STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 3, 2003
V	No. 236302 Wexford Circuit Court
JEFFREY CLARENCE DAVIDSON, Defendant-Appellant.	LC No. 00-006120-FH

Before: Gage, P.J., and Wilder and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of operating a motor vehicle under the influence of intoxicating liquor causing death (OUIL causing death), MCL 257.625(4). He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 10 years, 5 months to 22-1/2 years for each count. We affirm.

This case arises from an automobile accident resulting in the death of two people. The prosecution alleged that defendant was driving one of the motor vehicles involved in the accident, defendant's pickup truck, while he was intoxicated. Before trial, defense counsel requested the trial court to authorize public funds[1] by which he could retain an accident reconstruction expert on defendant's behalf to explore potential defenses. The trial court denied defendant's motion. At trial, defendant argued that there was reasonable doubt as to whether he had been driving his vehicle at the time of the accident. In particular, defendant testified that Ed Poachich, who was in the car at the time of the accident, had driven his pickup truck on at least a "couple" previous occasions and that he did not know who was driving at the time of the accident.

Defendant argues that the trial court erred by denying his motion for funds to hire an expert to reconstruct the traffic accident underlying this case. We disagree. Under both the state and federal constitutions, a defendant has a right to present a defense. In *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997), this Court, referencing *Ake v Oklahoma*, 470 US 68; 105 S Ct 1087; 84 L Ed 2d 53 (1985), noted that "[u]nder the Due Process Clause, states may not condition the exercise of basic trial and appeal rights on a defendant's ability to pay for such

[1] There is no dispute that defendant was indigent.

rights." This Court also added that although an indigent defendant is not entitled to have the same level of assistance that a wealthy person could afford to purchase, fundamental fairness demands that the state provide an indigent defendant "'an adequate opportunity to present [his] claims fairly within the adversary system.'" *Id*., quoting *Moore v Kemp*, 809 F2d 702, 709 (CA 11, 1987).

Due process does not mean that an indigent defendant receives public funds to obtain expert assistance upon demand. In requesting the appointment of an expert at public expense, a defendant must demonstrate to the trial court not just a mere possibility of assistance from a requested expert, but "that there exists a reasonable *probability* both that an expert would be of assistance to the defense *and* that denial of expert assistance would result in a fundamentally unfair trial." *Leonard*, *supra* at 582, quoting *Moore*, *supra* at 712 (emphasis added). Stated differently, an indigent defendant who requests that the trial court appoint an expert witness at public expense must show that he "cannot otherwise safely proceed to trial" unless the expert is appointed. MCL 775.15; *Leonard, supra* at 582.

In reviewing defendant's claim that he was wrongfully denied necessary expert assistance at public expense, we determine whether any error committed by the trial court was harmless beyond a reasonable doubt. *People v Tanner*, 255 Mich App 369, 401; 660 NW2d 746 (2003).

Applying these legal principles to the facts of this case, and assuming first that defendant established that there was a reasonable probability that an accident reconstruction expert would be of assistance to the defense and second that the trial court erred in denying the defense request for assistance, we conclude that the denial of funds to obtain expert assistance was, nevertheless, harmless beyond a reasonable doubt. On the record before us, we are unable to conclude that the denial of the request for expert assistance resulted in a fundamentally unfair trial.

Defense counsel advised the trial court that because of the condition of defendant's vehicle following the accident, he required expert assistance to determine whether defendant's vehicle was defective. He also advised the trial court that his review of the evidence led him to believe that the other vehicle involved in the accident, a van, may have struck defendant's vehicle, a conclusion that was inconsistent with the police conclusion that defendant's vehicle had struck the van. Defense counsel communicated to the trial court that only with the requested expert assistance would he be able to specifically determine whether he would be able to assert, on defendant's behalf, a viable defense that one of these factors based on the physical evidence, and not defendant's operation of his motor vehicle while he was intoxicated, caused the accident and the death of the victims.

Defense counsel's expressed desire was to investigate whether there would be any evidentiary support for the assertion that something other than defendant's intoxication was a cause of the accident. We assume for purposes of our analysis that without an accident reconstruction expert to assist defense counsel in interpreting the physical evidence, it is possible that defense counsel could not know with reasonable certainty whether any defenses based on the physical evidence could be asserted on defendant's behalf, and that the requested expert would have provided information to assist defense counsel in ruling in or ruling out certain defenses.

Nevertheless, defendant was able to proceed safely to trial without expert assistance. Defendant presented a defense at trial, asserting that he may not have been driving his vehicle at the time of the accident. Defense counsel made no effort, however, to cross-examine the police witnesses about the physical evidence that defendant claims on appeal might have supported a possible defense that either the defendant's vehicle was defective or the van struck defendant's vehicle rather than the opposite. Additionally, Chere Galvanek, one of the first witnesses to arrive at the scene following the accident, testified that the interior of the van was shredded from the impact of the truck, and that the driver's side of the van was caved in. Defense counsel also made no effort to challenge by cross-examination the observations of this eyewitness. Thus, even if we assume the denial of expert assistance was error, in light of the failure of defendant to question the available witnesses about the physical evidence, particularly where that testimony was prejudicial to defendant, we cannot say that this error contributed to the guilty verdict.

Defendant next claims there was insufficient evidence that he was driving the pickup truck at the time of the incident to support his convictions. We disagree. In deciding whether there was sufficient evidence to support a conviction, we view the evidence in a light most favorable to the prosecution to determine whether any rational factfinder could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Hunter,* 466 Mich 1, 6; 643 NW2d 218 (2002).

June Slavik, another occupant of defendant's vehicle at the time of the accident, testified that on the evening of the incident, defendant arrived at her home driving his vehicle. Later, she, Poachich, and defendant left her home in defendant's truck with defendant driving. Slavik next remembered waking up either in a hospital or a helicopter, but had no recollection of the accident. Poachich similarly testified that he, Slavik, and defendant left Slavik's home and went to Poachich's apartment, with defendant driving. Poachich also testified that they left his apartment with defendant driving, stopped at a Marathon station, and that the last thing he remembered before being in the hospital was defendant driving. Viewed in a light most favorable to the prosecution, a reasonable factfinder could conclude beyond a reasonable doubt that defendant was driving his pickup truck at the time of the accident. Further, three additional witnesses testified that defendant was only wearing one shoe at the accident scene, and Deputy Mark Nyman testified that a tennis shoe was recovered from the floorboard of the driver's side of the pickup truck where it rested against the driver's door. This evidence further supports a conclusion that defendant was driving the truck at the time of the accident. In sum, there was sufficient evidence, viewed in a light most favorable to the prosecution, to support a finding beyond a reasonable doubt that defendant was driving his pickup truck at the time of the accident.

Defendant also argues that his trial counsel provided ineffective assistance by failing to produce medical testimony in support of his defense and by failing to request instructions on the lesser offense of negligent homicide. We again disagree. To establish ineffective assistance of counsel, a defendant must at minimum show (1) that counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's errors. *People v Kevorkian,* 248 Mich App 373, 411; 639 NW2d 291 (2001). Further, there is a presumption that the challenged

action by trial counsel might be considered sound trial strategy. *Id.* Because defendant did not raise this issue below, our review is limited to the existing record. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

The existing record does not support a conclusion that defense counsel was ineffective for not producing medical testimony in support of the defense. Indeed, there is nothing to show that a medical expert could have testified favorably to the defense.[2] Thus, defendant has not shown that trial counsel fell below an objective standard of reasonableness in failing to present such testimony. Defendant also has not overcome the presumption that trial counsel's failure to request an instruction on the lesser crime of negligent homicide was sound trial strategy. Evidence was presented at trial that, when defendant's blood was drawn in a hospital following the accident, he had a .25 blood alcohol level. The OUIL statute, MCL 257.625(1), prohibits a person with a blood alcohol content of .10 or more from operating a vehicle on a highway. Thus, trial counsel could reasonably have concluded that it was unlikely that the jury would determine that, if defendant was driving, his driving was not influenced by his alcohol consumption. Moreover, defense counsel might have reasonably concluded that vigorous challenge of defendant's blood alcohol content would distract the jury from considering the defense's position that reasonable doubt existed concerning whether defendant was driving his vehicle at the time of the accident. Thus, defendant has not shown that his trial counsel provided ineffective assistance.

Finally, defendant argues that offense variable (OV) 9 of the sentencing guidelines was improperly scored in this case and that his sentence was disproportionate. However, defense counsel stated that he was "satisfied with the scoring" of the sentencing guidelines. This constituted a waiver by defendant of any claim of error with regard to the scoring of OV 9. *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000). This waiver extinguished any possible error with regard to the scoring of the sentencing guidelines. *People v Riley*, 465 Mich 442, 449; 636 NW2d 514 (2001).[3] With regard to defendant's argument that his sentences are disproportionate, "we must affirm a sentence within the guidelines range absent an error in scoring or inaccurate information relied on in determining the defendant's sentence." *People v McGuffey*, 251 Mich App 155, 166; 649 NW2d 801 (2002). Defendant was sentenced within the sentencing guidelines as scored by the trial court. Thus, because defendant's waiver extinguished any arguable error in the scoring of the guidelines and because he does not argue that the trial court otherwise relied on inaccurate information in sentencing him, we will not disturb his sentences based on his claim that the sentence lacks proportionality.

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[2] We recognize that defendant previously filed a motion to remand with regard to his ineffective assistance of counsel issue and that this motion was previously denied by a panel of this Court because it was "not persuaded that a remand is necessary at this time." Defendant's motion to remand was inadequate because it was not "supported by affidavit or offer of proof regarding the facts to be established at a hearing," as required by MCR 7.211(C)(1)(a)(ii) for such a motion to remand to be granted.

[3] Thus, we need not consider whether appellate review of the scoring of OV 9 is otherwise precluded by MCR 6.429(C) or MCL 769.34(10) based on defendant's failure to object to the scoring of OV 9 below. See *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002).

Affirmed.

/s/ Hilda R. Gage
/s/ Kurtis T. Wilder
/s/ Karen Fort Hood