

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH JOHNSHAIL GRISHAM,

Defendant-Appellant.

UNPUBLISHED

October 9, 2008

No. 276414

Muskegon Circuit Court

LC No. 05-052379-FH

Before: Bandstra, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for one count each of resisting and obstructing a police officer, MCL 750.81d(1), and larceny less than \$200, MCL 750.356(5). Following a jury trial, defendant was convicted and sentenced to concurrent terms of 195 days in jail for resisting and obstructing a police officer, and 93 days in jail for larceny less than \$200. Defendant received credit for serving 195 days in jail. Defendant was also sentenced to pay \$200 in fines, \$200 in court costs, a \$60 state cost fee for the resisting and obstructing conviction, and \$100 in fines, \$100 in court costs, and a \$45 state cost fee for the count larceny less than \$200. We affirm in part, and vacate in part.

I. FACTS

On October 7, 2005, at approximately 11:20 p.m., Officer Jim Davis saw defendant pushing a red lawn mower across Seaway Drive. A business, Parker's Trophies and Awards (Parker's), was located 100 yards away from defendant. The owner of Parker's later identified the lawn mower as belonging to his business. Officer Davis turned on his overhead lights and approached defendant in police uniform. After Officer Davis asked defendant to stop, defendant began to back pedal. When Officer Davis instructed defendant to walk toward him again, defendant complied. Officer Davis grabbed defendant's left hand and informed him he was under arrest. Defendant then struck Officer Davis in the face with a CD case. Officer Davis and defendant struggled until a motorist stopped and assisted the officer.

During the incident, the video camera in Officer Davis's police cruiser captured part of the incident. However, Officer Davis did not activate the microphone on his belt or the microphone inside of his patrol car, so the videotape¹ had no audio.

After defendant was taken into custody, Sergeant Todd Baker saw lawn mower tire tracks leading away from Parker's. Between the tire tracks were footprints, which based on a photograph, appeared to match defendant's shoe soles.

II. IMPOSITION OF COSTS

Defendant first argues that the assessments of \$300 in court costs and \$105 in state costs constituted plain error, because there was no statutory authority for the imposition of these costs. We agree in part.

A. Standard of Review

Defendant failed to preserve this issue; therefore, our review is for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763, 774.

B. Analysis

Defendant correctly argues that the statutory sections under which he was convicted do not contain provisions authorizing the impositions of court costs or state costs. However, the imposition of costs for defendant's conviction for resisting and obstructing could have been justified under MCL 769.34(6), which provides, in relevant part:

As part of the sentence, the court may also order the defendant to pay any combination of a fine, costs, or applicable assessments. The court shall order payment of restitution as provided by law.

MCL 769.34(2) provides that Michigan's statutory sentencing guidelines apply to felonies "enumerated in part 2 of chapter XVII" of the Code of Criminal Procedure, which occur after January 1, 1999. MCL 777.16d, which is found in part two of Chapter XVII of the Michigan Code of Criminal Procedure, lists MCL 750.81d as an "enumerated felony." Therefore, MCL 769.34(6) applies to defendant's resisting and obstructing conviction. We affirm the \$200 in court costs and \$60 in state costs for defendant's resisting and obstructing conviction as they were proper under MCL 769.34(6).

However, the statutory sentencing guidelines do not apply to defendant's misdemeanor conviction for larceny less than \$200; thus, costs cannot be justified under MCL 769.34(6). The prosecutor argues that court costs and state costs could have been imposed against defendant

¹ We note that the videotape was not provided to this Court on appeal.

under MCL 769.1k. MCL 769.1k, which was effective on January 1, 2006, and provides in relevant part:

(1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:

(a) The court shall impose the minimum state costs as set forth in section 1j of this chapter.

(b) The court may impose any or all of the following:

(i) Any fine.

(ii) Any cost in addition to the minimum state cost set forth in subdivision (a).

(iii) The expenses of providing legal assistance to the defendant.

(iv) Any assessment authorized by law.

(v) Reimbursement under section 1f of this chapter.

MCL 769.1k's effective date was more than two months after the date of defendant's offenses, October 7, 2005. While not precedentially binding under the rule of stare decisis, MCR 7.215(C)(1), we view this Court's ruling in *People v Sironen*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2007 (Docket No. 267820), as instructive and persuasive. In that case, the panel explicitly found that if MCL 769.1k was applied retroactively, there would be a violation of "constitutional ex post facto prohibitions by increasing the level of punishment applicable when defendant committed his crimes." *Id.* at slip op p 2. Therefore, we conclude that MCR 769.1(k) may not be applied retroactively in this case because the increase in costs to defendant at sentencing, awarded with the application of a new statute between the time of commission of the offense and sentencing, amounts to an ex post facto law. See *id.*, citing *People v Slocum*, 213 Mich App 239; 539 NW2d 575 (1995). Accordingly, the portion of the order imposing costs for defendant's larceny less than \$200 conviction is vacated.

III. STANDARD 4 BRIEF

A. Investigatory Stop & Warrantless Arrest

In his supplemental brief, defendant argues that the police officer who arrested him lacked probable cause and only investigated defendant's behavior because of defendant's race. We disagree.

1. Standard of Review

Defendant also failed to preserve this issue by raising it before the trial court. Therefore, our review is again for plain error affecting defendant's substantial rights. *Carines, supra*, at 763.

2. Analysis

On the record before us, defendant has not shown that the arresting officer lacked probable cause to arrest him, or to engage in an investigatory stop. Further, there is no indication of racial discrimination in the arrest of defendant. At trial, the officer testified that, after observing defendant pushing a lawn mower on a busy highway at 11:30 p.m., he became suspicious, because "people don't normally push lawn mowers across Seaway Drive at almost midnight," and because the lawn mower appeared "very similar" to the lawn mower owned by a business, which was located approximately 100 yards away from where defendant was pushing the lawn mower. Generally, an investigatory stop is justified if the police possess a particularized suspicion, based upon some objective manifestation, that one person has been engaged in some type of criminal activity. *People v Dunbar*, 264 Mich App 240, 247; 690 NW2d 476 (2004). Here, the officer was justified to believe that defendant was engaged in criminal activity, because of the suspicious nature of his activity, and because defendant was pushing a lawn mower the officer believed belonged to somebody else. Thus, the officer was justified in detaining defendant. The stop was proper, and the officer was permitted to make reasonable inquires "aimed at confirming or dispelling his suspicions." *People v Yeoman*, 218 Mich App 406, 411; 554 NW2d 577 (1996). While the officer was attempting to investigate defendant, defendant committed the felony crime of resisting and obstructing the officer. Thus, defendant's arrest was justified without a warrant. For a custodial arrest to be valid, the arresting officers "must possess information demonstrating probable cause to believe that an offense has occurred and that the defendant committed it." *People v Champion*, 452 Mich 92, 115; 549 NW2d 849 (1996). "Probable cause to arrest exists where the facts and circumstances within an officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed." *Id.*

B. Admission & Accuracy of Video

Defendant also argues that the arresting officer, the prosecutor, or the trial court manipulated a video taken of defendant's arrest to ensure that there was no audio accompanying the video. We disagree.

1. Standard of Review

Again, defendant failed to preserve this issue; therefore, we review for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

2. Analysis

Defendant does not explain or support the basis for this claim of error. It is based on speculation and innuendo. On appeal, a defendant may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim. *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000). A party's failure to properly address the merits of his

argument constitutes abandonment of the issue. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

C. Malicious Prosecution

Next, defendant argues that he was the victim of malicious prosecution, consisting of a conspiracy to entrap him to commit the instant offenses. Again, we disagree.

We would normally review an unpreserved issue for plain error affecting defendant's substantial rights. *Carines, supra* at 763. However, defendant abandoned the issue of malicious prosecution. A party's failure to properly address the merits of his argument constitutes abandonment of the issue. *Harris, supra* at 50. Defendant presented no evidence to the contrary at trial. On the record before us, defendant cannot explain the basis for this claim of error, and it is abandoned. Even if considered, on the facts of record, defendant cannot show plain error.

D. Effective Assistance of Counsel

Defendant next argues that he was denied the effective assistance of counsel. We again disagree.

1. Standard of Review

The trial court did not conduct a *Ginther*² hearing, so the issue of whether defendant was denied the effective assistance of counsel is limited to mistakes apparent on the record. *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

2. Analysis

The right to the effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel, defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of defendant's trial would have been different, and (3) the resulting trial was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant argues that his trial counsel conspired with the trial court and the prosecutor to prevent him from objecting to the broadcast of the video taken by the camera inside of the police cruiser at trial, by attempting to coerce defendant into accepting a plea agreement, by failing to reasonably investigate defendant's case, and he further argues that his trial counsel unreasonably

² *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

prevented him from raising several defenses. However, defendant does not indicate the factual basis for any claims of error. Therefore, defendant has failed to establish the factual predicate for his claim. Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant further argues that his trial counsel unreasonably prevented him from raising several issues at trial. However, defendant abandons this claim on appeal, because he does not describe the issues that he wanted to raise that his trial counsel prevented him from raising, and he does not explain how raising those issues would have affected the outcome of the trial. *Mackle, supra* at 604 n 4.

Defendant also argues that trial counsel failed to reasonably investigate the circumstances surrounding his arrest, and failed to sufficiently communicate with him before trial. A trial counsel's failure to reasonably investigate a case can constitute ineffective assistance of counsel. *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004). When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Here, defendant does not explain or describe any aspect of the case that his trial counsel could have investigated, or any substantive defense or plea offer that he was prevented from taking advantage of due to lack of communication that would have resulted in a different outcome at trial. Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *Hoag, supra* at 6. On appeal, a defendant may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim. *Mackle, supra* at 604 n 4.

Defendant next argues that his trial counsel was ineffective for "preventing" him from testifying at trial. A defendant's decision whether or not to testify is considered a strategic decision, which is best left to defendant and his counsel. *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). Here, defendant presents no evidence that he ever expressed to his counsel, or to the trial court, a desire to testify during trial. Moreover, the record does not support that defendant was discouraged or prevented from testifying. If a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, then the right to testify is deemed waived. *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985).

E. Sixth Amendment Rights

Defendant further alleges that the trial court committed plain error by denying him his Sixth Amendment right to a public trial. We disagree. The Sixth Amendment guarantees every defendant in a criminal case the right to a "speedy and public trial." US Const, Am VI; Const 1963, art 1, § 20. "Although the right to an open trial is not absolute, that right will only rarely give way to other interests." *People v Kline*, 197 Mich App 165, 169; 494 NW2d 756 (1992). Defendant does not point to anything in the record indicating that he was denied his right to a public trial, regardless whether members of the public were not in the gallery during trial. Therefore, defendant has not shown the existence of plain error.

F. Prosecutorial Misconduct

Defendant finally argues that he was denied his due process right to a fair trial by substantial prosecutorial misconduct, that the trial court denied his right to raise issues on the record, and that the officer who arrested him testified falsely at trial. We disagree. Defendant abandoned these issues by failing to address their merits in his brief on appeal. Again, a defendant may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim. *Mackle, supra* at 604 n 4. A party's failure to properly address the merits of his argument constitutes abandonment of the issue. *Harris, supra* at 50.

Affirmed in part, vacated in part.

/s/ Richard A. Bandstra

/s/ Michael J. Talbot

/s/ Bill Schuette