

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRANCE JEROME HOLMES,

Defendant-Appellant.

UNPUBLISHED

November 18, 2003

No. 240973

Calhoun Circuit Court

LC No. 10-003641-FH

Before: O’Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. The trial court sentenced him to a term of 38 to 120 months’ imprisonment. We affirm.

The instant case stems from allegations that defendant attacked and beat a woman to whom he was then married.

Defendant first contends that the trial court abused its discretion in denying his motion for an adjournment. Defendant asserts that this decision denied him the right to present a defense and to have effective assistance of counsel. We disagree.

On October 22, 2001, defendant’s attorney filed a motion to withdraw as counsel citing a breakdown in the attorney client relationship. While the motion to withdraw was pending, defendant’s original attorney submitted a witness list. On January 28, 2002, the trial court granted the motion and allowed the substitution of new counsel. Because of this, the trial date was moved from February 12, 2002 to March 5, 2002. On February 21, 2002, defendant filed a motion to adjourn the trial contending that he needed more time to prepare an alibi defense. In denying the motion the trial court noted that the trial had previously been delayed because defendant substituted new counsel. And the trial court indicated that the five week period between the substitution and the revised trial date should have been adequate for defendant to prepare an alibi defense when the witnesses were already known.

We review a trial court’s denial of a motion for adjournment for abuse of discretion. *People v Jackson* 467 Mich 272, 276; 650 NW2d 665 (2002). This standard gives great deference to the holdings of the trial court. In order for a decision to be overturned, based on an abuse of discretion, the result must have been “so violative of fact and logic” that it evidences a

“perversity of will” a defiance of judgment, or “an exercise of passion or bias.” *People v Lett*, 466 Mich 206, 220; 644 NW2d 743 (2002) (citations omitted).

In determining whether a trial court abused its discretion in denying a defendant’s motion for adjournment, we consider four factors: (1) whether the defendant was asserting a constitutional right, (2) whether the defendant had a legitimate reason for asserting the right, (3) whether defendant was guilty of negligence, and (4) whether defendant had previously caused the trial to be adjourned. *People v Pena*, 224 Mich App 650, 660-661; 569 NW2d 871 (1997), citing *People v Williams*, 386 Mich 565, 575-578; 184 NW2d 337 (1972). Even if a defendant can establish that the trial court abused its discretion based on these factors, he must still establish that he was prejudiced by the decision. *Id.* For example, in *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992), the defendant “asserted his right to call witnesses, had not been negligent, and had not requested previous adjournments.” But the witness the defendant wished to present was a codefendant who enjoyed the Fifth Amendment privilege against self-incrimination. *Id.* at 348-349. The trial court “had no reason to believe that [the witness] would have surrendered this privilege to exonerate his codefendant.” *Id.* Therefore, no prejudice resulted from the denial of defendant’s motion to adjourn. *Id.*

Under the factors set forth in *Pena, supra*, we find that the trial court did not abuse its discretion. Although defendant asserts his constitutional right to call witnesses, the trial court found that his own negligence created the need for additional time to do this. And defendant’s trial had already been delayed to give his new attorney adequate time to prepare his defense. Because the trial court’s decision was based on these factors, defendant’s own negligence and the delay to give defendant’s new attorney preparation time, it is not violative of fact and logic and does not constitute an abuse of discretion. See *Lett, supra* at 220.

Even if the trial court had abused its discretion in denying defendant’s motion, we find that no prejudice resulted. Defendant requested an adjournment so that he could file his notice of alibi in a timely manner. The trial court later refused to allow the presentation of alibi witnesses because defendant failed to file such notice on time. But the trial court explained that this only meant defendant could not call witnesses to testify that it was impossible for him to have been present at the scene of the crime. The trial court allowed two witnesses to testify to circumstances showing that, because defendant was in Atlanta around February 26, 2001, he was unlikely to have committed the crime. As in *Lawton, supra*, defendant has not shown that a different result would have occurred if the adjournment had been granted and additional witnesses had testified.

Defendant next argues that his attorney’s failure to file a timely alibi notice constituted ineffective assistance of counsel. We disagree.

Because no evidentiary hearing occurred, regarding ineffective assistance of counsel, we limit review to the record at trial.¹ *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96

¹ Defendant filed a motion requesting a *Ginther* hearing, *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), but this motion was denied.

(2002). "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

In order to establish ineffective assistance of counsel, the attorney's performance must have been "objectively unreasonable in light of prevailing professional norms" and "but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 640 NW2d 314 (2001), citing *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "The burden of establishing the factual predicate" for this type of claim falls on the defendant. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The Michigan Supreme Court stated the standard as follows:

"A convicted person who attacks the adequacy of the representation he received at his trial must prove his claim. To the extent his claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately." [*Id.*, quoting *Ginther*, *supra* at 442-443.]

In *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990), the defendant claimed that his trial attorney's failure to file a timely notice of alibi deprived him of effective assistance of counsel. This Court held that a "defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses," those that might make a difference in the outcome of the trial. *Id.* (citations omitted). But at a post trial evidentiary hearing, the defendant must demonstrate that he "made a good faith effort to avail himself of the right and that the defense he was deprived of was substantial." *Id.*

As in the present case, the defendant in *Kelly* filed a post trial motion that was denied by the trial court. *Kelly*, *supra* at 527. On appeal, this Court stated that during the hearing on this motion, the defendant "failed to show that he was deprived of a substantial defense." *Id.* Specifically, this Court found:

There is nothing in the record showing what the proposed alibi witnesses' testimony would have been had they been permitted to testify on the matter and, thus, whether they would have, in fact provided an alibi for defendant. [*Id.*]

Based on the above finding, this Court stated, "[e]ven if defendant's trial attorneys were ineffective by failing to file a timely notice, we nevertheless decline to reverse defendant's conviction." *Id.*

Defendant, in the present case, similarly failed to show that the lack of alibi notice deprived him of a substantial defense. The trial court ruled on his motion for a *Ginther* hearing at the start of his sentencing hearing. In arguing his motion, defendant stated that there were witnesses who should have been called who could have testified to his whereabouts on February 26, 2000. Like the defendant in *Kelly*, *supra*, defendant provided no information concerning the

identity of these witnesses or what their testimony would have been if they had been permitted to testify. Because defendant failed to establish a factual predicate for his claim, we have no basis on which to review his assertion of ineffective assistance of counsel. *Rodriguez, supra* at 38. As in *Kelly, supra*, we decline to reverse defendant's conviction based upon his assertion that his attorney was ineffective for failing to file a timely alibi notice. Based on the record, upon a de novo review of this constitutional issue, defendant has not established the deficient performance and prejudice required to succeed on a claim of ineffective assistance of counsel. *LeBlanc, supra* at 579.

Affirmed.

/s/ Peter D. O'Connell

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder