

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN ROOSEVELT WEAKLEY,

Defendant-Appellant.

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UNPUBLISHED

October 12, 2010

No. 292444

Washtenaw Circuit Court

LC No. 08-000143-FC

Before: O'CONNELL, P.J., and BANDSTRA and MARKEY, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right his conviction of first-degree criminal sexual conduct, MCL 750.520b, first-degree home invasion, MCL 750.110a(2), conspiracy to commit first-degree home invasion, MCL 750.157a and MCL 750.110a(2), armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm but remand for correction of the judgment of sentence.

Defendant's conviction arose from a 1997 home invasion, during which complainant was robbed and raped. The police obtained DNA evidence from a vaginal swab of the complainant, but found no match until August 2006. Thereafter, the police located defendant in Missouri and brought him to Michigan to stand trial.

Defendant first argues that the trial court abused its discretion and violated his due process rights by denying his motion for a court-funded DNA expert. We review the trial court's denial of an expert for abuse of discretion; we review de novo defendant's constitutional claim. *People v Tanner*, 469 Mich 437, 442; 671 NW2d 728 (2003); *People v Odom*, 276 Mich App 407, 421; 740 NW2d 557 (2007). Under MCL 775.15, a trial court may, in its discretion, grant funds for the retention of an expert witness if an indigent defendant shows "that there is a material witness in his favor within the jurisdiction of the court, without whose testimony he cannot safely proceed to a trial." Defendant is required to demonstrate a "nexus between the facts of the case and the need for an expert." *Tanner*, 469 Mich at 443 (citation omitted).

At the hearing on the motion for a court-funded expert, defendant provided nothing more than speculation regarding whether a court-funded DNA expert might provide him with a defense. This speculation was insufficient to require the trial court to appoint an expert. *Id.* at 443. Absent some indication that the DNA evidence was flawed, the trial court was within its

discretion in denying defendant's motion. Accord, *People v Jacobsen*, 448 Mich 639, 641-642; 532 NW2d 838 (1995).

Further, while “[a] defendant has a constitutionally guaranteed right to present a defense, which includes the right to call witnesses,” *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008), preservation of this right does not mean that the state is required to provide funding for any and all witnesses. The due process right to present a defense requires that the prosecution “comport with prevailing notions of fundamental fairness” and that the defendant have a “meaningful opportunity to present a complete defense.” *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006), quoting *California v Trombetta*, 467 US 479, 485; 104 S Ct 2528; 81 L Ed 2d 413 (1984). Here, both requirements were met. The cross-examination of the prosecution's DNA experts provided defendant with a fair and meaningful opportunity to challenge the DNA evidence.<sup>1</sup>

Next, defendant contends that his counsel was ineffective, alleging that counsel failed to consult with or present evidence from a DNA expert and failed to cross-examine the prosecution witnesses rigorously.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. [*People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005) (citations omitted).]

Because there was no evidentiary hearing held pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to the existing record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

To overcome the presumption that counsel provided effective assistance, defendant must show that his counsel's alleged failure to consult with a DNA expert resulted in counsel's ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990); see also *McGhee*, 268 Mich App at 626. The record before us does not indicate whether defense counsel consulted a DNA expert. Even assuming there was no consultation, defendant has not explained how the trial would have been altered had counsel consulted a DNA expert. Moreover, the record reflects that defense counsel requested several pieces of information regarding the labs that tested the DNA in this case, including procedures, guidelines for analysis,

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<sup>1</sup> Defendant also asserts that his equal protection right was violated, but he presents no specific support for this assertion. Accordingly, the Court deems the equal protection issue abandoned. *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

and past problems, and the prosecution agreed to supply relevant and feasible information. On this record we discern no reasonable probability that counsel was ignorant of beneficial evidence, or that the trial outcome might have been different with any such evidence.

Similarly, counsel cannot be deemed ineffective for the decision not to call a DNA expert at trial. Counsel's decision regarding whether to call witnesses would be ineffective assistance only if the decision deprived defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). As noted above, defendant has provided nothing to indicate that an expert could have presented any challenge to the DNA evidence other than the challenges defense counsel raised during cross-examination. Accordingly, defendant has not demonstrated that counsel's decision deprived defendant of a substantial defense.

There is also no basis for defendant's assertion that trial counsel's cross-examination was ineffective. Defendant contends that his counsel should have challenged the evidence collection process, the reliability of CODIS (Combined DNA Index System), the methodology of DNA testing, or the results themselves. Defendant essentially contends that his counsel was ineffective for failing to present a more intense challenge to the DNA evidence. We disagree. We presume that counsel's cross-examination constituted sound trial strategy, and defendant's contentions do not overcome that presumption. See *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

Next, defendant asserts that he was denied his right to a speedy trial. Defendant is apparently arguing that his due process guarantee against prearrest delay was violated. "Before dismissal may be granted because of prearrest delay there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage." *People v Patton*, 285 Mich App 229, 237; 775 NW2d 610 (2009). The defendant's interest in a prompt adjudication must be balanced against the state's possible interest in delaying prosecution. *People v Cain*, 238 Mich App 95, 108; 605 NW2d 29 (1999). If a defendant presents evidence of prejudice resulting from the delay, the burden then shifts to the prosecutor to persuade the court that the reason for the delay was sufficient to justify whatever prejudice resulted. *Patton*, 285 Mich App at 237; *Cain*, 238 Mich App at 108.

The time lapse between the initial identification of defendant in CODIS and the issuance of his arrest warrant was primarily attributable to the DNA confirmation process. The law enforcement officials used this process to ensure that defendant's DNA matched the sample from the crime. Defendant contends the delay prejudiced his defense because complainant's memory and the memories of the alibi witnesses were fading. However, defendant does not explain how the purported memory loss could have occurred during the 16-month time period at issue. Nor does he allege that the prosecution was trying to gain a tactical advantage. Thus, defendant has not demonstrated substantial prejudice. Substantial prejudice "meaningfully impairs the defendant's ability to defend against the charge in such a manner that the outcome of the proceedings was likely affected." *Patton*, 285 Mich App at 237. Unsupported statements of prejudice, or unspecified claims of witness memory loss, are insufficient to satisfy this burden. *People v Walker*, 276 Mich App 528, 546; 741 NW2d 843 (2007), vacated in part on other grounds 480 Mich 1059 (2008).

Last, defendant requests that we remand to the trial court for a correction of the judgment of sentence. The people concede that a correction should be made to the judgment of sentence to reflect that the term for felony-firearm should run concurrently with the term for conspiracy to commit home invasion.

Remanded for correction of the judgment of sentence. In all other aspects, defendant's convictions and sentences are affirmed. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Richard A. Bandstra

/s/ Jane E. Markey