STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2009
v	No. 288578 Dickinson Circuit Court
DREW JAMES PELTOLA, Defendant-Appellant.	LC No. 08-004032-FH

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), and conspiracy to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv); MCL 750.157a. The trial court sentenced defendant, according to MCL 333.7413(2), to 46 months to 40 years' imprisonment for each conviction. The sentences are to be consecutive to defendant's parole for a prior drug offense. Defendant received no credit for time served. Defendant appeals as of right his convictions and sentences. Because defendant was not denied the effective assistance of counsel, we affirm defendant's convictions. We also affirm defendant's sentences. The trial court did not err in doubling the minimum sentence and defendant was not entitled to any credit for time served. Because changes ordered by the trial court to the presentence investigation report have not yet been made, we remand for correction of the report.

I. Sentencing Issues

Defendant first argues that the trial court erred in doubling his minimum sentence under MCL 333.7413(2). Defendant contends that the phrase "the term otherwise authorized" in the statute only applies to the statutory maximum sentence.

Our Supreme Court recently rejected defendant's argument. In *People v Lowe*, 484 Mich 718, 724; ___ NW2d ___ (2009), the Court held that "under Michigan's scheme of indeterminate sentencing and the courts' implementation of that scheme, the 'term otherwise authorized' is not exclusively the minimum sentence *or* the maximum sentence, but it is the actual indeterminate sentence, which is defined by both the minimum and maximum limits for that sentence." It explained:

> [T]he "period of time" that a defendant could potentially spend in prison lies somewhere between the minimum and the maximum allowable sentences, and accordingly those sentences operate in tandem to define the "term" for which a defendant has been sentenced. In order to double this "term," a trial court necessarily has to double both the minimum and maximum sentences because both are required to constitute a particular "term." Accordingly, § 7413(2)'s authorization for a trial court to imprison a defendant for a "term not more than twice the term otherwise authorized" signifies that both the minimum and maximum sentences must be doubled to fashion an enhanced sentence that is twice the "term otherwise authorized." [*Id*.]

The Supreme Court also rejected the argument that the absence of enhancement language in MCL 777.21(4) suggests that the Legislature did not intend to authorize doubling of the minimum sentence:

> MCL 777.21(4) simply provides the methodology for a trial court to follow in calculating a defendant's minimum sentence guideline range. The lack of a minimum sentence enhancement in that subsection provides no insight into whether MCL 333.7413(2) provides a minimum sentence enhancement, and it is unclear why a lack of a minimum sentence enhancement under MCL 777.21(4) must mean that the Legislature intended MCL 333.7413(2) to also lack a minimum sentence enhancement. The Legislature's silence in MCL 777.21(4) regarding a minimum sentence enhancement cannot preclude the Legislature from providing a minimum sentence enhancement in a separate statute. [*Id.* at 728.]

We are bound by our Supreme Court's decision in *Lowe*. *People v Hall*, 249 Mich App 262, 270; 643 NW2d 253 (2002). The trial court did not err in doubling defendant's minimum sentence under MCL 333.7413(2).

Defendant also argues that he was entitled to credit for time served for the time he spent in jail awaiting sentencing on the instant offenses. Defendant's argument is two-fold. First, he argues that, pursuant to the plain language of MCL 769.11b, he was entitled to credit for the time he served while awaiting sentencing on the instant offenses. However, in *People v Idziak*, 484 Mich 549, 562-563; ___ NW2d ___ (2009), our Supreme Court rejected the argument:

> [T]he jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of his earlier sentence unless and until discharged by the Parole Board. For that reason, he remains incarcerated regardless of whether he would otherwise be eligible for bond before conviction on the new offense. He is incarcerated not "because of being denied or unable to furnish bond" for the new offense, but for an independent reason. Therefore, the jail credit statute, MCL 769.11b, does not apply.

Second, defendant asserts that his deoble jeopardy, due process, and equal protection rights were violated by the trial court's denial of jail credit. These arguments were also rejected by the

Supreme Court in *Idziak*. *Id.* at 570-574. Accordingly, defendant is not entitled to any credit for time served.

II. Presentence Information Report

We agree with the parties that remand is necessary for correction of the presentence information report (PSIR). Defendant objected to the inclusion of certain factual statements in the PSIR. The trial court agreed to delete one sentence and to add another. To date, these amendments have not been made. When a trial court determines that information in the PSIR is inaccurate, it must strike or correct the disputed information before sending the PSIR to the Department of Corrections (DOC). *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003). "'[C]ritical decisions are made by the [DOC] . . . based on the information contained in the [PSIR].'" *People v Uphaus (On Remand)*, 278 Mich App 174, 182; 748 NW2d 899 (2008) (quotation omitted). Accordingly, we remand for correction of the PSIR.

III. Ineffective Assistance of Counsel

In his Standard 4 brief, defendant argues that he was denied the effective assistance of counsel. We disagree. Because defendant failed to move for a new trial or an evidentiary hearing below, our review is limited to the existing record. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

To establish a claim of ineffective assistance of counsel, a defendant must show that trial counsel's performance fell below an objective standard of reasonableness and that trial counsel's representation was so prejudicial that he was denied a fair trial. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (1999). "[T]he defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003). Further, we will not assess trial counsel's competence with the benefit of hindsight. *People v Rice* (*On Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant first claims that he was denied the effective assistance of counsel by counsel's failure to call any alibi witnesses after filing a notice of alibi defense. However, decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and we will not second-guess counsel on matters of trial strategy, *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). Further, the failure to call witnesses only constitutes ineffective assistance of counsel if it deprived the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (opinion of Cooper, J.). Defendant claims that the alibi witnesses would have testified that he was attending a birthday party at the time of the controlled drug buy. However, one of the prosecution's witnesses testified that defendant was not present during the drug buy. Accordingly, defendant was not deprived of a substantial defense.

Defendant next argues that he was denied the effective assistance of counsel by defense counsel's lack of performance, which was due to an undisclosed conflict of interest. Defendant fails to articulate what his counsel's alleged conflict of interest was, but asserts that this conflict resulted in his counsel's lack of performance at trial. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . ." *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (quotation omitted). By

failing to identify counsel's alleged conflict of interest or how it affected the outcome of his case, defendant has abandoned the issue on appeal.

Defendant further argues that he was denied the effective assistance of counsel by defense counsel's failure to request discovery in a timely manner. Specifically, defendant asserts that defense counsel failed to secure various witness statements that were inconsistent with their trial testimony. However, it is clear that defense counsel was aware of and in possession of the statements made by the prosecution's witnesses because he cross-examined those witnesses extensively about their prior inconsistent statements. Defendant's argument is without merit.

Defendant asserts that he was denied the effective assistance of counsel by defense counsel's failure to move to strike unnecessary and misleading allegations in the information. Defendant fails to explain what allegations were unnecessary and how they were misleading. Therefore, this issue is also abandoned. *Matuszak*, *supra* at 59.

Defendant also challenges defense counsel's failure to object to plaintiff's motion to amend the second amended information at trial. However, defense counsel did object, stating that it violated defendant's right to notice. The trial court denied the objection and allowed amendment. MCR 6.112(H) provides that an information may be amended before, during, or after trial "unless the proposed amendment would unfairly surprise or prejudice the defendant." Here, the prosecutor requested a change of dates to correct the second amended information. The original and first amended information included the proper dates. Defendant suffered no surprise or prejudice from this date change. The amendment was proper.

We affirm defendant's convictions and sentences, but remand for correction of the PSIR. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto