STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SANDY SEAN HOLT, JR.,

Defendant-Appellant.

UNPUBLISHED
December 21, 2004

No. 250580
Muskegon Circuit Court
LC No. 02-047915-FC

Before: Hoekstra, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Defendant Sandy Sean Holt, Jr., appeals as of right his jury trial conviction of armed robbery. MCL 750.529. Defendant was sentenced to serve a term of 30 to 90 years' imprisonment. We affirm.

In this case, the victim testified that two men forced their way into her home at gunpoint and took from her money and a cell phone. The victim identified defendant as one of the perpetrators. The prosecution also admitted at trial defendant's statement, given to police after his arrest, implicating himself in the robbery.

On appeal, defendant first maintains that trial counsel was ineffective. Specifically, defendant claims that his attorney should have accompanied him to a polygraph examination, that the trial court's failure to appoint substitute counsel until after his polygraph denied his right to representation at a critical stage in the proceedings, and that counsel was ineffective for failing to move to strike evidence that the victim was threatened by defendant's ex-wife.

Effective assistance of counsel is presumed and the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). 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, 531; 640 NW2d 314 (2001), citing *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Because defendant failed to move the trial court for an evidentiary hearing or a new trial based on ineffective assistance, our review is limited to mistakes apparent on the record. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995).

After arrest and appointment of counsel, defendant availed himself of the opportunity to demonstrate his innocence through a polygraph examination. Defendant appeared for the test, waived his right to counsel, and submitted to the examination. Counsel was not present. Following the test, defendant made incriminating statements to the investigating police officer that were later admitted at trial. Now, on appeal, defendant maintains that counsel's failure to attend the polygraph examination constituted ineffective assistance.

In *People v McElhaney*, 215 Mich App 269, 273-274; 545 NW2d 18 (1996), this Court held that statements made following a polygraph examination are not taken in violation of defendant's right to counsel, even though counsel has been appointed, if the accused initiated the communication and waived his right to the presence of counsel. See also *US v Eagle Elk*, 711 F2d 80, 83 (CA 8, 1983). Here, the record shows that defendant volunteered to take a polygraph test and successfully waived the presence of counsel. Under these circumstances, defendant has no basis to claim that counsel was ineffective for failing to attend the test with him. Had that been his desire, defendant could have stopped the proceedings until counsel was in attendance. To find counsel ineffective under these circumstances would in effect require an attorney to be present at all polygraph proceedings, which clearly is not what the law requires or expects of lawyers representing clients in criminal cases.

To the contrary, defendant contends that, because the facts in the instant case are materially indistinguishable from those in *Tyler v US (On Remand)*, 78 F Supp 2d 626 (ED Mich, 1999), this Court must conclude that his trial counsel was ineffective. We disagree. In *Tyler*, counsel essentially abandoned the defendant, causing him to have to fend for himself in trying to reach a settlement with the prosecutor. *Id.*, at 631. Here, counsel's absence from the polygraph proceeding does not equate to such an abandonment and does not entitle defendant to relief.

Next, relying on the contention that substitute counsel was not appointed to represent defendant after his first attorney withdrew in December, 2002 until March, 2003, defendant argues that he was denied his right to counsel on the day of the polygraph examination in February, 2003. The facts do not support defendant's contention. Although the record in this case does not reveal the exact date when substitute counsel was appointed, prior to the polygraph test, but after defendant's first attorney withdrew, the prosecutor filed a Memorandum to Add Witnesses that named substitute counsel as being defendant's attorney and indicated in the proof of service that the document was served on substitute counsel. On the basis of this document, we are satisfied that defendant was represented by substitute counsel on the day of the polygraph examination and accordingly, defendant's argument is without merit.

Finally, defendant asserts that his trial counsel provided ineffective assistance by not moving to strike the victim's testimony that she felt threatened by statements made to her by defendant's ex-wife shortly before or during the trial. The trial court admitted this evidence to establish the ex-wife's bias. However, she later invoked her privilege against self-incrimination and never testified. Defendant maintains that counsel was ineffective in failing to move to strike the now irrelevant testimony. Even assuming counsel should have moved to strike, we conclude that defendant is not entitled to relief because a different outcome would not reasonably have resulted had the jury not heard the testimony. *Harmon, supra*. The victim's identification of defendant and defendant's own incriminating statements conclusively established his guilt. Further, the prosecution never linked the testimony regarding the threats to defendant himself.

Consequently, defendant cannot establish that he received ineffective assistance or that he was deprived of a fair trial.

In addition to his claims of ineffective assistance, defendant argues that his armed robbery conviction must be vacated because of a violation of the 180-day rule. This issue is controlled, as defendant candidly admits, by *People v Chavies*, 234 Mich App 274, 279-281; 593 NW2d 655 (1999). Because defendant was on parole at the time of the alleged offense and therefore, his sentence in this case must be consecutive, the 180-day rule of MCL 780.131(1) and 780.133 does not apply. *Id.* Further, we decline defendant's invitation to hold that *Chavies* was wrongly decided. The holding in *Chavies* is consistent with well-established precedent, see *People v Von Everett*, 156 Mich App 615, 618-619; 402 NW2d 773 (1986), and the statutory goal of allowing sentences to be served concurrently. *People v Smith*, 438 Mich 715, 717-718; 475 NW2d 333 (1991).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello