

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 10, 2015

v

TOMMIE GENE THREATT,
Defendant-Appellant.

No. 323837
Oakland Circuit Court
LC No. 2011-236324-FC

Before: STEPHENS, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right following remand by this Court for resentencing. We affirm.

Defendant contends that he was denied his Sixth Amendment right to a speedy trial because his resentencing was delayed for over a year. We disagree. Because this issue was not preserved for appeal, our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

First, we note that defendant’s resentencing was not delayed for over a year; rather, it was delayed for about nine months. Our remand order did not become effective until defendant’s application for leave to appeal was denied by our Supreme Court. See MCR 7.215(F)(1)(a).

Second, the Sixth Amendment right to a speedy trial is not applicable to resentencing. As explained in *US v Sanders*, 452 F3d 572 (CA 6, 2006), “the right to a speedy trial . . . cease[s] to apply when the conviction becomes definitive. This occurs when the conviction is affirmed on direct appeal, if not sooner.” *Id.* at 579. While decisions of the lower federal courts construing federal law are not binding on this court, we find the analysis persuasive. See *Abela v Gen Motors Corp*, 469 Mich 603, 606; 677 NW2d 325 (2004). And here, at the latest, defendant’s right to a speedy trial ended when his conviction was affirmed on direct appeal.

The Sixth Circuit did, however, hold that a delay in resentencing could “still run afoul of due process guarantees.” *Sanders*, 452 F3d at 580. In light of that concern, the *Sanders* Court held that “after a conviction has been affirmed on appeal, and a case is remanded solely for resentencing, the question of whether any delay in imposing the sentence violates the defendant’s right to due process can be answered by looking to: (1) the reasons for the delay; and (2) what prejudice the defendant has suffered as a result of the delay.” *Id.* The primary concern when a

case is remanded for resentencing is “oppressive delay.” *Id.* Michigan’s due process guarantee is construed no more broadly than the federal guarantee. *Syntex Laboratories v Dep’t of Treasury*, 233 Mich App 286, 292; 590 NW2d 612 (1998).

Here, defendant claims that he does not know the reason for the delay in resentencing. However, the prosecutor explains that the delay was because the case had to be reassigned to a different assistant prosecutor. As the *Sanders* Court held: “[A]ny evidence that the delay was purposeful or due to bad faith would provide strong evidence of a due process violation. Bad faith requires an affirmative showing by the defendant; it cannot be implied from circumstantial evidence.” *Sanders*, 452 F3d at 581. Defendant has made no affirmative showing of bad faith and has provided no evidence that the delay was deliberate.

Further, defendant has not established that he suffered any prejudice while waiting to be resentenced. A parolee who is sentenced for a crime committed while on parole must serve the remainder of the term imposed for the previous offense before he serves the term imposed for the subsequent offense. MCL 768.7a(2); *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Thus, during the nine-month delay, defendant was serving the remainder of the term imposed for the previous offense. Accordingly, defendant cannot demonstrate that the delay in resentencing violated his due process rights.

Next, defendant argues that he was denied the effective assistance of counsel because his counsel failed to request an adjournment (1) to research defendant’s claim that a violation of MCL 771.1 resulted in the trial court losing jurisdiction to resentence him, and (2) to obtain an updated presentence investigation report (PSIR). We disagree. Because defendant raised this issue for the first time on appeal, our review is limited to errors apparent on the record. See *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, a defendant must show that defense counsel’s performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

First, defendant was not denied the effective assistance of counsel because his attorney failed to request an adjournment to research defendant’s claim that a violation of MCL 771.1(2) resulted in the trial court losing jurisdiction. MCL 771.1(2) addresses delays of more than a year, which did not occur in this case. It also addresses the imposition of a “sentence,” not a resentence. And, most importantly, MCL 771.1(2) is applicable only in an action where “the court may place the defendant on probation.” At the time defendant committed these offenses, he “was under parole supervision;” thus, there was no possibility that he would be placed on probation. Therefore, when the prosecutor informed the court that MCL 771.1(2) was not applicable in this case and the trial court agreed, there was no error and no reason for defendant’s attorney to ask for an adjournment.

Second, defendant was not denied the effective assistance of counsel because his attorney failed to request an adjournment under MCR 6.425(B) to obtain an updated PSIR. The record shows that a “reasonably updated presentence report” was utilized at this sentencing. See *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980). “There is no requirement that a

completely new report be prepared for resentencing.” *People v Martinez (After Remand)*, 210 Mich App 199, 202; 532 NW2d 863 (1995), overruled on other grounds *People v Cervantes*, 448 Mich 620, 625-626 (1995).

Next, defendant contends that the trial court reversibly erred because it did not comply with MCR 6.425(E)(1). Defendant did not preserve this issue by an objection on the record and, therefore, must demonstrate plain error affecting substantial rights. *Carines*, 460 Mich at 763. Our review of the record reveals that the trial court complied with the requirements of MCR 6.425(E)(1). Moreover, even if defendant could establish a violation of MCR 6.425(E)(1), he did not establish that any such error resulted in prejudice to him. And because defendant did not establish any errors on appeal, his claim that the cumulative effect of a number of minor errors warranted reversal is without merit. See *People v Anderson*, 166 Mich App 455, 472-473; 421 NW2d 200 (1988).

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Christopher M. Murray