STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 26, 2010
v	No. 286478 Jackson Circuit Court
ANTHONY DONIQUE CLAY, Defendant-Appellant.	LC No. 06-004307-FC

Before: Cavanagh, P.J., and Fitzgerald and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for first-degree criminal sexual conduct (CSC), MCL 750.520b(1). We affirm.

On April 30, 1998, defendant was sentenced to 10 to 30 years' imprisonment on a plea conviction for second-degree murder, MCL 750.317. On August 25, 2006, while defendant was incarcerated, a felony warrant was issued against him for the charged crime of first-degree CSC committed on July 28, 1995. On September 29, 2006, a waiver of preliminary exam was signed by defendant and he was bound over to the circuit court for arraignment. On October 11, 2006, an information charged defendant, as a third-offense habitual offender, with first-degree CSC. On November 17, 2006, the matter was remanded to the district court for a preliminary exam. On December 15, 2006, defendant filed a motion to dismiss citing MCL 767.24 and arguing that the charge was barred by the statute of limitations. On January 25, 2007, the motion was denied. A preliminary exam was held on April 5, 2007, and defendant was bound over to circuit court on the charge.

On July 12, 2007, defendant moved to dismiss the charge, again arguing that the matter was time-barred under MCL 767.24. Defendant also argued that once defendant was "identified as the perpetrator" on September 28, 2005, "the State had a duty to bring him to trial within 180 days [sic] MCL 780.131 and 133." Instead, defendant argued, the complaint and warrant were not filed until August 25, 2006 "because the People deliberately delayed authorizing a warrant to defeat the '180 day rule' and can always do so, if the statute is interpreted favoring the prosecution." Defendant also claimed that his right to a speedy trial was implicated and that a delay of 18 months was presumptively prejudicial. The prosecution responded to the motion to dismiss, arguing that defendant was identified as a DNA match on July 7, 2005, but a confirming DNA sample was necessary for evidentiary purposes. Further, under MCR 6.004(D)(1), "[t]he 180-day rule begins only when the Department of Corrections notifies the Prosecution that the

defendant is in their custody after a warrant has been authorized." In this case, the 180-day rule never started because the prosecution did not receive proper notification from the Department of Corrections. And defendant's right to a speedy trial was not violated because prejudice does not attach until after 18 months from the time a defendant is charged and defendant has failed to even allege actual prejudice. At a hearing conducted on July 19, 2007, the motion was denied.

Following a jury trial, on July 16, 2008, defendant was convicted as charged. Defendant was sentenced to life in prison to be served consecutively to his then-current prison sentence on a conviction for second-degree murder. This appeal followed. Subsequently, this Court vacated the sentence imposing a consecutive sentence and remanded for entry of an amended judgment of sentence to reflect that the sentence was to be served concurrently to his second-degree murder sentence. *People v Clay*, unpublished order of the Court of Appeals, entered 01/30/09 (Docket No. 286478).

On appeal defendant argues that, because the Michigan Department of Corrections (MDOC) failed to notify the prosecutor of defendant's inmate status as required under the 180-day rule, MCL 780.131(1), due process required dismissal of the charge. We disagree.

Issues of statutory interpretation, and legal issues presented under the 180-day rule, are reviewed de novo on appeal. *People v Cleveland Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006); *People v McLaughlin*, 258 Mich App 635, 643; 672 NW2d 860 (2003). However, defendant did not raise the issue in the trial court whether dismissal was the proper remedy when the MDOC fails to provide the requisite notice under MCL 780.131(1); thus, our review is for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCL 780.131(1) provides, in part:

> Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.

As our Supreme Court held in *Cleveland Williams*, *supra* at 256-257 n 4, "the 180-day period begins to run the day after the prosecutor receives notice that a defendant is incarcerated and awaiting trial on pending charges." Here, the prosecutor never received the requisite notice, thus, the 180-day period never commenced. See *People v Holt*, 478 Mich 851; 731 NW2d 93 (2007). Defendant claims that this failure of the MDOC to render such notice denied defendant his "statutory right to a speedy trial" and thus "created a due process violation. US Const, Ams V, XIV; Const 1963, art 1, § 17." Defendant further claims that reversal of his first-degree criminal sexual conduct conviction is the proper remedy. We disagree.

The plain language of MCL 780.131(1) does not require the MDOC to send the requisite notice; it merely indicates that *after* the MDOC provides such notice, "the inmate shall be brought to trial within 180 days." *Cleveland Williams*, *supra* at 250. The statute does not provide a remedy for the failure of the MDOC to provide such notice. Defendant claims that the remedy for depriving him of the right afforded by MCL 780.131(1) derives from the due process clause and results in dismissal of the charge and reversal of his conviction.

However, even if we assumed without deciding that a violation of the 180-day rule implicated due process rights, defendant has failed to establish that reversal of his conviction is required. In a criminal case, due process generally requires reasonable notice of the charge and an opportunity to be heard. *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003). Defendant does not deny that he was afforded those rights. And to establish a due process violation requiring reversal, a defendant must prove prejudice to his defense. *Id*. at 700. Defendant has set forth no such claims of prejudice to his defense. Defendant merely claims that his "constitutional right to speedy trial was placed in jeopardy by the delays in bringing his case to trial." But defendant was not precluded from raising this claim in the trial court and did, in fact, raise the claim, which was denied. Defendant does not challenge that decision on appeal. Considering the facts of this case, defendant has failed to establish that he is entitled to reversal of his conviction on the ground that he was denied a right afforded by MCL 780.131(1). See *Carines*, *supra* at 763; *McGee*, *supra* at 700.

Next, defendant argues that he was denied the effective assistance of counsel because his defense counsel failed to further question jurors Richard Powers and Michael Horton during voir dire despite them expressing potential bias. We disagree.

To establish ineffective assistance of counsel, defendant must show that his trial counsel's representation fell below an objective standard of reasonableness, that but for counsel's errors there is a reasonable probability that the result 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).

A criminal defendant has a constitutional right to be tried by an impartial jury, US Const, Am VI; Const 1963, art 1, § 20. In addition, there is a presumption that jurors are impartial until the contrary is shown. *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008). The burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt. *Id*. It is the "duty of counsel to ferret out potential bases for excusing jurors." *Bynum v ESAB Group, Inc*, 467 Mich 280, 284; 651 NW2d 383 (2002). However, "an attorney's decisions relating to the selection of jurors generally involve matters of trial strategy," which we normally decline to evaluate with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001).

Here, defendant has failed to establish that Powers and Horton were not impartial. See *Miller*, *supra* at 550. Further, on the record before this Court, defendant has not overcome the

presumption that defense counsel's decision to select Powers and Horton as jurors was sound trial strategy. See *Johnson*, *supra*. This Court should not second-guess defense counsel on matters involving trial strategy. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Because counsel may have been engaged in legitimate trial strategy, defendant has not affirmatively demonstrated that his counsel's performance fell below an objective standard of reasonableness. See *Toma*, *supra* at 302-303.

Further, even if we concluded that defense counsel's representation fell below an objective standard of reasonableness, there is no reasonable probability that the outcome of the case would have been different. See *id*. Defendant admitted that he broke into the victim's home, beat her, and stabbed her. He further admitted that he cut the victim's underwear off, but did not recall sexually assaulting her. However, DNA confirmed that defendant's semen was found in the victim's vagina. Thus, defendant has not demonstrated that, but for counsel's failure to question Powers and Horton further about their impartiality, defendant would have avoided conviction of first-degree CSC. See *id*.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald