STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK HUBERT CONWAY,

Defendant-Appellant.

UNPUBLISHED
May 26, 2000

No. 211491
Ogemaw Circuit Court
LC No. 97-001215 FH

Before: Doctoroff, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*); MSA 14.15(7401)(2)(d)(*iii*). He was given an enhanced sentence of eight to fifteen years' imprisonment as a fourth habitual offender, MCL 769.12; MSA 28.1084. Defendant appeals as of right. We affirm, but remand so that the trial court may complete a sentencing information report regarding the possession of marijuana charge.

Defendant first contends that the trial court erred by refusing to dismiss the charges on the ground that the prosecutor failed to bring defendant to trial within the 180-day limitation of MCL 780.131(1); MSA 28.969(1)(1) and MCR 6.004(D)(1). We disagree. The determination whether the 180-day rule applies to defendant and, if so, when the 180-day time period begins to run is a mixed question of law and fact. This Court reviews a trial court's factual determinations for clear error, *People v Truong (After Remand)*, 218 Mich App 325, 330; 553 NW2d 692 (1996), and reviews the court's legal determinations de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

The 180-day rule provides that a prosecutor must make good-faith efforts to bring an incarcerated or detained defendant facing untried charges to trial within 180 days of receiving notice of the defendant's place of incarceration or detention. *People v Taylor*, 199 Mich App 549, 551-553; 502 NW2d 348 (1993). Defendant argues that because he was technically free on bond in this case, his continued detention for violating his parole meant that he was being detained while awaiting incarceration in a state facility. Because the number of days from when he posted bond until the date of

trial exceeded the 180-day limitation, defendant contends that the trial court should have granted his motion to dismiss.

This Court has repeatedly held that a defendant detained in a local facility pursuant to a parole hold is not an inmate of a state penal institution for purposes of the 180-day rule. *People v Chavies*, 234 Mich App 274, 279-280; 593 NW2d 655 (1999); *People v Metzler*, 193 Mich App 541, 545; 484 NW2d 695 (1992); *People v Von Everett*, 156 Mich App 615, 618-619; 402 NW2d 773 (1986); *People v Shipp*, 141 Mich App 610, 613; 367 NW2d 430 (1985); *People v Rose*, 132 Mich App 656, 659-660; 347 NW2d 774 (1984); *People v Sanders*, 130 Mich App 246, 251; 343 NW2d 513 (1983); *People v Wright*, 128 Mich App 374, 379; 340 NW2d 93 (1983). This Court explained in *Wright, supra*, that the mere fact that an individual is being held pending a parole revocation hearing, or even that the individual is held after a violation of parole is established at such a hearing, does not mean that the individual will be incarcerated. *Wright, supra* at 378-379. Whether the individual will be incarcerated and, thus, become a person detained in a local facility awaiting incarceration in a state facility, must await the determination of the parole board. *Id.* Here, the trial court made a factual finding that defendant's parole was not revoked until June 11, 1997 and correctly ruled that defendant's trial commenced within 180 days of that date. Defendant has failed to demonstrate that this factual determination was clearly erroneous. Furthermore, the purpose of the 180-day rule is to dispose of untried charges against prison inmates so that sentences may run concurrently. *Chavies, supra* at 280. Because defendant committed the instant offense while on parole, he was subject to mandatory consecutive sentencing, MCL 768.7a(2); MSA 28.1030(1)(2), and the 180-day rule was inapplicable. *Id.* at 280-281.

Defendant next claims that the trial court erred when it refused to dismiss the entire jury venire because the prospective jurors were tainted by comments made by some of the jurors during the voir dire. We disagree. This Court reviews issues regarding the dismissal of jurors for cause for an abuse of discretion. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

Defendant is entitled to a fair trial before an impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *People v Jendrzejewski*, 455 Mich 495, 501; 566 NW2d 530 (1997); *People v Schmitz*, 231 Mich App 521, 528; 586 NW2d 766 (1998). A prospective juror may be dismissed for cause for a variety of reasons, including where the juror "shows a state of mind that will prevent the person from rendering a just verdict, or has formed a positive opinion on the facts of the case or on what the outcome should be." MCR 2.511(D)(4). The challenging party bears the burden of showing bias or prejudice. *People v Roupe*, 150 Mich App 469, 474; 389 NW2d 449 (1986). To establish that he is entitled to relief, defendant must show 1) that the trial court improperly denied a challenge for cause, 2) that he exhausted all peremptory challenges, 3) that he demonstrated the desire to excuse another subsequently summoned juror, and 4) that the juror whom he wished later to excuse was objectionable. *Legrone, supra* at 81.

Here, the trial court dismissed for cause a number of jurors who indicated that they were predisposed toward finding defendant guilty simply because he was charged with a crime, or who indicated that their opinions would be affected by their belief that plea bargaining occurred during a lengthy recess in the voir dire. Defendant also exercised two of his peremptory challenges to dismiss

two other prospective jurors. The trial court specifically questioned the remaining jurors to determine whether they could be impartial. A juror who expresses an opinion evidencing predisposition, but who nevertheless swears that he can render an impartial verdict, may not be challenged for cause. *Roupe, supra*. Defendant has failed to demonstrate that the trial court abused its discretion in refusing to dismiss the challenged jurors for cause. Furthermore, defendant failed to use all of his peremptory challenges and expressed satisfaction with the jury. *LeGrone, supra* at 82. Thus, he has failed to demonstrate that he is entitled to relief on the basis of this issue.

Defendant next contends that the trial court erred by refusing his trial day request for a continuance to obtain civilian clothing. This Court reviews the trial court's decision regarding granting a defendant's request for a continuance on the basis of the defendant's attire for an abuse of discretion. *People v Harris,* 201 Mich App 147, 151; 505 NW2d 889 (1993).

Generally, when a defendant makes a timely request to wear civilian clothing, rather than prison clothing, at trial, the request must be granted. *Estelle v Williams,* 425 US 501; 96 S Ct 1691; 48 L Ed 2d 126 (1976); *People v Harris,* 201 Mich App 147, 151; 505 NW2d 889 (1993); *People v Shaw*, 381 Mich 467, 475; 164 NW2d 7 (1969). Here, however, defendant knew of the trial date for at least eleven days and took no steps to insure that he would have civilian clothing to wear. *Shaw, supra* at 474-475; *People v Porter*, 117 Mich App 422, 424-426; 324 NW2d 35 (1982). Moreover, the trial court was in the best position to view how defendant was attired, *id.*, and concluded that defendant's clothing, while casual, was not so distinctive that it would set him apart from what was commonly worn in the community. We give deference to the trial court's opportunity to observe defendant, as well as to its finding that defendant's clothing did not mark him as a prisoner. *Harris, supra* at 152. Defendant has not disputed the prosecutor's observation that there were no distinctive markings on the clothing that identified it as prison attire. Thus, defendant has failed to demonstrate an abuse of the trial court's discretion.

In his fourth claim of error, defendant contends that the trial court abused its discretion by refusing to appoint counsel for him and refusing to grant a continuance of the trial. This Court reviews the trial court's ruling regarding the granting of a continuance, or for substitution of counsel, for an abuse of discretion. *People v Peña,* 224 Mich App 650, 660; 569 NW2d 871 (1997), modified 457 Mich 885 (1998); *People v Mack,* 190 Mich App 7, 14; 475 NW2d 830 (1991).

Appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *Mack, supra*. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *Id.* In this case, on the first day of trial, after the trial court denied defendant's motion regarding his attire and his motion to dismiss pursuant to the 180-day rule, defendant asked to discharge his retained attorney, to have the court appoint counsel, and for the trial to be continued. Defendant rejected the proffered option of representing himself (with his retained attorney as standby counsel), and subsequently, during a guilty plea proceeding, he professed satisfaction with his counsel's representation. We conclude that the trial court correctly characterized defendant's request as frivolous and an attempt to delay the trial. The trial court did not abuse its discretion by denying defendant's last minute request to change counsel where defendant did not

establish good cause, and a continuance at that late juncture would have unreasonably disrupted the judicial process. *Mack, supra.*

Next, defendant raises several related claims regarding his sentence. Initially, defendant contends that he is entitled to resentencing because the trial court failed to prepare a sentencing information report (SIR) with respect to the underlying offense. Although we believe that, as an habitual offender, defendant lacks standing to challenge the trial court's failure to prepare an SIR, *People v Yeoman,* 218 Mich App 406, 419-421; 554 NW2d 577 (1996), and that the preparation of an SIR is unnecessary where defendant has not shown that it will have any effect on his sentence, we are bound by this Court's decisions in *People v Zinn,* 217 Mich App 340, 350-351; 551 NW2d 704 (1996), and *Yeoman, supra,* to remand to the trial court for the administrative task of preparing an SIR.

Defendant next argues that his sentence was disproportionate and constituted cruel and unusual punishment. The test of the propriety of an habitual offender enhanced sentence is whether it is proportionate. *People v Cervantes,* 448 Mich 620, 625; 532 NW2d 831 (1995); *People v Terry,* 217 Mich App 660, 663; 553 NW2d 23 (1996). A sentence is proper if it is proportionate to the seriousness of the offense and the circumstances of the offender. *People v Milbourn,* 435 Mich 630, 636, 651; 461 NW2d 1 (1990). A proportionate sentence is not cruel or unusual. *People v Terry,* 224 Mich App 447, 456; 569 NW2d 641 (1997). Defendant fails to argue how his sentence is disproportionate. Failure to present such an argument results in the waiver of a challenge to the propriety of the sentence. *People v Hill,* 221 Mich App 391, 397; 561 NW2d 862 (1997). In any event, in light of defendant's background of drug offense convictions, the fact that he previously absconded while on parole, and the fact that he committed the current offense while on parole, we conclude that defendant's eight-year minimum sentence as a fourth habitual offender is proportionate.

We also reject defendant's supplemental claim that the new legislatively enacted sentencing guidelines should be applied retroactively to his sentence. The Legislature specifically provided in MCL 769.34(1) and (2); MSA 28.1097(34)(1) and (2) that the former sentencing guidelines would not apply to felony offenses committed after January 1, 1999, and that the new legislatively enacted sentencing guidelines would apply only to felony offenses committed on or after January 1, 1999. Therefore, the Legislature has specifically indicated its intent that the new sentencing guidelines not be applied retroactively to felony offenses that occurred prior to January 1, 1999, and defendant's argument is without merit.

Defendant's final claim is that he was denied his right to the effective assistance of counsel because his trial counsel failed to pursue an interlocutory appeal of the trial court's denial of defendant's 180-day rule motion, and because his counsel failed to inform him of a plea bargain offer from the prosecutor. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation prejudiced the defendant to the extent that it denied him a fair trial. *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate prejudice, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Stanaway,* 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *Id.* at 687.

This Court has already concluded that there was no merit to defendant's motion to dismiss because the 180-day rule did not apply to defendant. Just as counsel is not required to make a meritless motion, *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998), counsel is not required to pursue a meritless interlocutory appeal. Defendant was not prejudiced by his counsel's failure to pursue an interlocutory appeal. Absent a showing of prejudice, this Court will not find ineffective assistance of counsel. *People v Crawford*, 232 Mich App 608, 615; 591 NW2d 669 (1998).

Nor was defendant denied the effective assistance of counsel by the alleged failure of his counsel to make defendant aware of a plea bargain offer. Defendant's trial counsel testified at the *Ginther*[1] hearing that he informed defendant of the plea bargain offer, but that defendant declined to accept it. Defendant testified that he was unaware until the first day of trial that the prosecutor made an earlier offer. However, the trial court concluded that defendant's testimony was not credible. Because there is evidence to support the trial court's conclusion, we defer to that court's superior ability to determine the credibility of witness testimony. *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997). Additionally, defendant's subsequent attempt to plead guilty on the day of trial to a revised plea bargain offer was unsuccessful because he disclaimed any knowledge of the large quantity of marijuana in his vehicle. Therefore, defendant has failed to show how he was prejudiced by his counsel's alleged failure to communicate an earlier plea offer where he presumably would have been unable to provide a factual basis to support a guilty plea to the earlier offer. *Crawford*, *supra* at 615.

Defendant's conviction is affirmed, but the case is remanded to the trial court for the completion of a sentencing information report regarding the underlying offense of possession with intent to deliver marijuana. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder

[1] *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).