STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

EDWARD DARREL CARLISLE, JR.,

Defendant-Appellant.

UNPUBLISHED
November 13, 2001

No. 223727
Tuscola Circuit Court
LC No. 99-007518-FH

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a motor vehicle while under the influence of intoxicating liquor or a controlled substance (OUIL), third offense, MCL 257.625; driving while license suspended, MCL 257.317; and resisting and obstructing an officer while effectuating an arrest, MCL 324.1608. Defendant was sentenced to ten to twenty years' imprisonment as a third habitual offender, MCL 769.12, on the OUIL charge. Defendant was also sentenced to one year in jail for driving while license revoked and two to fifteen years' imprisonment for resisting and obstructing an officer. Defendant appeals as of right. We affirm in part and remand for further proceedings.

Defendant first argues that he was deprived of effective assistance of counsel. Defendant claims that counsel was ineffective for failing to properly communicate to him a plea bargain offer made by the prosecution. Failure to convey a plea bargain offer can constitute ineffective assistance of counsel. *People v Williams*, 171 Mich App 234, 241-242; 429 NW2d 649 (1988), remanded 432 Mich 853; 434 NW2d 411, lv den 432 Mich 913; 440 NW2d 416, cert den 493 US 956; 110 S Ct 369; 107 L Ed 2d 355 (1989). Defendant bears the burden of proving by a preponderance of the evidence that a plea offer was made and that counsel failed to communicate it to him. *Williams*, 171 Mich App at 241-242.

The lower court record establishes that a plea offer was made in this case, as evidenced by the pre-preliminary examination conference summary and the pretrial order, as well as the prosecutor's and defense counsel's statements on the record. Also, it appears that defense counsel may well have been confused regarding the prosecution's plea offer and it is unclear whether counsel properly communicated the correct offer to defendant in a timely manner.

Defendant must also show by a preponderance of the evidence that any error resulted in prejudice. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Specifically,

defendant must show that he did not know of the prosecutor's actual plea bargain offer and would have accepted it had he known of it. *People v Carter*, 440 Mich 870, 870-871; 486 NW2d 740 (1992). The lower court record is insufficient to allow a conclusion with regard to these issues.[1] Therefore, we remand this case for an evidentiary hearing at which the trial court should make factual findings regarding "the facts and circumstances of the defendant's knowledge and his decision to stand trial." *Id.* at 870-871. Specifically, the court shall determine whether defendant had actual knowledge of the prosecutor's offer, when he received any such knowledge, whether the offer was still open to him at that time, and whether he would have accepted the offer had he had timely knowledge of it. We retain jurisdiction to review defendant's ineffective assistance claim in light of the trial court's findings.

Defendant also argues that he was denied a fair trial by admission of an expert witness' testimony based on a scientific technique that is not generally accepted as reliable in the relevant scientific community. We disagree.

Defendant failed to preserve this issue for appeal because he did not object to the testimony when offered. The prosecution offered Dr. Julia Pearson as an expert in the field of pharmacology and toxicology. Defense counsel then conducted a voir dire examination of the witness. During the voir dire, defense counsel cross-examined the witness regarding the reliability of retrograde extrapolation. After some questioning in this area, the trial court interjected that the examination had gone beyond the question of the witness' expertise. Defense counsel stated that he conceded that the witness was qualified to testify regarding blood draws and analysis, but not retrograde extrapolation. The court stated that it had not heard any request to have anybody render an opinion in the area of retrograde extrapolation, and invited further voir dire or objection to the witness' qualifications. Defense counsel had none. The prosecutor moved to qualify the witness and clarified that he would be asking questions regarding retrograde extrapolation, stating:

> We do expect we will be asking some questions in regards to retrograde extrapolation as a sub-unit of that, or if the Court wishes to address those issue [sic] at that time.
>
> THE COURT: I'll do that when it comes up.

When the prosecutor turned his questioning to the area of retrograde extrapolation, defense counsel did not renew his objection or request a *Davis-Frye*[2] hearing.

An issue not raised at trial and addressed by the trial court is not properly preserved. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Thus, our review on this issue is limited to whether the

---

[1] The record is, however, sufficient to establish that the result would have been more favorable to defendant if he had accepted the offer, under which he would have faced a maximum sentence of ten years' imprisonment. MCL 769.11(1)(a).

[2] *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 App DC 46; 293 F 1013 (1923).

evidence resulted in manifest injustice. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

We conclude that the trial court's admission of the expert witness' testimony did not result in manifest injustice because defendant introduced the testimony of his own expert discrediting the methodology employed by the prosecution's witness, the jury had ample other evidence from which to conclude that defendant was intoxicated at the time of the accident, and the testimony regarding defendant's likely blood alcohol level at the time of the accident was unnecessary given this Court's analysis in *People v Campbell*, 236 Mich App 490; 601 NW2d 114 (1999). The blood test was not shown to be so stale as to be irrelevant. The passage of time goes to the weight, rather than the admissibility, of the evidence, *People v Wagner*, 460 Mich 118; 594 NW2d 487 (1999), and there is no need to extrapolate the results of the blood alcohol test back to the time of the offense. *Campbell, supra.*

Affirmed in part and remanded for further proceedings consistent with this opinion. We retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff
/s/ Helene N. White