

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN J. CISTRUNK,

Defendant-Appellant.

UNPUBLISHED
December 15, 2000

No. 215839
Wayne Circuit Court
LC No. 97-010018

Before: Smolenski, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of felonious assault, MCL 750.82; MSA 28.277, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to one to four years' imprisonment for the felonious assault conviction and a consecutive term of two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right. We affirm.

Defendant first contends that his trial counsel rendered ineffective assistance in failing to request a pretrial lineup to ascertain whether prosecution witness Jeffrey Brown could identify defendant,¹ and that the trial court erroneously failed to order a new trial on this basis. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that a reasonable probability exists that but for counsel's error the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). The defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302.

We find that defendant has failed to overcome the presumption that his second trial counsel's decision to forego a pretrial lineup involving Brown represented sound trial strategy. Brown stood next to the victim when defendant approached them and opened fire. Brown had failed to appear at either the preliminary examination or the first trial that resulted in a hung jury, despite that the prosecutor before defendant's first trial listed Brown as an intended witness. Defendant's second trial counsel testified that he discussed with defendant the decision whether to move to require Brown's presence at a lineup, and ultimately decided against this request because he believed and hoped that Brown likewise might not appear at the second trial. Based on his experience as a trial attorney, trial counsel felt that forcing the prosecutor to conduct a lineup would ensure that, to the potential and significant detriment of defendant, the prosecutor would secure Brown's presence at the second trial to corroborate the victim's

¹ To the extent that the parties refer to defense counsel's failure to request a *Wade* hearing, *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967), we observe that the instant circumstances do not warrant a *Wade* hearing. A *Wade* hearing is "[a] pretrial hearing in which the defendant contests the validity of his . . . out-of-court identification. If the court finds that the identification was tainted by unconstitutional methods, the prosecution cannot use the identification." Black's Law Dictionary (7th ed), p 1573. This case involved no pretrial, out-of court identification of defendant by Brown.

testimony. We will not with hindsight second guess trial counsel's otherwise reasonable trial strategy.² *People v Rocky*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999); *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant also argues that trial counsel provided ineffective assistance because on the day of trial he did not move for an adjournment to allow defendant time to obtain civilian clothes, thus forcing defendant to waive his right to a jury trial. At the new trial hearing, defendant explained that he had no clothes for trial because, despite that on the day before trial he gave trial counsel the telephone number of the aunt who possessed defendant's clothes and instructed counsel to direct her to bring defendant these clothes, counsel failed to contact defendant's aunt and instead left a message with defendant's brother. According to defendant, he did not wish to appear before the jury wearing prison attire. Trial counsel testified that he and defendant discussed for approximately three hours whether defendant should waive a jury trial, and that he and defendant jointly decided to waive a jury because (1) in counsel's experience the jury appeared conservative, and (2) counsel felt that defendant would be better served by having a trier of fact that would more closely scrutinize the specific intent element involved in the charged assault with intent to murder. With respect to defendant's clothes, counsel testified that he made the call and agreed that he left a message with defendant's brother. The trial court expressly found defendant's testimony incredible and self-serving, and agreed that had defendant chosen a jury "he could have been found guilty of something a lot more serious." We will not second guess the trial court's credibility determination or trial counsel's reasonable strategic choice of a bench trial. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999); *Rockey, supra*; *People v Cyr*, 113 Mich App 213, 222; 317 NW2d 857 (1982).

Because we find no ineffective assistance of counsel, we conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage

² We also note that defendant had no constitutional or statutory right to a pretrial lineup. *People v Farley*, 75 Mich App 236, 238; 254 NW2d 853 (1977). A right to a lineup arises when eyewitness identification has been shown to be a material issue and when there is a reasonable likelihood of mistaken identification that a lineup would tend to resolve. *People v McAllister*, 241 Mich App 466, 471; 616 NW2d 203 (2000). Although the victim testified at trial regarding defendant's identity, Brown's testimony represented material evidence because the trial court expressly credited it. The victim had had a child with a woman who, at the time of the shooting, apparently was defendant's girlfriend, and the court found that at the time of the shooting defendant was angry because of his involvement in "a difficult situation in that [defendant] was living and about to be engaged to this woman that was having, continually having some type of relationship with [the victim]." Defendant theorized that the victim lied regarding the shooter's identity to cause trouble for defendant. In finding that defendant was the shooter, the trial court explained that "the telling point of this all is, in fact, not [the victim], not the defendant, himself, but th[e testimony] of Jeffrey Brown" because he appeared an unbiased witness. Defendant neither at the motion for new trial nor in his brief on appeal delineates any specific factors that would cause a reasonable likelihood of Brown's mistaken identification of him, other than that defendant's retrial occurred approximately eleven months after the shooting. See *People v Fuqua*, 146 Mich App 133, 143; 379 NW2d 396 (1985) ("There is no per se rule that, when the initial [eyewitness-defendant] confrontation occurs at trial, such situation is inherently suggestive."), overruled in part on other grounds in *People v Heflin*, 434 Mich 482, 498; 456 NW2d 10 (1990).