 (1996).

Defendant, who was the only witness called by defense counsel, testified as follows:

Defense Counsel: Would you please give your name for the record.

Defendant: Yul Darrius Dunning.

Defense Counsel: I have no further questions of this witness, your Honor.

Prosecutor: I don't either.

Trial Court: All right. You may step down, sir.

Defendant argues under *People v Forbush*, 170 Mich App 294, 299; 427 NW2d 622 (1988), that although a defendant cannot commit perjury, a defendant can testify concerning "ultimate facts" that concern legal definitions and the "legal elements of the crime." Specifically, defendant contends that his testimony would have supported an attack on the legal elements of felon in possession of a firearm because defendant believed that his right to possess a firearm had been restored and that the weapon he was carrying was not a firearm. However, this Court does not allow any type of witness to testify about conclusions of law "because it is the exclusive responsibility of the trial judge to find and interpret the applicable law." *People v Lyons*, 93 Mich App 35, 45-46; 285 NW2d 788 (1979).

Defendant cites *Forbush*, which addressed how perjury prosecutions could not be based on a defendant's statements regarding ultimate facts, which are "the legal definitions and effects ascribed to the basic facts, such as statements regarding the noncommission of a crime charged or a legal element of the crime." *Forbush*, *supra* at 299. However, the substance of defendant's proposed testimony was not to address any facts, but to argue legal conclusions based on his view of the applicable statutes. Defendant did not want to address ultimate facts. Rather, he wanted to testify regarding a reinterpretation of the applicable the statutes to support his view that his right to carry a firearm had been restored and the weapon he was carrying was not a firearm. Further, on appeal, defendant does not argue or provide any basis that his views regarding the applicable statutes have any merit. Additionally, defendant provides no basis for his view that the weapon he was carrying did not constitute a firearm. Although there is a constitutional right to testify, defendant provides no authority that this right entails inadmissible testimony. The only testimony that defendant indicates he wished to give relates to his conclusions of law through his own view of the applicable statutes. Therefore, because the basis of defendant's proposed testimony was his own conclusions of law, he was not denied the right to testify.

Even if there were error, a deprivation of the right to testify is subject to a harmless error analysis. *Solomon*, *supra* at 532-533. Following a review of the entire record, the evidence clearly established that the police observed defendant in possession of a shotgun, which he threw onto a lawn when he noticed the police. Defendant later admitted to being in possession of this firearm and the parties stipulated that defendant had been convicted of a prior felony for the purposes of felon in possession of a firearm. Therefore, the undisputed evidence shows that defendant was a felon in possession of a firearm and was also committing felony-firearm. Thus, based on this overwhelming evidence, any error was harmless beyond a reasonable doubt.

Next, defendant argues that the trial court erred by not sua sponte reopening the proofs to allow defendant to testify. We disagree. As analyzed above, there was no error in restricting defendant's right to testify because the testimony he wished to give was inadmissible. Further,

as analyzed above, any error was harmless. Therefore, the trial court's failure to act sua sponte does not constitute error.

II. Ineffective Assistance of Counsel

Next, defendant asserts a variety of grounds under in which he contends that he was denied the effective assistance of counsel. Defendant does not argue that the individual instances which defendant cites constitute denial of the effective assistance of counsel alone. Rather, defendant argues that the combined effect of defense counsel's conduct was to not subject the prosecution's case to any meaningful adversarial testing, and thus, prejudice should be presumed. We disagree.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews the factual findings for clear error and the constitutional question de novo. *Id.* However, because there was no hearing pursuant to *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973), this Court's review is limited to mistakes apparent on the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Under the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, the guaranteed right to counsel encompasses the right to the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). The *Strickland* test for establishing ineffective assistance of counsel requires a showing "that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Alternatively, the United States Supreme Court has ruled that a trial judge may presume a defendant was prejudiced by a defense counsel's performance if defense counsel "'entirely fails to subject the prosecution's case to meaningful adversarial testing."' *Bell v Cone*, 535 US 685, 696; 122 S Ct 1843; 152 L Ed 2d 914 (2002), quoting *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984). However, for prejudice to be presumed, counsel's failure to subject the prosecution's case to meaningful adversarial testing "must be complete." *Bell*, *supra* at 695-696. The *Cronic* test applies when the attorney's failure is complete, while the *Strickland* test applies when counsel failed at specific points of the proceeding. *Bell*, *supra* at 697.

Defendant argues that counsel's alleged errors should be analyzed under the *Cronic* standard. Specifically, defendant contends that defense counsel's failure to make an opening statement or substantive closing argument, failing to effectively cross-examine prosecution witnesses, stipulating that defendant had a prior felony for purposes of felon in possession of a firearm, and depriving defendant of his right to testify, all together show that this case was not subject to any meaningful adversarial testing.

However, as the record reflects, counsel's alleged failure was not complete. Although faced with insurmountable facts, defense counsel did subject the prosecution's case to meaningful adversarial testing. In particular, defense counsel cross-examined Officer Andrew Berry and solicited testimony indicating that Berry did not recall whether he had an on-board video recorder or whether it was working. This was an attempt to point out that Berry's testimony could not be confirmed by video evidence. Defense counsel also extensively voir dired Sergeant William Robinson to determine whether defendant's constitutional rights were violated when police questioned defendant. Additionally, defendant cross-examined Officer Calvin Lewis, obtaining testimony that the shotgun recovered had a smooth bore. On the basis of this testimony, defense counsel moved for a directed verdict, arguing that this type of weapon was not a firearm under the statute. Accordingly, because defense counsel did take some action to subject the prosecution's case to meaningful adversarial testing, defendant has failed to establish the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Therefore, prejudice may not be presumed. *People v Frazier*, 478 Mich 231, 244-245; 733 NW2d 713 (2007). Further, beyond arguing that prejudice may be presumed, defendant has failed to show that a reasonable probability exists that the result of the proceedings would have been different without any of defense counsel's alleged errors. Therefore, defendant was not denied the effective assistance of counsel.

Defendant also argues that defense counsel was ineffective for stipulating to defendant's prior conviction of a felony because defense counsel essentially admitted defendant's guilt. We disagree. A defense attorney may not admit their client's guilt without first obtaining the client's consent. *People v Fisher*, 119 Mich App 445, 448; 326 NW2d 537 (1982). Further, counsel may believe it is a good tactical decision to stipulate to a particular element of a charge or to issues of proof, but he or she may not stipulate to facts which amount to the "functional equivalent" of a guilty plea. *Id*. at 447. .

Although defense counsel did stipulate that defendant was a felon and that as a felon defendant was not allowed to possess a weapon, these actions do not constitute ineffective assistance of counsel under the circumstances of this case. Defense counsel's stipulations were tactical and meant to protect defendant from the prejudice of having the details of his prior felony presented to the jury. Further, the elements stipulated to were facts that could easily have been proven by official documents. Because defense counsel left the prosecution to its proofs on the element of possession and whether the gun defendant was alleged to be in possession of was a firearm, the stipulation was not a "functional equivalent" of a guilty plea, and therefore, defense counsel was not ineffective.

III. Attorney Fees for Court Appointed Attorney

Lastly, defendant argues that the trial court erred when it imposed attorney fees without considering defendant's ability to pay. We disagree. Because there was no objection to the trial court's order that defendant reimburse the county for court appointed attorney fees, we review for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant argues that the trial court erred by failing to make a determination on the record regarding his ability to pay court costs and attorney fees as required by *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), reversed *People v Jackson*, 483 Mich 271;

___NW2d ___ (2009). In *Jackson*, our Supreme Court overruled *Dunbar's* requirement that a trial court perform an assessment of defendant's ability to pay before sentencing, and ruled that a "defendant is not entitled to an ability-to-pay assessment until the imposition of the fee is enforced." *Jackson, supra* at 292.

In *Jackson*, our Supreme Court reasoned that the relevant United States Supreme Court decisions "do not require a presentence ability-to-pay assessment[,]" that " *Dunbar's* ability-to-pay rule frustrates the Legislature's legitimate interest in recouping fees for court-appointed attorneys from defendants who eventually gain the ability to pay those fees[,]" and that *Dunbar* conflicts with state statutes (MCL 769.1k and MCL 769.1l) which allow the trial court to impose a fee for a court-appointed attorney and operate irrespective of a defendant's ability to pay. *Id.*, at 275, 289-290. The Supreme Court also held that "there is a substantive difference between the imposition of a fee and the enforcement of that fee" and that trial courts should not entertain defendants' ability-to-pay-based challenges to the imposition of fees until enforcement of that imposition has begun. Id. at 290.

Here, there has been no attempt to enforce the imposition of attorney fees. Once such enforcement is undertaken, and defendant makes a timely objection based on his claimed inability to pay, defendant will be entitled to an evaluation by the trial court to determine whether he "is indigent and unable to pay *at that time* or whether forced payment would work a manifest hardship on the defendant *at that time.*" *Id.* at 293 (emphasis in original).

Affirmed.

/s/ Pat M. Donofrio
/s/ Kurtis T. Wilder
/s/ Donald S. Owens