

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 16, 2012

v

MARKUS DEMOND BAILEY,

Defendant-Appellant.

No. 305759
Washtenaw Circuit Court
LC No. 10-001719-FC

Before: SHAPIRO, P.J., and GLEICHER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant Markus Demond Bailey of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, and possession of a firearm during the commission of a felony, MCL 750.227b.¹ Because defendant has not overcome the presumption that his trial counsel provided effective assistance and his sentence falls within the appropriate minimum sentencing guidelines range, we affirm.

I. BACKGROUND

On September 30, 2010, defendant and two cohorts robbed a medical marijuana clinic in Ann Arbor. The police responded while the robbery was in progress and apprehended the three suspects at the scene. The police searched defendant's person and found marijuana, \$5,497.80 in cash, two of the victims' cellular telephones, a folding knife, and a live bullet. After the police took defendant into custody, a detective read defendant his *Miranda*² rights and defendant agreed to be interviewed. Ultimately, defendant confessed to conspiring with the other two men to rob the clinic, participating in the robbery, and possessing a handgun during part of the robbery.

Before trial, defense counsel moved to suppress defendant's confession. Counsel argued that defendant was emotionally and cognitively impaired and therefore lacked the capacity to

¹ The court acquitted defendant of unlawful imprisonment, MCL 750.349b, and resisting arrest, MCL 750.81d(1).

² *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966), reh den 385 US 890; 87 S Ct 11; 17 L Ed 2d 121 (1966).

knowingly, understandingly, and voluntarily waive his *Miranda* rights. At defendant's bench trial, the court heard defendant's motion. Defense counsel presented the testimony of defendant's stepfather that defendant had been in special education classes in school, took medication to control his attention deficit/hyperactivity disorder, and was prone to suggestion from peers and authority figures. The trial court denied defendant's motion and considered his confession in convicting him.

II. ASSISTANCE OF COUNSEL

Defendant contends that his trial counsel was ineffective in failing to raise the suppression motion at the preliminary examination stage of the proceedings and failing to secure an expert witness to testify that defendant's disabilities rendered his *Miranda* waiver involuntary. Because defendant did not request a new trial or an evidentiary hearing, our review is limited to errors apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish an ineffective assistance claim, a defendant must show that "(1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). We must presume "that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Defendant first questions counsel's decision to waive defendant's right to a preliminary examination. Specifically, defendant claims that a reasonable attorney would have insisted on holding the examination to gather information "necessary to reasonably defend against, and/or outright suppress" the confession. Yet, defendant points to no additional information that could have been gathered at that examination. Defendant also suggests that counsel should have raised the suppression motion at the preliminary examination phase, rather than at trial. However, defendant has made no argument supporting that he was actually prejudiced in any way by waiving the examination. Defendant was still able to bring his motion to suppress at trial and was allowed to present supporting evidence. Given defendant's cursory treatment of this argument, he cannot overcome the strong presumption that counsel acted reasonably.

Defendant also claims that counsel should have called an expert witness to support that defendant's emotional and mental disabilities rendered his *Miranda* waiver involuntary. "An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). The failure to call a particular witness amounts to ineffective assistance only if the defendant is thereby deprived of a substantial defense, i.e. one that would have affected the outcome of the trial. *Id.*; *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vac in part on other grounds 453 Mich 902 (1996). Defendant has provided no information regarding the nature of his disabilities and merely speculates, without support or detail, that an expert witness could have proved his waiver was involuntary. As such, he failed to "show that the retention of an independent expert would have altered the outcome of the lower court proceedings." *Payne*, 285 Mich App at 190.

III. SENTENCING

Defendant argues that the trial court abused its discretion by imposing a disproportionate sentence. “We review for an abuse of discretion whether a sentence is proportionate to the seriousness of the offense.” *People v Armisted*, 295 Mich App 32, 51; 811 NW2d 47 (2011). Yet, we must affirm a sentence imposed within the applicable minimum sentencing guidelines range, absent reliance on incorrect or inaccurate information. MCL 769.34(10). This is because a minimum sentence within the applicable range “is presumptively proportionate.” *Armisted*, 295 Mich App at 51. Defendant concedes that his 135-month minimum sentence is within the appropriate guidelines range and raises no claim of error regarding the information relied upon by the trial court. Accordingly, we must affirm.

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Amy Ronayne Krause