

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALEXIS ALEXANDER LEGREE,

Defendant-Appellant.

UNPUBLISHED

December 19, 2006

No. 265577

Kent Circuit Court

LC No. 02-009102-FH

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). He was sentenced as a fourth habitual offender, MCL 769.12, to one to 20 years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Undercover officers used marked currency to purchase a substance they believed to be crack cocaine from defendant and an acquaintance, Casey Wolfe. The substance was field tested for cocaine, and was later sent for laboratory analysis. Defendant denied participating in the sale and maintained that he was only present while Wolfe completed the transaction.

On appeal, defendant argues that he is entitled to a new trial because he received ineffective assistance of counsel. He argues that trial counsel acted inappropriately when he stipulated to the introduction of the laboratory test results. The trial court denied his motion for a new trial based on this claim. This issue has been preserved. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Defendant also argues that substitute counsel rendered ineffective assistance by failing to visit him at the jail prior to trial. However, because defendant did not move for a new trial or a *Ginther*¹ hearing on this ground, this issue has not been preserved. *Id.* Because an evidentiary hearing was not conducted, our review is limited to the mistakes apparent on the existing record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

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

In order to establish ineffective assistance, defendant must establish that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and must show a reasonable probability that the outcome of the proceedings would have been different in the absence of counsel's unprofessional errors. *Sabin, supra* at 658-659. He must also overcome a strong presumption that counsel's actions were strategic. *Id.* We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant first argues that he was denied the effective assistance of counsel because he was denied counsel during a critical stage of the proceedings. He bases this argument on the fact that his substitute trial counsel held a private meeting with him only once while he was at the county jail. As an offer of proof, defendant presents a log of visits he received while he was incarcerated before trial. Counsel met with defendant at the jail on one occasion, after the jury had been chosen.

Defendant does not explain how his attorney's failure to visit with him at the jail affected his defense, but instead maintains that he is not required to prove actual prejudice because the denial of counsel at a critical stage in the proceedings requires an automatic reversal. See *United States v Cronin*, 466 US 648, 659 n 25; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005). However, while defendant has shown that counsel did not meet with him at his cell prior to trial, he has not shown that he was deprived of the assistance of counsel prior to that time. Defendant has not alleged that he had no other contact with his attorney prior to trial. He has not presented a phone record to suggest that counsel did not speak with him on the phone. Nor does he discuss whether he engaged in any written correspondence with his attorney.

In addition, the record contradicts defendant's assertion that he was denied counsel during this portion of the proceedings. The trial court's docket entries indicate that trial was set to begin on March 9, 2005, but was postponed, apparently to allow newly appointed substitute counsel a chance to become familiar with the case. Moreover, on July 7, 2005, defendant moved the court for substitute counsel before sentencing. He complained that his trial counsel "attempted to coerce (him) into a plea that would admit false guilt on my behalf." The parties discussed this plea offer before trial, and defendant rejected it. This evidence strongly suggests that counsel contacted defendant prior to trial to discuss his options. We find that defendant has failed to show that he was deprived of counsel during a critical stage of the proceedings.

Defendant also argues that trial counsel rendered ineffective assistance by stipulating to the introduction of laboratory test results showing that the tested substance was cocaine. The report contained the name of another individual. That name had been crossed out and apparently replaced with defendant's name in marker or pencil. During trial, defense counsel stipulated to the admission of the report, but not to its accuracy. During his closing arguments, defense counsel argued that the lab test results presented by the prosecutor were not, in fact, the test results for the substance taken from defendant and Casey Wolfe. Counsel maintained that the prosecutor had failed to show beyond a reasonable doubt that the substance taken from defendant was actually cocaine. The prosecutor countered by arguing that the error in the report was a typographical error, and that defendant should have challenged the admission of the document when the prosecutor sought to admit it.

Defendant maintains that counsel's actions were objectively unreasonable. We disagree. Decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). We find that defense counsel had a clear strategy for undermining this portion of the prosecutor's case. Rather than challenging the admission of the document at the outset and having the prosecutor present evidence to refute defendant's claim that the results were not from the substances received from Wolfe, defense counsel was able to challenge the validity of the results and argue that the prosecutor's error should cause the jury to acquit defendant. That a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant cannot show that any error on the part of trial counsel affected the outcome of the case. Defendant has not presented any evidence that the test results were not, in fact, those applicable to his case. He cannot show that, had counsel objected to the introduction of the report, it would not ultimately have been admitted.

We find that defendant has failed to provide support for this claim of ineffective assistance of counsel. In addition, although defendant alternatively requests a remand for a *Ginther* hearing, nothing presented here suggests that a remand would benefit him.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly