

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRENT LAMAR GREEN,

Defendant-Appellant.

UNPUBLISHED
February 27, 2001

No. 218216
Oakland Circuit Court
LC No. 98-161150-FC

Before: White, P.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant was convicted of assault with intent to murder, MCL 750.83; MSA 28.278, in connection with the stabbing of Joseph McCoy. He was sentenced as a second habitual offender, MCL 769.10; MSA 28.1082, to twenty to forty years. He appeals as of right and we affirm.

Defendant first contends that the failure to conduct certain DNA and fingerprint tests deprived him of due process, and that counsel's failure to request such tests constituted ineffective assistance. Specifically, defendant contends that defense counsel should have requested that DNA and fingerprint testing be performed on all the knives found in the victim's house, and that serology tests be performed to determine whose blood was on various items and whether there was any semen on the victim's bed. The theory advanced by defense counsel at trial was that the victim made several sexual advances toward defendant. Defendant refused and then fell asleep. He awoke to find the victim standing over him with a knife. Defendant was able to wrestle the knife away from the victim and stabbed him in self-defense.

The victim, on the other hand, testified that he and defendant were drinking beer at the victim's townhouse. The victim is bisexual and testified that defendant made several sexual advances toward him. The victim stated that defendant performed oral sex on him until the victim told defendant that oral sex was not his preference. The victim went up to his bedroom to change clothes and fell asleep on the bed. He awoke to the feeling of something sharp entering his body. Defendant was straddling him on the bed and held a silver object in his hand. Defendant told the victim, "you're going to die."

Throughout the trial, defendant's counsel argued that no evidence existed, besides the testimony of the victim, that defendant performed any kind of sexual act with the victim. He further argued that the police were incompetent in failing to have DNA and blood tests done on

the evidence found in the house and that, in and of itself, demonstrated reasonable doubt.

Defendant acknowledges that in *People v Vaughn*, 200 Mich App 611, 619; 505 NW2d 41 (1993), rev'd on other grounds 447 Mich 217 (1994), this Court held that, absent a defense request, the prosecution is not required to submit evidence for DNA testing. We find no due process violation.

Nor do we find that defense counsel's failure to request that the test be performed was ineffective. Defendant conceded that he stabbed the victim, but argued that he did so in self-defense. Accordingly, his prints on the knife handle and the victim's blood or tissue on the knife blade would be expected and not helpful to defendant's case. Moreover, testing the sheets for signs of semen or pubic hair could have undermined defendant's argument that no sex occurred between defendant and the victim and the victim attacked defendant because defendant rejected his sexual advance. In contrast, defense counsel used the failure to conduct the tests to defendant's advantage. Defendant's trial strategy was to use the lack of physical evidence to attack the police investigation and the victim's credibility and to argue reasonable doubt. A defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant failed to overcome the presumption that defense counsel's actions constituted sound trial strategy.

Defendant next contends that he is entitled to resentencing because the trial court improperly based his sentence on the unproven fact that this was a crime motivated by defendant's anti-homosexual sentiment. In the presentence investigation report, defendant stated that he was over at the victim's house drinking beer. Defendant contended that he is straight, but that "he [the victim] is a bisexual and kept making advances to me. He's not bigger than me so I didn't feel threatened and just played him off and kept drinking all his beer." Defendant further stated that he is a heterosexual and has never engaged in homosexual activity. Officer Griffin testified at trial that defendant stated that he did not "get into [that] fag shit."

At his sentencing, defendant said, in part:

I'm very sorry for what happened to Mr. McCoy. But I am guilty – what I am guilty of is putting myself in a situation around a stranger, where he could try such advances on me and I would get in a situation like that. I put my fate in the hands of 12 Oakland County residents, which I never should have been in the first place. I shouldn't have been with a stranger drinking, knowing his tendencies, knowing that something could happen. I figured nothing like this could happen.

The trial court responded as follows:

Well, your comments have reinforced what I thought this case was about. It wasn't about the VCR. It was about your attitude toward homosexuality and your inability to cope with the situation in a law abiding manner.

I think you do need a lot – a lot of therapy, quite frankly, Mr. Green and you're going to have to give it a lot of thought in prison. Because I don't think you do express any remorse.

We do not share defendant's characterization of the court's remarks. Defendant interjected and stated that his first cousin was dying of AIDS and that he is "not a gay basher" and does not dislike homosexuals. The trial court noted that the victim in this case was sleeping at the time defendant stabbed him and stated, "Mr. Green, I think you have a lot of issues to work out, impulse control is the way I would put it."

Defendant argues that his sentence was based on inaccurate information, and thus, invalid. In *People v Wybrecht*, 222 Mich App 160, 173; 564 NW2d 903 (1997), this Court held that a sentence is not invalid if conclusions about the defendant's character are drawn from undisputed facts. In the instant case, the trial court's remarks were based on defendant's undisputed comments, and thus, a proper factor to be considered during sentencing.

Defendant next contends that he is entitled to resentencing because the trial court mis-scored the guidelines. In order to state a cognizable claim on appeal, a defendant must demonstrate that (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). Here, defendant has established none of the three prerequisites.

Defendant next contends that the trial court erred in basing defendant's sentence, at least in part, on his lack of remorse. Defendant was convicted of assault with intent to murder. The victim alleged that defendant stabbed him in his sleep. Defendant contended that he stabbed the victim in self-defense. Defendant did not express remorse until the issue was raised by the prosecutor and he was given the opportunity to do so by the trial judge. Despite defendant's attempts at contrition, the trial court did not find defendant remorseful. The Michigan Supreme Court has held that a defendant's lack of remorse may be considered in imposing sentence. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). The trial court's comment was proper. Defendant is not entitled to resentencing.

Affirmed.

/s/ Helene N. White

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra