STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 1999
v	Nos. 206974 & 213821 Kalamazoo Circuit Court
FLOYD CHARLES SCHIMP, Defendant-Appellant.	LC Nos. C94-0771FH & C95-0346FH

Before: Hoekstra, P.J., and Saad and R.B. Burns,* JJ.

PER CURIAM.

Defendant appeals as of right his conviction and sentence of probation violation. We affirm.

I

In 1994, defendant pleaded guilty to breaking and entering, MCL 750.110; MSA 28.305. The court sentenced him to 40 days in jail followed by 48 months' probation. In 1995, defendant pleaded guilty to assault with intent to commit second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). Consequently, the court found defendant guilty of probation violation and ordered him to serve one year in jail and 48 months' probation. The terms of the probation provided that defendant not engage in any assaultive, intimidating, abusive or threatening behavior, and not consume alcohol. In August, 1997, defendant was once again convicted of a probation violation. This conviction arose from an altercation between defendant and his wife in the trailer park where they lived and from defendant's alcohol consumption. Following a hearing, the trial court revoked defendant's probation and ordered him to serve the following concurrent prison sentences: (1) 36 to 60 months, with credit for 69 days, for violation of probation for assault with intent to commit second degree criminal sexual conduct, and (2) 60 to 120 months, with credit for 156 days, for violation of probation for breaking and entering a building with intent to commit any felony or a larceny.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

II

Defendant contends that he was denied his constitutional rights to due process and the effective assistance of counsel because of trial counsel's failure or refusal to question complainant wife about her alleged motivation to fabricate assault charges, and failure to call an eyewitness who would have corroborated that no assault had occurred. He argues that it is reasonably probable that, but for these alleged errors, defendant would have been acquitted. We disagree.

In order to prove ineffective assistance of counsel, the defendant must prove that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for the unprofessional errors, the result of the proceeding would have been different. *People v Mitchell,* 454 Mich 145, 157-158; 560 NW2d 600 (1997). "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 156. In applying this test the court must strongly presume that there is a wide range of reasonable professional assistance within which the counsel's conduct falls. *Strickland v Washington,* 466 US 668; 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Because defendant did not move for a *Ginther*[1] hearing, this Court's review is limited to mistakes apparent on record. *People v Williams,* 223 Mich App 409, 414; 566 NW2d 649 (1997).

Defendant claims that his trial counsel should have questioned defendant's wife regarding her alleged motives (jealousy and anger) for falsely informing the police that defendant had assaulted her. On appeal, defendant supports this claim with a signed affidavit from his wife. Defendant also claims that his trial counsel should have introduced testimony of a neighbor who would have testified that she saw defendant carry his wife out of the trailer, set her down on the porch and that the wife did not have any bruises on her after the incident. Defendant purports to support this claim with an unsigned affidavit made out in the neighbor's name.

By submitting affidavits that were not part of the trial court record, defendant asks this Court to enlarge the record on appeal. Generally, this Court's review is limited to the record of the trial court, *Amorello v Monsanto Corp,* 186 Mich App 324, 330; 463 NW2d 487 (1990), and it will allow no enlargement of the record on appeal, *Hawker v Northern Michigan Hospital, Inc,* 164 Mich App 314, 318; 416 NW2d 428 (1987). However, if remand to supplement the record would be a waste of judicial time, this Court might consider the enlarged record without remand. *Id.*

Here, there is no reason for a remand because the affidavits do not establish ineffective assistance of counsel. Assuming, arguendo, that defendant's attorney knew about the neighbor witness and also knew that defendant's wife would testify that she fabricated the assault charge and then explain her motive for doing so, failure to call either witness would not be enough to prove ineffective assistance of counsel. Under *Strickland,* the defendant must "overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland, supra* at 466 US 689. In this case even with the additional testimony of wife and neighbor, it would not have changed the outcome of the hearing because the court found through the testimony of others, by a preponderance of the evidence, that there was some kind of altercation and disturbance that required the police being present at the home of defendant and his wife and that defendant assaulted his wife.

Therefore, defendant's ineffective assistance claim fails because, "[o]n this record, there is no basis to conclude that the failure to present these witnesses was error or that, had the witnesses been presented, 'the factfinder would have had a reasonable doubt respecting guilt.'" *Id.*; *Mitchell, supra* at 166.

III

Next, defendant argues that he is entitled to resentencing because the sentences in both cases far exceed the sentencing guidelines for the underlying offenses, and were disproportionate to the underlying offense, the instant offense and the offender. We disagree.

We review disproportionate sentence claims for abuse of discretion. *People v Milbourn,* 435 Mich 630, 651; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and offender. *Id.* at 636.

Probation statutes provide that when a probation is revoked or terminated, the sentence must be in accordance with the permissible sentence for the underlying offense itself. *People v Maxson,* 163 Mich App 467, 470; 415 NW2d 247 (1987). In all indeterminate sentences, the maximum term is set by statute and the minimum term is set by the court. *Id.* at 471. The breaking and entering statute, MCL 750.110; MSA 28.305, provides for a maximum imprisonment of ten years. Defendant's sentence of 60 to 120 months fell within the permissible sentence for the underlying offense. The statutory maximum sentence for assault with intent to commit second-degree criminal sexual conduct is 15 years. MCL 750.520c; MSA 28.788(3), provides for a maximum imprisonment of 15 years.

Furthermore, "sentencing guidelines do not apply to sentencing for probation violations." *Williams,* 223 Mich App 412. This Court may not use the sentencing guidelines in any manner to determine whether a probation violator's sentence is proportionate. *Id.* at 412-413. However, a sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 411. In assessing whether a sentence is proportionate, the judge must consider the nature of the offense and the background of the offender. *Milbourn, supra* at 651. The trial court may appropriately consider the defendant's actions and the seriousness and severity of the facts and circumstances surrounding the probation violation. *Id.* In this case, since being placed on probation, defendant involved himself in one difficulty after another. The trial judge considered defendant's history of escalating misconduct contained in the presentence report. Under these circumstances, the sentence was proportionate to the circumstances of both the offense and the offender.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Henry William Saad
/s/ Robert B. Burns

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).