

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MICHAEL CRUDER,

Defendant-Appellant.

UNPUBLISHED

September 16, 2010

No. 292743

Wayne Circuit Court

LC No. 08-019697-01-FH

Before: TALBOT, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Cruder contends the trial court improperly considered non-record evidence in convicting him of felon in possession of a firearm¹ and possession of a firearm during the commission of a felony.² Cruder also alleges that his trial counsel was ineffective for failing to produce two witnesses at trial, not disclosing a conflict of interest based on counsel's representation of a codefendant and in not seeking disqualification of the trial judge who accepted his codefendant's guilty plea. We affirm Cruder's convictions and sentences.³

Cruder and codefendant Fred Gordon were arrested after officers on patrol in the early morning hours witnessed them purchasing heroin from the driver of a pickup truck. When police activated their vehicle lights, Cruder and Gordon ran toward a house. A woman came to the door and beckoned them inside. Gordon was arrested outside the house and charged with possession of over 50 grams of heroin. Cruder was arrested in the living room of the house, after he discarded a handgun. While charges were initially dismissed, both Cruder and Gordon were subsequently charged and separately re-arraigned. Gordon pleaded guilty to possession of drugs. Cruder waived his right to a jury trial and testified that he was present in the area because his car broke down, but denied having a weapon, entering a house, seeing a pickup truck or having any knowledge regarding the heroin in Gordon's possession.

¹ MCL 750.224f.

² MCL 750.227b.

³ Cruder was sentenced to time served of 16 days in jail for the felon in possession conviction and five years' imprisonment for the felony firearm conviction. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Cruder asserts the trial court improperly considered non-record evidence of Gordon's guilty plea for his conviction. While the trial court did make a passing reference to Gordon's plea, this constituted merely one of the myriad reasons why the trial court did not find Cruder's testimony credible. The trial court observed that Cruder's testimony would require it to believe that every statement by the police officers involved in this matter constituted blatant falsehoods. The trial court found "defendant's version of what happened to be so implausible and so preposterous and so different than the officer's version of what happened that it just simply belies credibility." The trial court did not use Gordon's plea as a basis to convict Cruder but merely referenced it within the multitude of reasons it reviewed in explaining its determination that Cruder's version of events was simply too incredible to be believed and to address defense counsel's contention that the police officers involved in Cruder's arrest fabricated the evidence. This situation is effectively no different from cases alleging prosecutorial misconduct for revealing a codefendant's conviction. In such instances this Court has determined that even though the conviction of a codefendant involved in the same criminal episode is not admissible in a separate trial as evidence of a defendant's substantive guilt, the mere fact that it was revealed that a codefendant has pleaded guilty does not necessarily entitle a defendant to a reversal of his conviction.⁴ Reviewing the comment in context and in light of defense counsel's arguments we perceive no suggestion of either prejudice or bias to Cruder from the trial court's reference to Gordon's guilty plea.

We also reject Cruder's contention that the trial court erred when it considered a statement alleged to have been made by the woman in the house where he was arrested because it constituted hearsay. Although we disagree with Cruder's contention that the statement constituted inadmissible hearsay, we reject his allegation of error because it was defense counsel who elicited this statement from the police officer in a leading question. Cruder has waived this issue on appeal, as "error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence."⁵ We also reject Cruder's argument that the trial court improperly considered its own belief that police do not like to chase defendants. A review of the trial court's ruling clearly demonstrates that it did not rely on such a belief but made the reference only in passing as part of its explanation of why it found Cruder's testimony so unbelievable.

Cruder also contends that his trial counsel was ineffective. The determination whether a defendant has been deprived of the "effective assistance of counsel is a mixed question of fact and constitutional law." This Court "must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo.⁶ To establish ineffective assistance of counsel, a defendant must establish that counsel's performance "fell below an objective standard of

⁴ *People v Barber*, 255 Mich App 288, 297; 659 NW2d 674 (2003).

⁵ *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003), disapproved of on other grounds, *People v Guerra*, 469 Mich 966 (2003).

⁶ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

reasonableness” under prevailing professional norms and “that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”⁷

Cruder asserts that trial counsel was ineffective for failing to call two witnesses. “Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which we will not second guess with the benefit of hindsight. The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.”⁸ Trial counsel may have elected not to call a police officer who testified at the preliminary examination because his testimony, while not precisely the same as that of the police officer who testified at trial, was sufficiently consistent to undermine Cruder’s version of the events and how they transpired. Because counsel may have determined that such testimony was more detrimental than helpful he was not ineffective for failing to secure this witness for trial.

Regarding the woman who beckoned Cruder and Gordon into the house, defense counsel indicated that he was having difficulty locating this witness and asked for assistance from the prosecutor. The trial court requested defense counsel to provide citation to authority in support of this request but there is no record of counsel’s compliance. While MCL 767.40a(5) requires the prosecutor or law enforcement to provide reasonable assistance to locate and serve process on a witness, there is nothing in the lower court record to indicate whether the prosecution or the officer in charge attempted to find the woman on Cruder’s behalf, if trial counsel attempted to find the woman and was unsuccessful, or if trial counsel found the woman and determined that her testimony would not be helpful. Because Cruder has not established that he was denied a substantial defense by counsel’s failure to call this witness, his assertion of ineffective assistance cannot be sustained.⁹

Cruder also asserts that counsel was ineffective because he had a conflict of interest. Trial counsel previously represented Gordon on charges stemming from this matter. An attorney may represent codefendants where he reasonably believes the representation will not be adversely affected and the clients consent after consultation.¹⁰ Although there is nothing in the record to indicate that Cruder and Gordon consented to representation by the same counsel, even if a conflict of interest is assumed, “prejudice is presumed only if defendant demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer’s performance.”¹¹ Although Cruder asserts that counsel’s performance was affected because he could not call Gordon to testify at trial, the unavailability of this witness was attributable to his incarceration and not because counsel was trying to protect Gordon’s right against self-incrimination. Of greater relevance is the fact that at the time Gordon pleaded

⁷ *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

⁸ *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) (footnotes omitted).

⁹ *Id.* at 398.

¹⁰ MRPC 1.7(b).

¹¹ *People v Smith*, 456 Mich 543, 557; 581 NW2d 654 (1998) (citation omitted).

guilty, counsel did not represent Cruder. Only later, when Cruder was recharged was counsel appointed to represent him. At no point did trial counsel actively represent any conflicting interests of Gordon and Cruder, so Cruder is unable to demonstrate ineffective assistance because of his attorney's divided loyalties.¹²

Cruder also suggests that trial counsel was ineffective for failing to seek recusal of the trial judge because he was the judge that accepted the Gordon's guilty plea. Any claim of ineffective assistance of counsel on this basis is unavailing as such a motion would have been futile.¹³ To disqualify a judge a defendant must show that the judge has personal bias or prejudice against the defendant and the basis for the bias must involve events outside of the judicial proceeding.¹⁴ Because acceptance of the Gordon's guilty plea arose from a judicial proceeding it cannot form the basis of a motion for recusal of the trial judge¹⁵ and any failure to seek disqualification for this reason cannot establish a claim of ineffective assistance of counsel.

Affirmed.

/s/ Michael J. Talbot

/s/ Patrick M. Meter

/s/ Pat M. Donofrio

¹² *Id.* at 556-557.

¹³ *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

¹⁴ *Cain v Mich Dep't of Corrections*, 451 Mich 470, 495-496; 548 NW2d 210 (1996).

¹⁵ *People v Rider*, 93 Mich App 383, 388; 286 NW2d 881 (1979).