

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 17, 2017

v

EDWARD GRIFFITH,
Defendant-Appellant.

No. 333487
Wayne Circuit Court
LC No. 14-009500-01-FH

Before: SAAD, P.J., and CAVANAGH and CAMERON, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of attempted first-degree home invasion, MCL 750.110a(2); MCL 750.92, and possession of burglar's tools, MCL 750.116. Defendant was initially sentenced, as a fourth habitual offender, MCL 769.12, to 12 to 20 years' imprisonment for the attempted first-degree home invasion conviction and 12 to 20 years' imprisonment for the possession of burglar's tools conviction.

Defendant filed an appeal from his initial judgment of sentence. After defendant filed his brief on appeal, whose sole point of contention was that the trial court erred when it sentenced defendant as if he was convicted of first-degree home invasion due to errors in defendant's sentencing information report (SIR), the prosecution filed a confession of error wherein the prosecution admitted that defendant was entitled to resentencing due to errors in the calculation of defendant's recommended minimum sentence guidelines range. This Court granted the prosecution's confession of error, vacated defendant's sentence, and remanded for resentencing.¹ On remand, defendant was resentenced, as a fourth habitual offender, to 40 to 120 months' imprisonment for the attempted first-degree home invasion conviction, 40 to 120 months' imprisonment for the possession of burglar's tools conviction and assessed \$1,300 in court costs. Defendant again appeals. We remand to the trial court to establish a factual basis for the imposed court costs or to adjust the amount of court costs, if appropriate.

¹ *People v Griffith*, unpublished order of the Court of Appeals, entered October 21, 2015 (Docket No. 326499).

Defendant contends that the trial court erred when it imposed court costs as part of his amended sentence following his resentencing. The prosecution agrees that there was error and that the error requires a remand to allow the trial court to make a factual basis on the record to support the assessment of the costs.

At the time of defendant's sentencing and resentencing, MCL 769.1k² provided, 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:

* * *

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

* * *

(iii) Until 36 months after the date the amendatory act that added subsection (7) is enacted into law, *any cost reasonably related to the actual costs incurred by the trial court* without separately calculating those costs involved in the particular case, including, but not limited to, the following:

(A) Salaries and benefits for relevant court personnel.

(B) Goods and services necessary for the operation of the court.

(C) Necessary expenses for the operation and maintenance of court buildings and facilities. [Emphasis added.]

This version of MCL 769.1k authorizes “an award of certain costs that are *not* independently authorized by the statute for the sentencing offense.” *People v Konopka (On Remand)*, 309 Mich App 345, 357; 869 NW2d 651 (2015).

However, if a trial court does not establish a factual basis for the court costs it imposes, then this Court “cannot determine whether the costs imposed were reasonably related to the actual costs incurred by the trial court, as required by MCL 769.1k(1)(b)(iii).” *Id.* at 359-360. Thus, in *Konopka*, this Court remanded the defendant's case in order for the trial court to establish a factual basis for the costs it imposed, “or to alter that figure, if appropriate.” *Id.* at 360. Further, this Court held that a defendant “should be given the opportunity to challenge the reasonableness of the costs imposed.” *Id.*

² The current version of MCL 769.1k went into effect on June 30, 2017. See 2017 PA 64.

Here, during defendant's resentencing hearing, the trial court did not establish a factual basis for the \$1,300 in court costs it imposed. Furthermore, defendant's initial judgment of sentence indicates that the trial court initially imposed \$600 in court costs, which presumably included all of the costs the trial court incurred during defendant's pretrial hearings, his bench trial, and his initial sentencing. Yet, the trial court more than doubled that figure when it resentenced defendant, despite the fact that defendant's resentencing hearing only lasted for approximately 20 minutes. Thus, it is impossible to determine whether the trial court's imposition of court costs was reasonably related to the costs it actually incurred without the trial court providing a factual basis for those costs on the record. Therefore, consistent with *Konopka*, we remand to the trial court for further proceedings.

In his Standard 4 brief, defendant raises several other issues. The Michigan Supreme Court has held that when a defendant appeals from a remand, as is the case here, "the second appeal is limited by the scope of the remand." *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975); see also *People v Kincade*, 206 Mich App 477, 481; 522 NW2d 880 (1994).

Defendant asserts that he was denied the effective assistance of appellate counsel when his initial counsel for this appeal, Chari Grove, refused to raise claims that were unrelated to defendant's resentencing. To preserve a claim of ineffective assistance of counsel, a defendant must file a motion for a new trial or a *Ginther*³ hearing to develop a record to support the claim. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Defendant has not filed a motion for a new trial or a *Ginther* hearing. Thus, "because the trial court did not hold an evidentiary hearing, our review is limited to the facts on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

This Court evaluates claims of ineffective assistance of counsel using the standard established in *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57, 59 (1999). "A defendant seeking relief for ineffective assistance in this context must meet *Strickland's* familiar two-pronged standard by showing (1) 'that counsel's representation fell below an objective standard of reasonableness,' and (2) 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014), quoting *Lafler v Cooper*, 566 US 156, 162; 132 S Ct 1376; 182 L Ed 2d 398 (2012). "The defendant has the burden of establishing the factual predicate of his ineffective assistance claim." *Douglas*, 496 Mich at 592, citing *Hoag*, 460 Mich at 6.

"[T]he test for ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel." *People v Uphaus*, 278 Mich App 174, 186; 748 NW2d 899 (2008). A defendant "must show that his appellate counsel's decision not to raise a claim of ineffective assistance of trial counsel fell below an objective standard of reasonableness and prejudiced his appeal." *Id.* A defendant must "overcome the presumption that his appellate counsel's decision constituted sound strategy." *Id.* "Appellate counsel may

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

legitimately winnow out weaker arguments in order to focus on those arguments that are more likely to prevail.” *Id.*

Defendant has not overcome the presumption that Grove’s decision not to raise issues on appeal that related to his trial constituted sound strategy. Notably, defendant concedes in his Standard 4 brief that Grove informed him that the scope of this current appeal is confined to his resentencing. Grove’s failure to raise meritless arguments that fell outside of the scope of this appeal does not constitute ineffective assistance of counsel. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (“Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.”). Therefore, defendant’s argument necessarily fails.

Defendant has raised several other issues that do not pertain to the scope of this Court’s initial remand. When we remanded, the scope was “for the limited purpose of resentencing.” See *People v Griffith*, unpublished order of the Court of Appeals, entered October 21, 2015 (Docket No. 326499). Accordingly, because defendant’s other issues fall outside that scope, we decline to review them. See *Jones*, 394 Mich at 435-436 (holding that “the scope of the second appeal is limited by the scope of the remand”).

We remand for the trial court to establish a factual basis for the court costs imposed or to adjust the court costs imposed, if appropriate. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Thomas C. Cameron