STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 29, 2000
v	No. 212718 Kent Circuit Court
BILLY JOE NOEL, Defendant-Appellant.	LC No. 97-009955-FC

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

PER CURIAM.

Defendant Billy Joe Noel was convicted of assault with intent to commit robbery while armed, MCL 750.89; MSA 28.284, and aggravated assault with intent to do bodily harm less than murder, MCL 750.84; MSA 28.279. At sentencing the trial court noted that the sentencing guidelines were not applicable because of defendant's habitual offender status, but that the guidelines were computed and filed and that he would stay within the guidelines when sentencing defendant. On the record, the trial court proceeded to sentence defendant to time served in the county jail on the aggravated assault charge and to fifteen years to fifty years on the assault with intent to rob while armed charge. The guidelines as scored for assault with intent to rob while armed set the minimum sentence range at sixty to three hundred months and the Sentencing Information Report records the actual sentence as 180 months to 600 months, mirroring the trial court's sentence on the record. However, the judgment of sentence records a sentence of fifteen years to twenty years imprisonment[1] for assault with intent to commit armed robbery and to time already served in the county jail for aggravated assault.

Defendant appeals as of right. We affirm defendant's conviction, but remand to the circuit court for a correction of the judgment of sentence with regard to the maximum sentence imposed.

I

Defendant's first issue on appeal is that the trial court abused its discretion by allowing defendant to appear at trial while wearing prison clothes and handcuffs. We disagree.

Where a defendant makes a timely request to wear civilian clothing, the court must grant the request. *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). A defendant who does not want to be tried in prison clothes must timely object before the jury is impaneled; otherwise, the defendant's right to be tried in civilian clothes is waived. *People v Turner*, 144 Mich App 107, 109; 373 NW2d 255 (1985).

In the present case, defendant never requested that he be allowed to wear civilian clothes even after the trial court inquired why defendant was still in "jail greens" prior to the start of the jury selection process. Defendant responded to the court's question by indicating that he was not in civilian clothes because of the way he felt, explaining that he was objecting to his court-appointed counsel. The court, not having received an adequate answer to his question about defendant's attire, then indicated since defendant did not want to be in civilian clothes, jury selection would proceed. Further, defendant's counsel did not object until sentencing, which occurred almost three months after defendant's trial, and the objection was not accompanied by a request for a new trial. Because defendant failed to timely object, this argument is an unpreserved constitutional issue.

This Court reviews unpreserved claims of constitutional error for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). The United States Supreme Court has held that a defendant and defendant's counsel, but not the trial judge, have the duty to timely object to the defendant's appearance before the jury is impaneled. *Estelle v Williams*, 425 US 501, 512; 96 S Ct 1691; 48 L Ed 2d 126 (1976). The *Estelle* Court reasoned that trial strategy and tactics are the responsibility of the accused and the accused's attorney because "[a]ny other approach would rewrite the duties of trial judges and counsel in our legal system." *Id*.

In the present case, the trial judge did not have a duty to prevent the jury from seeing defendant in prison clothes; therefore, no error occurred, and there is no need to conduct a plain error analysis under *Carines*, *supra*. Similarly, there is no need for this Court to review defendant's related claim that the trial court abused its discretion in allowing the jury to see him in handcuffs. This Court's review is limited to the trial court record, *Amorello v Monsanto Corp*, 186 Mich App 324, 330; 463 NW2d 487 (1990), and because the trial court record is devoid of any indication that defendant was wearing handcuffs at any time during his trial or that jurors ever saw defendant wearing handcuffs, this Court will not review defendant's claim.

II

Defendant's second issue on appeal is that defense counsel made four serious mistakes that had the cumulative effect of violating his constitutional right to effective assistance of counsel. According to defendant, he was denied the effective assistance of counsel in the following ways: (1) defense counsel failed to object when the trial court allowed the potential jurors to see defendant in his jail clothes and handcuffs; (2) defense counsel failed to object to the admission of defendant's statement to police; (3) defense counsel failed to move for the inclusion of a cautionary jury instruction regarding accomplice testimony; and (4) defense counsel failed to make a pretrial motion to facilitate a plea bargain. We disagree.

Defendant failed to request an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); therefore, this Court reviews defendant's claim of ineffective assistance of counsel only to the extent that defense counsel's mistakes are apparent on the record. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). The Michigan Supreme Court has noted that a claim of ineffective assistance of counsel must be examined under the United States Supreme Court's standard in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298, 326; 521 NW2d 797 (1994). Under *Strickland*, a defendant must satisfy a two-pronged test to establish a claim of ineffective assistance of counsel. *Strickland*, *supra* at 687. The defendant must first demonstrate that counsel's performance was deficient by "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. Then, the defendant must demonstrate that counsel's deficient performance prejudiced the defense by "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id*.

Each of defendant's four claims of ineffective assistance of counsel fails the two-pronged test in *Strickland*. Defense counsel's performance was not deficient in any of the four claims. Moreover, even if this Court were to find that defense counsel's performance was deficient in all four claims, defendant has failed to demonstrate that prejudice resulted. This Court recently noted that it "will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

A

Defendant first claims that defense counsel failed to object when the trial court allowed the potential jurors to see defendant in his jail clothes and handcuffs. Because the record does not indicate that defendant ever wore handcuffs in the jury's presence, this Court does not address that portion of defendant's claim. *Amorello*, *supra* at 330. However, the record does indicate that defense counsel failed to object to defendant wearing prison clothes before the jury was impaneled. In fact, defense counsel waited until the sentencing hearing to object to defendant's appearance and never moved for a mistrial.

Assuming that defense counsel's failure to timely object to defendant's appearance before the jury was impaneled constitutes deficient performance, defendant has not established "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The evidence of defendant's guilt was overwhelming and there is no reason to believe that the jurors would have rendered a different verdict had defendant been wearing civilian clothing; therefore, this claim fails.

B

Defendant's second claim of ineffective assistance of counsel based on the failure to object to the admission of defendant's statement to the police also fails. Defendant claims that because he made his statement to police after requesting counsel, defense counsel should have requested a hearing under

People v Walker, 374 Mich 331; 132 NW2d 87 (1965), to determine if *Miranda* rights were observed or whether the police were attempting to induce defendant to inculpate himself.

Because the record does not indicate that defendant ever told defense counsel that he made his statement to the police after requesting counsel, defense counsel's alleged mistakes are not apparent on the record. *Harris, supra* at 154. Therefore, defendant cannot demonstrate the first *Strickland* requirement that defense counsel's performance was deficient.

C

Defendant next complains of defense counsel's failure to move for the inclusion of a cautionary jury instruction regarding accomplice testimony. "[W]here a defendant requests a cautionary instruction regarding an accomplice's testimony, a trial court is required to give that instruction." *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). However, even if defense counsel should have requested the instruction, defendant cannot show prejudice on this record. The case against defendant did not rest solely on the testimony of the accomplice, defendant's own statement admitted his involvement in the crime and the victim testified that defendant was one of the robbers.

D

Finally, the lower court record does not support defendant's last claim of ineffective assistance of counsel. Defendant claimed that before withdrawing, defendant's original defense counsel failed to advise him that he had forty-two days to accept a proffered plea bargain; however, the record does not reflect that the prosecutor made a plea offer, or that defendant intended to accept the alleged plea offer. When the current defense counsel was appointed, the forty-two-day period to make a plea agreement had already expired. Defendant argues that defense counsel's failure to make a pretrial motion to extend the forty-two-day period to seek a plea bargain with the prosecutor constitutes ineffective assistance of counsel.

Although the trial judge stated at the sentencing that he probably would have granted defendant's motion to extend the forty-two-day period, there is nothing in the record indicating that the prosecutor was willing to offer a plea bargain after the forty-two days expired. Also, our Supreme Court has held that "according to the specific language of MCR 6.302(C)(3)(a), the trial judge is authorized to reject the entire plea agreement, including the underlying plea, where the plea agreement includes either a sentence agreement or a sentence recommendation." *People v Grove*, 455 Mich 439, 455; 566 NW2d 547 (1997). Further, the *Grove* Court noted that a trial court can reject a plea agreement even where the agreement does not provide for a specific sentence disposition. *Id*. at 456. Therefore, assuming that the trial court agreed to extend the forty-two-day period, and further assuming that the prosecutor and defendant agreed to a plea bargain, there is no guarantee that the trial court would have accepted the terms of the agreement. In other words, even if defense counsel's representation was deficient, defendant has failed to establish that prejudice resulted, as required under *Strickland* and *Pickens*.

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Janet T. Neff

[1] This sentence, had it been the intent of the trial court to impose it, would violate the two-thirds rule of *People v Tanner*, 387 Mich 683, 689-690; 199 NW2d 202 (1972) because *Tanner* applies to habitual offender sentences per *People v Thomas*, 447 Mich 390, 392; 523 NW2d 215 (1994). However, it is clear from the record that the sentence recorded in the Judgment of Sentence represents a clerical error and no violation of the *Tanner* rule occurred. Defendant did not raise a *Tanner* issue on appeal.