

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 13, 2016

v

GREGORY DANFORTH,
Defendant-Appellant.

No. 329106
Wayne Circuit Court
LC No. 15-002507-FC

Before: SAAD, P.J., and METER and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to commit murder (AWIM), MCL 750.224, felon in possession of a firearm (felon-in-possession), MCL 750.224f, possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and carrying a dangerous weapon with unlawful intent, MCL 750.226. Defendant was sentenced to life imprisonment for the AWIM conviction, two to five years' imprisonment for the carrying a dangerous weapon with unlawful intent conviction, two to five years' imprisonment for the felon-in-possession conviction, and to the mandatory two-year term for the felony-firearm conviction. We affirm.

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that his trial counsel was ineffective both at trial and at sentencing. Specifically, defendant claims trial counsel was deficient by failing to conduct an investigation, failing to present or explain a lack of DNA evidence, failing to prepare defendant for trial, and failing to object to the scoring of the sentencing guidelines at defendant's sentencing hearing.

“Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law.” *People v Solloway*, __ Mich App __, __; __ NW2d __ (2016) (Docket No. 324559); slip op at 7; citing *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Where no factual record has been established on which this Court may evaluate defendant's claim of ineffective assistance of counsel, “this Court's review is limited to mistakes apparent on the lower record.” *Solloway*, __ Mich App at __; slip op at 7 (citation and footnote omitted).

“A trial court's factual determinations [in calculating sentencing guidelines] are reviewed for clear error and must be supported by a preponderance of the evidence.” *People v Gloster*,

499 Mich 199, 204; 880 NW2d 776 (2016) (footnote omitted). “Whether the facts, as found, are adequate to satisfy the statutory scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *Id.* (citations and footnote omitted). “[I]f the trial court clearly erred in finding that a preponderance of the evidence supported one or more of the [sentencing variables] or otherwise erred in applying the facts to the [sentencing variables][.],” and such an error resulted in an incorrect calculation of the minimum sentence range, defendant would be entitled to resentencing. *People v Biddles*, __ Mich App __, __; __ NW2d __ (2016) (Docket No. 326140); slip op at 4 (citation omitted); see also *People v Francisco*, 474 Mich 82, 89; 711 NW2d 44 (2006).

A. TRIAL

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012) (citation omitted). When claiming ineffective assistance of counsel, it is defendant’s burden to prove (1) counsel’s performance was deficient, meaning it fell below an objective standard of reasonableness and (2) the deficient representation prejudiced the defendant, meaning but for counsel’s error, there is a reasonable probability that the outcome of defendant’s trial would have been different. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Solloway*, __ Mich App at __; slip op at 7. “[D]efendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel[.]” *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Trial counsel’s failure to investigate can rise to the level of ineffective assistance of counsel. *People v Trakhtenberg*, 493 Mich 38, 53; 826 NW2d 136 (2012). Trial counsel’s performance is evaluated by an objective standard of reasonableness and without the benefit of hindsight. *People v Payne*, 285 Mich App 181, 188, 190; 774 NW2d 714 (2009). A defendant must show prejudice resulted from counsel’s lack of preparation. *People v Bosca*, 310 Mich App 1, 36; 871 NW2d 307 (2015).

Defendant takes issue with his counsel’s investigation into his claims of innocence and failure to address the lack of physical evidence against him, and counsel’s failure to meet enough with him to prepare his trial testimony. However, defendant has failed to show trial counsel was objectively unreasonable in his representation. *Bosca*, 310 Mich App at 37. First, regarding defendant’s claim that trial counsel failed to investigate, the record reflects that trial counsel was in possession of various discovery materials necessary to present defendant’s defense and made efforts to secure additional necessary documentation. The prosecution indicated at the final conference that it had turned over and made available to trial counsel a statement from Sabrina Irving, the warrant executed on defendant’s home, an unspecified 911 call, Cortze Woods’s medical records, and 45 photographs of the crime scene on a disk. The prosecution further indicated that there was a warrant pending for defendant’s cellular telephone records that had yet to be turned over by defendant’s cellular telephone provider. However, a “cell[ular] [tele]phone dump” of defendant’s cellular telephone had been done, and the disk was to be made available to trial counsel immediately. With regard to physical evidence, the prosecution informed the trial court that it was still awaiting DNA test results from the Michigan State Police Crime Lab

because of a backlog. Trial counsel informed the court that he would need the results of the DNA evidence.

Notably, at that same hearing, trial counsel stated that he would provide defendant with a copy of the preliminary examination transcript and a copy of Irving's statement. Trial counsel indicated that he had the 45 photographs of the crime scene on his laptop computer, but because of the volume of photographs and his limited budget, he could not promise that he would be able to provide defendant with color copies of all 45 photographs. The trial court agreed to make arrangements for trial counsel to bring a laptop into the jail to show defendant the photographs. Lastly, trial counsel noted that the trial court appointed an investigator whom trial counsel provided with information about the case. Trial counsel provided the investigator with information about the case and the investigator was "going to be contacting [defendant] about all the things that he is concerned about."

Taken together, the record is clear that trial counsel was provided discovery and that he shared that discovery with defendant. This directly contradicts defendant's claim that trial counsel did not meet with him and did nothing to prepare defendant for trial. Further, in addition to reviewing the discovery, the fact that an investigator was appointed and trial counsel coordinated communication between the investigator and defendant negates defendant's claims that trial counsel did nothing to investigate his claims of innocence. Additionally, the handgun used to shoot Woods was never recovered and no bullets or casings were located at the scene. Therefore, there did not appear to be much more for either trial counsel or the investigator to investigate by way of physical evidence.

Regarding the DNA evidence, defendant's trial counsel indicated to the trial court at the pretrial conference on June 16, 2015, that the DNA evidence, which still had not come back from the MSP Crime Lab, was information that the defense clearly needed to have in order to move forward with trial, saying, "[w]e have to have it. This is a faulty identification defense, and we must have the DNA scientific analysis." As a result, the trial court adjourned defendant's trial date five weeks to allow for additional time for the DNA.

Defendant fails to cite any other exculpatory information that would have been easily discoverable upon further investigation by trial counsel. Specifically, defendant also does not point to any other witnesses that should have been interviewed or any other alternative theories regarding who shot Woods after defendant left the car. Instead, it is readily apparent from the record that trial counsel did, in fact, investigate defendant's claims of innocence. An investigator was appointed, trial counsel actively pursued the results of DNA evidence, and was forthcoming with his plans to produce copies of discovery to defendant. Based on the foregoing, it cannot be said that trial counsel failed to sufficiently investigate this case. *Trakhtenberg*, 493 Mich at 52-53.

Defendant correctly asserts that no DNA or other physical evidence was presented against him at trial. However, it is clear from the record that trial counsel vigorously cross-examined a prosecution witness regarding the lack of physical evidence and then used the lack of physical evidence to argue in defendant's favor in his closing argument. It is evident that trial counsel's defense strategy was to highlight for the jury all the areas in which DNA evidence tying defendant to this crime was lacking. Defendant has not met his burden of establishing a

factual predicate showing his trial counsel was ineffective and, as a result, his argument that he received the ineffective assistance of counsel fails. *Hoag*, 460 Mich at 6.

Even if defendant was able to show trial counsel's representation was deficient, defendant also has the burden to establish that trial counsel's ineffective assistance resulted in prejudice to him. *Strickland*, 466 US at 691. Defendant did not prove prejudice, as the unchallenged evidence was more than sufficient for a reasonable jury to convict defendant, beyond a reasonable doubt, of the crimes of which he was convicted.

B. SENTENCING

Defendant also contends his sentencing guidelines were improperly scored and that trial counsel's failure to object to the miscalculation of the sentencing guidelines at the sentencing hearing resulted in ineffective assistance of counsel.

Specifically, defendant challenges the trial court's scoring of Prior Record Variable (PRV) 1, PRV 6 and Offense Variable (OV) 13 and trial counsel's failure to object. MCL 777.50, the statute that governs scoring PRV 1 through PRV 5 states, in pertinent part:

(1) In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

(2) Apply subsection (1) by determining the time between the discharge date for the prior conviction or juvenile adjudication most recently preceding the commission date of the sentencing offense. If it is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and determine the time between the commission date of that prior conviction and the discharge date of the next earlier prior conviction or juvenile adjudication. If that period is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and repeat this determination for each remaining prior conviction or juvenile adjudication until a period of 10 or more years is found or no prior convictions or juvenile adjudications remain. [MCL 777.50(1)-(2)].

Thus, when scoring PRV 1 through PRV 5, a court looks to see "whether, starting with the present offense, there was ever a gap of 10 or more years between a discharge date and a subsequent commission date that would cut off the remainder of [defendant's] prior convictions . . ." *People v Billings*, 283 Mich App 538, 552; 770 NW2d 893 (2009). This statutory provision

reflects a judgment by the Legislature that, if a person is able to go 10 years without a new conviction, he should be able to put his criminal past behind him,

even if there is later on a relapse into a life of crime and the defendant obtains a new conviction. In making this judgment, it is not unreasonable for the Legislature to have insisted that the 10-year conviction free period be exactly that: conviction free. [*People v Butler*, __ Mich App __, __; __ NW2d __ (2016) (Docket No. 327430); slip op at 4.]

Put simply, if a defendant does not have a 10-year conviction free period, all prior crimes are relevant in calculating defendant's PRV score under the sentencing guidelines. *Billings*, 283 Mich App at 552.

Because trial counsel did not object, the trial court did not explain on the record how the sentencing guidelines were calculated. Thus, this Court evaluated the guideline's calculation solely based on the information contained within the PSIR. The record reveals that defendant has been unable to maintain a 10-year crime-free period since 1980. Defendant has eight prior felony convictions. At the time Woods was shot, defendant was on probation for two counts of felonious assault, MCL 750.82(1), one count of malicious destruction of personal property \$200 or more but less than \$1,000, MCL 750.377a(1)(c)(i), and domestic violence, MCL 750.812. All four convictions stemmed from the same incident on July 9, 2010. At the time of sentencing, defendant also had an outstanding warrant issued March 10, 2011, for violating his probation.

Defendant challenges his scores under both PRV 1 and PRV 6. MCL 777.51, the statute governing the scoring of PRV 1, provides, in pertinent part, as follows:

(1) Prior record variable 1 is prior high severity felony convictions. Score prior record variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(c) The offender has 1 prior high severity felony conviction 25 points

* * *

(2) As used in this section, 'prior high severity felony conviction' means a conviction of any of the following, if the conviction was entered before the sentencing offense was committed:

(a) A crime listed in offense class M2, A, B, C, or D.

The trial court did not clearly err in scoring PRV 1. *Gloster*, 499 Mich at 204. Defendant was correctly assessed 25 points under PRV 1, indicating one prior high severity conviction, MCL 777.51(1)(c), where defendant had a prior conviction of bank robbery, MCL 750.531, which is a Class C felony. Defendant's bank robbery conviction was discharged March 6, 2005, 10 years and one day before the commission of the present crimes. However, defendant is not entitled to the protection of the 10-year rule because on August 24, 2010, he was convicted of two counts of felonious assault, MCL 750.82(1), one count of malicious destruction of person property \$200 or more but less than \$1,000, MCL 750.377a(1)(c)(i), and one count of domestic violence, MCL

750.812, all stemming from the same incident occurring on July 9, 2010. Thus, even though over 10 years had passed between the discharge of defendant's bank robbery conviction and the present offense, he was not conviction free within that 10 year span. Accordingly, defendant's prior bank robbery conviction is properly considered in his PRV 1 score. MCL 777.50(1); *Billings*, 283 Mich App at 552.

Defendant next challenges the scoring of PRV 6. MCL 777.56, the statute governing the scoring of PRV 6, provides in pertinent part, as follows:

(1) Prior record variable 6 is relationship to the criminal justice system. Score prior record variable 6 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(c) The offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony 10 points

Defendant's PRV 6 score is supported by a preponderance of the evidence. *Gloster*, 499 Mich at 199, 204. Defendant was assessed 10 points under PRV 6, indicating that he was on parole, probation or delayed sentence status or on bond awaiting adjudication or sentencing for a felony at the time of sentencing. MCL 777.56(1)(c). Defendant contends that the PSIR does not indicate defendant was actually on parole or probation for another crime at the time Woods was shot, but instead only indicates that a warrant had been issued for a probation violation dating back to 2011. Defendant is incorrect. At the time of the present convictions, defendant was on probation for the 2010 convictions. Defendant was sentenced on August 24, 2010, to three years' probation for each offense. The PSIR indicates that defendant was still on probation as of March 7, 2015, the date Woods was shot, likely due to the outstanding probation violation warrant from March 10, 2011. There is nothing in the record to indicate defendant otherwise successfully completed probation for those convictions, and defendant does not assert on appeal that he successfully completed probation for those convictions. Thus, defendant was properly assessed 10 points under PRV 6. Overall, defendant was correctly assessed a total of 85 points for his total PRV score. Using the sentencing grid for Class A offenses, MCL 777.62, defendant's total PRV score of 85 points properly placed him in the PRV Level F range.

Finally, defendant challenges the scoring of OV13. MCL 777.43, the statute governing the scoring of OV13, provides, in pertinent part, as follows:

(1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(c) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person 25 points

* * *

(2) All of the following apply to scoring offense variable 13:

(a) For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

Again, it was not error for the trial court to assess defendant 25 points pursuant to MCL 777.43(1)(c). As noted above, defendant was convicted of two counts of felonious assault on August 24, 2010. Felonious assault, MCL 750.82(1), is a crime against a person according to the list of crimes outlined in the Michigan Sentencing Guidelines Manual. The events relating to defendant's current convictions occurred on March 7, 2015, less than five years after defendant's August 24, 2010 convictions. Thus, pursuant to MCL 777.43(2)(a), defendant's August 24, 2010 felonious assault convictions are to be considered together with defendant's present AWIM conviction, a crime against a person. This amounts to three crimes against a person in the five-year period immediately preceding defendant's convictions on appeal. Thus, defendant was properly assessed 25 points under OV 13. Overall, defendant was correctly assessed a total of 130 points for his total OV score. Using the sentencing grid for Class A offenses, MCL 777.62, which includes AWIM, defendant's total OV score of 130 points properly placed him in the OV Level VI range. Viewed together with defendant's PRV Level F range, defendant's minimum sentencing guidelines range was 270 to 450 months' imprisonment, or life imprisonment. MCL 777.62.

Defendant argues that trial counsel was ineffective by failing to object to the PSIR and the scoring of the sentencing guidelines at defendant's sentencing hearing. "Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (citation omitted). Because the sentencing guidelines in this case were properly calculated, defendant's counsel was not deficient in failing to object to their scoring at defendant's sentencing hearing. *Id.* A sentence of life imprisonment for AWIM fell within the recommended minimum sentencing guideline range. As such, resentencing is unwarranted.

Lastly, in claiming trial counsel provided ineffective assistance, defendant advances the argument that trial counsel failed to meet with him before sentencing to discuss the presentence investigation report and the sentencing information report. This Court's review of defendant's argument is limited to mistakes apparent on the record. *Solloway*, __ Mich App at __; slip op at 7. The record confirms that trial counsel did, in fact, review the presentence investigation report with defendant before sentencing, contrary to defendant's claims. Thus, defendant's claim of ineffective assistance of counsel regarding sentencing is without merit.

Affirmed.

/s/ Henry William Saad
/s/ Patrick M. Meter
/s/ Christopher M. Murray