

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DARRYL ANTHONY MORGAN,

Defendant-Appellant.

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UNPUBLISHED

November 14, 2006

No. 265199

Wayne Circuit Court

LC No. 05-002106-01

Before: Fort Hood, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction for carjacking, MCL 750.529a. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 7 to 12 years in prison. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues on appeal that he was denied the effective assistance of counsel due to trial counsel's failure to move for suppression of the improper photographic identification prior to trial and move for a mistrial. The question of whether the defendant has been deprived of the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Le Blanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* Defendant moved for a new trial and a *Ginther* hearing, but his motion was denied. Therefore, this Court's review of defendant's ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

Effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). To support his claim of ineffective assistance of counsel, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness according to the prevailing professional norms, and (2) the error was so prejudicial that he was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Rogers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). When claiming deficient performance, the defendant must show that his counsel's action did not constitute sound trial strategy. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). Deficient performance may consist of counsel's failure to perform an essential duty, to investigate, or to meet a minimum level of competence. *People v McGhee*, 268

Mich App 600, 626; 709 NW2d 595 (2005), lv pending 707 NW2d 190 (2005); *People v Jenkins*, 99 Mich App 518, 519; 297 NW2d 706 (1980).

Deference is afforded to counsel's strategic judgments, but strategic choices made after an incomplete investigation are reasonable only to the extent that reasonable professional judgments support the limitation on investigation. *Wiggins v Smith*, 539 US 510, 521-522, 528; 123 S Ct 2527; 156 L Ed 2d 471 (2003). A counsel's error is prejudicial if there is a reasonable probability that, but for that error, the result of the proceedings would have been different. *Mitchell*, *supra* at 167; *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001) (citing *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984)).

Defendant was convicted of carjacking. To prove carjacking, a prosecutor must establish: "(1) that the defendant took a motor vehicle from another person, (2) that the defendant did so in the presence of that person, a passenger, or another person in lawful possession of the vehicle, and (3) that the defendant did so either by force or violence, threat of force or violence, or putting another in fear." *People v Green*, 228 Mich App 684, 694; 580 NW2d 444 (1998); see also MCL 750.529a(1); *People v Davis*, 468 Mich 77, 79-80; 658 NW2d 800 (2003). A vehicle is taken from a person when the person loses possession, dominion or control of it through the effect of fear or violence, threats of fear or violence, or by putting another in fear. *Green*, *supra* at 695-696. A carjacking occurs in the presence of a person if it occurs within his reach, inspection, observation or control and, if the person was not overcome by violence or prevented by fear, he could have retained his possession of the carjacked vehicle. *People v Raper*, 222 Mich App 475, 482; 563 NW2d 709 (1997).

Defendant admitted that he stole the vehicle, but he denied taking it by threat of force or violence from Bruce Brown's presence. Defendant argues that his counsel's failure to investigate and move for suppression of the photo identification prior to trial and move for a mistrial amounts to deficient performance and not mere trial strategy. Moreover, defendant argues that he was prejudiced by his counsel's deficient performance because, but for his counsel's errors, he would have been acquitted of the carjacking charge and convicted of unlawfully driving away an automobile, a lesser offense. Defendant failed to show that his counsel's performance fell below an objective standard of reasonableness and that the errors were so prejudicial that he was denied a fair trial.

Trial counsel's failure to move for suppression of the photo identification prior to trial and move for a mistrial did not amount to deficient performance. Generally, identification of a suspect by photograph should not be used when the accused is in custody. *People v Kurylczuk*, 443 Mich 289, 298; 505 NW2d 528 (1993). When there is a legitimate reason to use photographs for identification of an in-custody accused, the accused has the right to have counsel present during the identification procedure. *Id.*; *People v Williams*, 244 Mich App 533, 540; 624 NW2d 575 (2001); *People v Harrison*, 138 Mich App 74, 76; 359 NW2d 256 (1984). Here, counsel was not present at the photo identification. Although defendant's counsel failed to investigate and move for suppression of the photographic identification prior to trial and move for a mistrial, counsel moved for suppression during trial, and the court agreed to strike "all of the photo I.D. evidence. . . ." The error was discovered and remedied. Thus, trial counsel's

performance, while perhaps wanting in some respects, did not fall bellow an objective standard of reasonableness according to prevailing professional norms.

Moreover, even assuming that trial counsel's performance was deficient, defendant failed to show that trial counsel's failure to move for suppression of the photo identification prior to trial and move for a mistrial was so prejudicial that he was denied a fair trial. Defendant was convicted following a bench trial. Defendant denied taking the vehicle by threat of force or violence from Brown's presence. However, Brown testified that defendant "ran up on [him] when [he] was pulling inside the garage," came up to the driver's window holding against his left side or leg an object that looked like a pistol, and told Brown to get out of the car. Brown looked at defendant, and defendant told him again to get out of the car. Frightened, Brown complied with defendant's request. Defendant got in the car, a Neon, backed out of the garage, and drove away. Brown testified that the incident lasted for about one minute. Nobody else witnessed the incident. When defendant was driving out of the parking garage, turning left onto Washington, another valet was coming in with a truck and saw the Neon being driven away. Brown immediately called his supervisor over the walkie-talkie, and told him that he was carjacked; Brown's supervisor called the police. Brown described defendant as a "brown skinned" man, "about 30 to 35 years of age, five-eight, 180, medium complexion, round face." Brown also described to the police the clothes defendant was wearing. Defendant was 47 years old, five feet, six inches tall, weighed 150 pounds, and had a light complexion.

The fact finder disregarded the improper photo identification, but nonetheless, found Brown's testimony to be "considerably more credible than the [d]efendant's." The court determined that Brown's testimony "was not riddled with inconsistencies," Brown described "the assailant in terms that are roughly similar in the way he actually appears and then made an identification in court both at the preliminary exam and [at trial] and his identification was very confident." The court also determined that if defendant's version of what happened were true, Brown would have never seen defendant and known how to describe him. The photo identification, which was suppressed at trial, had no influence on the trial court's decision. This was a bench trial and a trial court "is less likely to be deflected from the task of fact-finding by prejudicial considerations that a jury might find compelling." *People v Edwards*, 171 Mich App 613, 619; 431 NW2d 83 (1988). There was sufficient other evidence to prove defendant guilty beyond a reasonable doubt, and defendant failed to show a reasonable probability that, but for his counsel's errors, the result of the trial would have been different. Therefore, because there is no reasonable probability that the verdict was influenced by the suppressed photographic identification evidence, defendant has not established the requisite prejudice to prevail on a claim of ineffective assistance of counsel.

Affirmed.

/s/ Karen M. Fort Hood  
/s/ Christopher M. Murray  
/s/ Pat M. Donofrio