STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 1, 2000
v	No. 221260 Cass Circuit Court
LYLE ANDREW DROGULA, Defendant-Appellant.	LC No. 97-009146-FH

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

PER CURIAM.

Defendant Lyle Andrew Drogula appeals as of right from his convictions of false report of a felony, MCL 750.411a(1)(b); MSA 25.643(1)(b), and insurance fraud, MCL 500.4511(1); MSA 24.14511(1), following a two-day jury trial in Cass Circuit Court. We affirm.

Defendant argues his counsel was ineffective when he failed to move for a directed verdict of acquittal because the information alleged that the crimes had occurred "on or about 6/6/96" and, defendant contends, the prosecution had not proven defendant guilty of committing the offenses on that date. We disagree.

Allegations pertaining to ineffective assistance of counsel must first be heard by the trial court to establish a record of the facts pertaining to such allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In cases such as this, where a *Ginther* hearing has not been held, review by this Court is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995).

To establish that the defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, this Court must find that counsel's representation fell below an objective standard of reasonableness and the representation so prejudiced the defendant as to deny him a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

The information alleged that "on or about 6/6/96" defendant made a false report of a felony contrary to MCL 750.411a(1)(b); MSA 25.643(1)(b), and presented a fraudulent insurance claim, contrary to MCL 500.4511(1); MSA 24.14511(1). Defendant does not argue that he had inadequate notice to defend against the charges. In fact, defendant indicates in his brief, "the

prosecution presented evidence that over one month before the defendant made a false report of a felony." Similarly, defendant indicates that "Gary Koch testified that the alleged false claim was submitted on April 24, 1996," and that the "supporting documentation was submitted on June 17, 1996." In so stating, defendant concedes that there was evidence presented at trial showing defendant committed the crimes, just not "on or about 6/6/96" as the information alleges.

It is well established that a defendant is, within reasonable bounds, required to take notice that the prosecution may offer proof of a date for the offense charged other than that expressly alleged in the information. *People v Smith*, 58 Mich App 76, 90; 227 NW2d 233 (1975). A time variance contained in an information is permissible unless time is an element of the offense or of the essence of the offense. *People v Miller*, 165 Mich App 32, 46; 418 NW2d 668 (1987), remanded on other grounds 434 Mich 915; 456 NW2d 235 (1990); *People v Bowyer*, 108 Mich App 517, 523; 310 NW2d 445 (1981).

Time is not an element of the crime of false report of a felony, MCL 750.411a(1)(b); MSA 25.643(1)(b), or insurance fraud, MCL 500.4511(1); MSA 24.14511(1). Therefore, the time variance contained in the information is not grounds for reversal.

Furthermore, MCL 767.45(1)(b); MSA 28.985(1)(b) requires only that the information contain the "time of the offense as near as may be" and also provides that "[n]o variance as to time shall be fatal unless time is of the essence of the offense." The proper inquiry is whether the information sufficiently apprised defendant of the charges against him. See *People v Mast*, 126 Mich App 658, 661-662; 337 NW2d 619 (1983).

Defendant does not claim that he received inadequate notice to defend against the charges. There was no confusion regarding which insurance claim defendant had instigated or regarding which snowmobile was allegedly stolen. There was only one insurance claim, one allegedly stolen snowmobile, one occurrence in which defendant's father's garage was allegedly broken into, and one false police report filed. Defendant's argument is purely technical and is without merit, as he was sufficiently apprised of the charges against him.

Because the substance of defendant's claim is without merit and any argument in support of a motion for directed verdict based on insufficiency of the evidence which relied on the "on or about 6/6/96" language in the information should have necessarily failed, counsel was not ineffective for failing to argue it. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Accordingly, defendant's first ineffective assistance claim fails.

Next, defendant argues that counsel was ineffective by failing to object to a police detective's testimony regarding what defendant's father had told the detective during a meeting that occurred in preparation for the preliminary examination, which defendant subsequently waived.

The detective's testimony regarding what defendant's father had told him previously about his son's admission was admissible for the purpose of impeaching defendant's father's credibility under MRE 607 and 613, which allow the use of a witness' prior inconsistent statement to impeach that witness. The court twice instructed the jury that the testimony was to

be used for impeachment purposes only, and was not to be taken as substantive evidence—once in the context of the father's testimony and once in the context of the general jury instructions. Therefore, the detective's testimony was properly admitted.

Counsel is not required to advocate a meritless position. *Snider*, *supra* at 425. Accordingly, defendant's second ineffective assistance of counsel claim also fails.

Affirmed.

/s/ Janet T. Neff
/s/ William B. Murphy
/s/ Richard Allen Griffin