

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER THOMAS WHITING,

Defendant-Appellant.

UNPUBLISHED

November 16, 2001

No. 221312

Emmet Circuit Court

LC No. 98-001448-FC

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to rob while armed, MCL 750.89. Defendant appeals by right his conviction and sentence of twenty years to life imprisonment on the assault and of being a fourth habitual offender, MCL 769.12. We affirm.

I

Defendant first argues that trial counsel was ineffective. Defendant failed to move for a new trial or file a motion for a *Ginther*¹ hearing; therefore, appellate review is limited to the record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989), remanded *People v Thomas*, 439 Mich 896; 478 NW2d 445 (1991).

Defendant cites no authority to support his position that counsel was ineffective for eliciting testimony from defendant on direct examination regarding his numerous contacts with police officers before defendant turned himself in to the police. It is not sufficient for a party simply to announce a position or assert an error and then leave it to this Court to discover and rationalize the basis for his claims, or give an issue cursory treatment with little or no citation or supporting authority. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998). In any event, after reviewing the record we conclude that defendant's arguments lack merit.

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Counsel elicited the testimony about defendant's numerous contacts with the police to address defendant's inconsistent statements regarding his assault of the victim. During trial, defendant testified that he hit the victim with an open hand, but during his taped confession, defendant stated that he hit the victim with barber clippers. Defense counsel attempted to explain this inconsistency as being the product of repeated police questioning about the clippers during his numerous police contacts.

We find that defense counsel's strategy was to show that the police had numerous contacts with defendant, that the police told defendant that the victim was hit with clippers, that defendant was intoxicated when he turned himself in, and that after repeated questioning, defendant said he hit the victim with clippers. Defendant has not established that defense counsel's strategy was objectively unreasonable and so prejudicial that it deprived him of a fair trial.

Finally, defendant has failed to overcome the presumption that counsel's assistance was sound trial strategy. It was reasonable trial strategy to explain that defendant stated on the tape that he hit the victim with clippers because he was intoxicated and because he was worn down by the frequent police questioning. The fact that a strategy does not work does not render its use the ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). It is not the role of this Court to second-guess counsel regarding matters of trial strategy; even if defense counsel was mistaken, this Court will not assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

II

In his Standard 11 supplemental brief, defendant raises a number of arguments concerning sentencing, all having to do with his status as an habitual offender². Defendant did not challenge the number or validity of his prior convictions in the trial court and he does not do so on appeal. None of defendant's arguments has merit.

Because the trial court properly followed the habitual offender statutes, defendant's due process rights were not violated. The decision to file habitual offender charges against a defendant is within the discretion of the prosecutor. *People v Sunday*, 183 Mich App 504, 506; 455 NW2d 321 (1990). This Court intervenes only in cases of malfeasance or constitutional violations. *Id.*

The habitual offender statutes, MCL 769.10 *et seq.*, provide the procedures for enhancing the penalty for persons repeatedly convicted of felonies. Here, because defendant was previously convicted of three felonies, he was charged as a fourth habitual offender in addition to being charged for the subsequent felony of assault with intent to rob. MCL 769.12.

² Defendant refers to a Supplemental Information throughout his brief. However, only one Information was filed, charging defendant with the substantive offense and as an habitual offender.

Under the sentence enhancement statute, defendant's prior convictions must be determined by the trial court at sentencing or at a separate hearing for that purpose before sentencing. MCL 769.13(5). In this case, defendant's three prior felony convictions were determined by the trial court at sentencing. The existence of a defendant's prior convictions may be established, as it was in this case, by information contained in the presentence report. MCL 769.13(5); *People v Green*, 228 Mich App 684, 700; 580 NW2d 444 (1998). Due process is satisfied if the sentence is based on accurate information concerning the existence of prior convictions and if the defendant had a reasonable opportunity at sentencing to challenge the information. *People v Williams*, 215 Mich App 234, 236; 544 NW2d 480 (1996). As noted, defendant has never challenged the accuracy of the information concerning his prior convictions and he had ample opportunity to do so at sentencing.

The habitual offender procedures, which are sentence enhancement mechanisms not substantive crimes, do not violate due process protections. *People v Zinn*, 217 Mich App 340, 347; 551 NW2d 704 (1996). Because MCL 769.13 is applicable where a prosecutor "seek[s] to enhance the sentence of a defendant" as an habitual offender, it eliminates the right to a jury trial and the right to have guilt proved beyond a reasonable doubt. *Id.* at 347.

Affirmed.

/s/ Janet T. Neff
/s/ Kurtis T. Wilder
/s/ Jessica R. Cooper