

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIS PATTON,

Defendant-Appellant.

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UNPUBLISHED

February 24, 1998

No. 198348

Oakland Circuit Court

LC No. 95-143131-FC

Before: McDonald, P.J., and Sawyer and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree felony murder, MCL 750.316; MSA 28.548, armed robbery, MCL 750.529; MSA 28.797, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced as an adult to life in prison without parole for the murder conviction, twenty-five to fifty years' imprisonment for the armed robbery conviction, and two two-year terms of imprisonment for the felony-firearm convictions. We affirm in part and reverse in part.

Defendant first argues that his statements and the items seized from his person should have been excluded at trial because the police lacked probable cause to arrest him for loitering, but did so merely as a pretext to gain more evidence against him concerning the murder. We disagree. "When a defendant is detained or taken into custody by the police acting without a warrant, the detention is illegal unless the police have probable cause to arrest that defendant." *People v Lewis*, 160 Mich App 20, 25; 408 NW2d 94 (1987). Probable cause to arrest exists when "the facts and circumstances within the officers' knowledge are sufficient to a prudent person, or one of reasonable caution, to believe that the suspect has committed or is committing a felony." *Id.* Where there is no probable cause to arrest, and the police instead take a defendant into custody for investigatory purposes only, any evidence obtained as a result of that unlawful detention or any statement made while unlawfully detained must be suppressed. *Id.* However, once probable cause is established, the subjective intent of the officers is irrelevant to the validity of a seizure. *Whren v United States*, 517 US 806; 116 S Ct 1769, 1774; 135 L Ed 2d 89, 98 (1996).

In the present case, although defendant was initially taken into custody for loitering, the facts and circumstances known to the officers at the time of his detention warranted a reasonably prudent person to believe that defendant committed the crime of murder, an offense with which he was later arrested and charged. When the arresting officer observed defendant within hours of the shooting at the location where the eyewitness informed police that defendant would most likely be found, defendant had in his possession an informational bulletin containing defendant's picture, a physical description of him, and a description of the crime defendant was suspected to have committed. The officer testified at trial that defendant resembled the man pictured on the flyer, as well as the description that the eyewitness gave, and that after he approached defendant and asked him his name and date of birth, it was apparent that defendant was attempting to conceal his identity. Given these facts, we find that probable cause existed at the time of defendant's detainment; hence, any evidence or statements seized thereafter were properly admitted at trial.

Next, defendant argues that he was denied effective assistance of counsel because his trial counsel failed to order a psychiatric examination in preparation for defendant's juvenile sentencing hearing and failed to put forth any evidence, particularly expert testimony, to prove that defendant would be best suited for rehabilitation within the juvenile justice system. Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *People v Caruso*, 513 US 1121; 115 S Ct 923; 130 L Ed 2d 802 (1995).

Defendant's claim is without merit because he has not established that counsel failed to perform an essential duty and that the failure was prejudicial to him, or that his counsel failed to meet a minimum level of competence. *People v Sharbnaw*, 174 Mich App 94, 106; 435 NW2d 772 (1989). The decision whether to call witnesses is a matter of trial strategy, an area in which this Court will not substitute its judgment for that of counsel. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Because defendant failed to establish a record below concerning this issue, we do not know what evidence would have been gleaned from psychological testing, to what matters a psychological expert would have testified, and whether either would have been favorable to defendant. Therefore, we cannot judge the propriety of defense counsel's performance.

However, we find that even if counsel had presented favorable testimony, it is unlikely that such evidence would have changed the court's decision concerning defendant's sentencing. During the sentencing hearing, defense counsel rigorously cross-examined the prosecution's witnesses, challenging their recommendation to sentence defendant as an adult by inquiring into the types of juvenile services available, by asking them to give a prediction as to defendant's success should he be placed in a juvenile lockdown setting with positive role models to encourage him, and by forcing them to reiterate defendant's family's pervasive criminal history and how he had been "bounced around" since he was a young child. Despite counsel's effort to emphasize defendant's dysfunctional childhood and need for a

second chance, the court noted that defendant brutally took another's life and posed an extreme danger to society.

In addition to the seriousness of the present crime, defendant had several prior juvenile adjudications, including a 1994 assault and battery, and a 1995 felonious assault arising out of an incident where defendant held a gun to his maternal grandmother's head and threatened to kill her. Also, defendant had formerly been sent to two separate juvenile facilities and placed on truancy status after he left both facilities without permission. He "very forthrightly" admitted to being involved in drugs. He showed no remorse or responsibility in connection with the victim's death in this case. In sum, we hold that the court's decision to sentence defendant as an adult, which requires only proof by a preponderance of the evidence, finds sufficient support in the record aside from any evidence defendant now proposes should have been admitted. See MCR 6.931(E)(2). Accordingly, defendant is not entitled to a new sentencing hearing.

Last, although defendant did not raise a double jeopardy argument on appeal, Michigan case law clearly holds that a defendant's constitutional right to be free from being twice placed in jeopardy for the same crime is violated when the defendant is convicted of both felony murder and the underlying felony. *People v Passeno*, 195 Mich App 91, 96; 489 NW2d 152 (1992). Therefore, we reverse defendant's armed robbery conviction, *People v Harding*, 443 Mich 693, 714; 506 NW2d 482 (1993), and the accompanying felony-firearm conviction, *People v Burgess*, 419 Mich 305, 309-312; 353 NW2d 444 (1984), affirming only his murder conviction and one felony-firearm conviction.

Affirmed in part, reversed in part.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Joel P. Hoekstra