

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES PAUL SNIDER,

Defendant-Appellant.

UNPUBLISHED

July 22, 1997

No. 173545

Ottawa Circuit Court

LC No. 93-017447-FC

Before: Reilly, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of bank robbery, MCL 750.531; MSA 28.799, and habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to ten to twenty-five years' imprisonment. Defendant appeals as of right. We affirm in part, and reverse and remand in part.

Defendant was convicted of robbing the Old Kent Bank on North River in Holland Township. At trial, both the prosecution and defendant agreed that the issue was not whether the bank had been robbed at the time in question, but whether defendant was the person who committed the robbery. A number of eyewitnesses testified regarding the robbery. Most of the eyewitnesses could not positively identify defendant as the culprit. However, several of defendant's family members, including his mother, adopted father, a brother, and a sister, positively identified defendant from enlarged photographs made from a videotape taken by bank surveillance cameras during the bank robbery.

Defendant argues that, because the pivotal issue in the bank robbery charge was his identification as the perpetrator of the crime, the trial court abused its discretion in denying his pretrial motion for an expert witness to address the question of identification. We disagree. Rulings on such motions are expressly left to the discretion of the trial court. *In re Attorney Fees of Klevorn*, 185 Mich App 672, 678; 463 NW2d 175 (1990); *People v Miller*, 165 Mich App 32, 47; 418 NW2d 668 (1987).

MCL 775.15; MSA 28.1252 requires a defendant to show "to the satisfaction of the judge presiding over the court wherein such trial is to be had . . . [that] he cannot safely proceed to a trial

[without the proposed witness]." In other words, a defendant must show a nexus between the facts of the case and the need for an expert. *People v Jacobsen*, 448 Mich 639, 641; 532 NW2d 838 (1995).

We find that defendant did not make the requisite showing under the statute that, without the expert, he could not proceed to a trial. Members of defendant's own family positively identified him as the culprit from photographs taken during the crime by the bank's surveillance cameras. Under these facts, defendant has failed to show any nexus between the positive identification of him by family members and the alleged need for an expert to explain that identification. The trial court did not abuse its discretion by denying defendant's motion.

Defendant also argues that his Sixth Amendment right to counsel was violated when Robert Scott, one of his cell mates, was allowed to testify at trial regarding incriminating evidence Scott had allegedly learned from defendant, where law enforcement officers, after conferring with Scott, allowed him to remain in defendant's cell and subsequently met with him again. We disagree.

The Sixth Amendment to the United States Constitution guarantees an accused, after inception of formal charges, the right to rely on counsel as a "medium" between himself and the state, and this guarantee encompasses the state's affirmative obligation not to circumvent the protections accorded an individual who invokes this right. *Maine v Moulton*, 474 US 159, 176; 106 S Ct 477; 88 L Ed 2d 481 (1985). Courts have not hesitated to find a violation of the right to counsel where the government has intentionally created a situation likely to induce a defendant to make incriminating statements without the assistance of counsel and has deliberately elicited the incriminating statements. *Moulton, supra* at 180; *United States v Henry*, 447 US 264, 274; 100 S Ct 2183; 65 L Ed 2d 115 (1980); *Massiah v United States*, 377 US 201, 206; 84 S Ct 1199; 12 L Ed 2d 246 (1964); *United States v Brink*, 39 F3d 419, 423-424 (CA 3, 1994). However, "a defendant does not make out a violation of [a Sixth Amendment] right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond mere listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann v Wilson*, 477 US 436, 459; 106 S Ct 2616; 91 L Ed 2d 364 (1986).

In this case, our review of the evidence convinces us that no violation of defendant's right to counsel occurred. The common thread running through cases finding a violation of an accused's Sixth Amendment rights, which is a collusive nexus between government authorities and an informant to improperly elicit incriminating evidence from a defendant, is absent here. By the time Scott had contact with the authorities, he had already amassed the incriminating evidence against defendant. We find no error.

Defendant also raises several instances of ineffective assistance of counsel at trial. After an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), conducted on remand ordered by this Court, the trial court concluded that counsel had not been ineffective. We agree.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; ___ NW2d ___ (1997).

Defendant claims that trial counsel was ineffective for failing to challenge the investigating detective's testimony that he had eliminated all suspects except defendant as likely perpetrators of the crime. The trial court recognized this as a mistake, but concluded that it made no difference in the outcome of the trial. We agree. Furthermore, although in retrospect counsel opined that his cross-examination of the detective on this issue might not have been wise trial strategy, this Court will not substitute its judgment for that of counsel on such matters. *Id.* The fact that a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant also claims that trial counsel did not adequately interview Ken DeJonge prior to trial. The trial court concluded that trial counsel did talk to the witness and gained whatever information the witness had to offer. We agree with the trial court's conclusion that this claim does not overcome the strong presumption that defendant was afforded effective assistance of counsel. We are not convinced that, but for trial counsel's actions, the outcome of defendant's trial would have been different.

Defendant also claims that trial counsel had a conflict of interest because he was acquainted with Scott. At the remand hearing, trial counsel testified that he had met Scott approximately twenty years before defendant's trial and had socialized with him to some extent at that time. Counsel denied that Scott was his "drinking buddy" and averred that he had not seen Scott for twenty years and that his acquaintance with Scott presented no conflict of interest. The trial court determined that there was no indication that counsel's relationship with Scott effected counsel's representation of defendant or that it affected counsel's treatment of Scott as a witness. We agree and find that defendant was afforded effective assistance of counsel.

Defendant further claims that trial counsel was ineffective for failing to move to disqualify the trial judge on the ground that he had handled certain pretrial motions that might have prejudiced him. Based on the evidence presented against defendant, we are not convinced that, but for trial counsel's actions, the outcome of defendant's trial would have been different.

Defendant also claims that trial counsel was ineffective for failing to move to suppress Scott's testimony because it violated his Sixth Amendment Rights. We concluded that Scott's testimony did not violate defendant's constitutional right to counsel. It therefore follows that defendant was not prejudiced by counsel's failure to challenge the testimony. Defendant was not denied his right to effective assistance of counsel.

Defendant also claims that his conviction for second-offense habitual offender must be vacated because he was tried by the court without validly waiving his right to a jury trial. We agree. We note that the prosecutor concedes this issue, and agrees that reversal is required on this issue. At the time of defendant's trial for bank robbery, he was entitled to a jury trial on the habitual offender charge. MCL 769.13; MSA 28.1085. Although he had a statutory right to waive a jury trial and be tried by the court, any waiver must have been in accordance with MCR 6.402. Our review of the record confirms that defendant did not effectively waive his right to trial by jury on the supplemental charge. We therefore reverse defendant's conviction of habitual offender, second offense, vacate his sentence, and remand for further proceedings on the habitual offender charge.

We affirm defendant's conviction for bank robbery, reverse his conviction for habitual offender, second offense, vacate that sentence, and remand this case to the trial court for further proceedings on the habitual offender charge. We do not retain jurisdiction.¹

/s/Maureen P. Reilly
/s/ Harold Hood
/s/ William B. Murphy

¹ Defendant also argues that he is entitled to either an adequate settled record or a new trial because portions of the trial proceedings were not transcribed. This issue has been rendered moot by the remand hearing at which the parties stipulated to settle the record regarding the missing testimony.