

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEREK STEPHEN SIEGEL,

Defendant-Appellant.

UNPUBLISHED

April 16, 2019

No. 342489

Livingston Circuit Court

LC No. 17-024329-FH

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

PER CURIAM.

Defendant pleaded guilty to operating a vehicle while intoxicated, third offense (OWI-III), MCL 257.625(1)(a); MCL 257.625(9)(c), operating a vehicle while license suspended, second offense, MCL 257.904(3)(b), and furnishing false identifying information to a peace officer, MCL 257.324(1)(h). Before sentencing, the trial court concluded that defendant had violated the conditions of his bond by using marijuana and, accordingly, that he was not entitled to be sentenced to jail and probation in accordance with the plea agreement. Thereafter, the trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to serve 28 months to 20 years in prison for OWI-III, one year in jail for operating while license suspended, and 90 days in jail for furnishing false information. Defendant appeals by leave granted,¹ arguing that the trial court violated his due-process rights by imposing a bond condition prohibiting marijuana use where he was registered under the Michigan Medical Marijuana Act (MMMA), MCL 333.26421 *et seq.* We affirm.

I. BACKGROUND

In May 2017, defendant was arrested and charged with OWI-III, driving while license suspended, second-offense, and furnishing false identifying information to a peace officer.

¹ *People v Siegel*, unpublished order of the Court of Appeals, entered April 5, 2018 (Docket No. 342489).

Defendant posted bond and signed a bond form, which included a provision that he would abide by specified bond conditions, including that he was prohibited from possessing or using marijuana with or without a prescription.

Defendant pleaded guilty as charged in exchange for a sentence agreement that he would be sentenced to one year in jail and to probation, and the prosecution agreed not to reissue charges in a different case involving defendant. At the plea hearing, the trial court instructed defendant that if he committed any new offenses while he was on bond, he would lose the benefit of his plea agreement, and the trial court would sentence him “within the bounds of the law.”

After defendant pleaded guilty but before he was sentenced, the prosecution asserted that defendant had committed a bond violation because he informed the probation agent who completed his presentence investigation report (PSIR) that he continued to use medical marijuana while he was on bond. Defense counsel noted that defendant was “not violating the law of the State of Michigan,” but the trial court stated that there was “a zero tolerance policy in this county that the Chief Judge has ordered regarding smoking marijuana.” Defense counsel later stated, “[A]t this time[,] my client will acknowledge that he smoked marijuana while on bond.”

At defendant’s sentencing hearing, the prosecutor argued that the plea agreement was no longer valid because defendant had committed misconduct by violating his bond conditions. Before imposing sentence, the trial court referenced defendant’s marijuana use while his case was pending.

II. ANALYSIS

On appeal, defendant argues that the MMMA prohibits the trial court from penalizing defendant’s use of medical marijuana in compliance with the MMMA.² Accordingly, defendant argues, the trial court violated his due-process rights when it found that his medical marijuana use constituted a bond violation and determined that he was no longer entitled to the benefit of his plea bargain on that basis. Defendant further asserts that his trial counsel was ineffective for failing to object to the trial court’s finding that defendant violated the conditions of his bond and to its decision to sentence him in excess of his plea agreement. We disagree.

MCR 6.310(B) provides the circumstances in which a trial court may permit a defendant to withdraw his or her plea agreement after accepting the agreement but before sentencing. Under MCR 6.310(B)(2)(a), a defendant may withdraw his or her plea if it “involve[d] an agreement for a sentence for a specified term or within a specified range, and the [trial] court states that it is unable to follow the agreement” However, MCR 6.310(B)(3) provides that “a defendant is not entitled to withdraw a plea under subsection (2)(a) . . . if the defendant commits misconduct after the plea is accepted but before sentencing.” Misconduct includes

² As an initial matter, we note that defendant has at no time provided this Court or the trial court with any proof of valid registration under the MMMA.

“violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing.” MCR 6.310(B)(3).

MCR 6.106 governs pretrial release. The rule provides that when a trial court determines that it cannot reasonably ensure the appearance of the defendant or the safety of the public by releasing the defendant on his or her personal recognizance, the trial court may order the defendant’s conditional release. MCR 6.106(D). The trial court may impose a “condition or [a] combination of conditions that the [trial] court determines are appropriate,” MCR 6.106(D), “which may include requiring the defendant to not use alcohol or illicitly use any controlled substance,” MCR 6.106(D)(2)(b). The trial court may also require the defendant to “comply with any other condition . . . reasonably necessary to ensure the defendant’s appearance as required and the safety of the public.” MCR 6.106(D)(2)(o).

In order to properly preserve an issue for appellate review, a defendant must raise an objection below to provide the trial court an opportunity to correct the error. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Defendant did not object to the trial court’s imposition of a condition of bond that prohibited him from using marijuana, to its finding that defendant violated that bond condition, or to it denying defendant the benefit of his plea bargain on that basis. Accordingly, this issue is unpreserved.³

This Court reviews a claim of unpreserved constitutional error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The defendant must show that an error occurred, that the error was plain, and that the error affected the defendant’s substantial rights. *Id.* The error must be clear and obvious and it must have prejudiced the defendant such “that the error affected the outcome of the lower court proceedings.” *Id.* Even where the defendant establishes all three requirements, this Court “must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant’s innocence.” *Id.* (quotation marks, alteration, and citation omitted).

Our Supreme Court has held that a “clear or obvious error . . . is one that is not subject to reasonable dispute.” *People v Randolph*, 502 Mich 1, 10; 917 NW2d 249 (2018) (quotation marks and citation omitted). Defendant asserts that § 4 of the MMMA, MCL 333.26424, prohibits the trial court from considering defendant’s medical marijuana use to be a bond violation. MMMA § 4 provides, in relevant part, that a “qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner . . . for the medical use of marihuana in accordance with this act” MCL 333.26424. However, neither this Court nor our Supreme Court has held that the MMMA prevents a trial court from restricting a defendant’s marijuana use as a condition of bond. Therefore, defendant is not able to demonstrate that the trial court committed a clear or obvious error, and he is not entitled to relief. See *Randolph*, 502 Mich at 10.

³ Although not addressed by the parties, defendant also failed to move to withdraw his plea in the trial court, as required by MCR 6.310(D).

Defendant also argues that his counsel provided ineffective assistance by failing to object to the trial court's finding of a bond violation and subsequent rejection of the agreed-upon sentence. A claim of ineffective assistance of counsel is preserved by moving for a new trial or for a *Ginther*⁴ hearing in the trial court. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009). Defendant did not move for a new trial or for a *Ginther* hearing and, therefore, this issue is unpreserved and this Court's review is for mistakes apparent in the record. See *id.*

To establish that defense counsel was ineffective, "a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). Counsel's performance is presumptively effective, and a "defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). Defense counsel is not ineffective when he or she fails "to advance a meritless argument or raise a futile objection" *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

As discussed, neither this Court nor our Supreme Court has held that the MMMA precludes a trial court from prohibiting a defendant's medical marijuana use as a condition of bond. Accordingly, there was no established legal basis for defense counsel to object to the trial court's finding that defendant violated his bond conditions and its decision to sentence defendant in excess of his plea agreement because of that violation. Moreover, the trial court had already indicated that "smoking marijuana with or without a card is not something I approve of unless I purposely give approval," in accordance with the circuit court's longstanding "zero tolerance policy." Defendant's ineffective assistance of counsel claim fails because counsel was not ineffective for failing to raise a meritless issue. See *id.*

Affirmed.

/s/ Mark J. Cavanagh
/s/ Thomas C. Cameron

⁴ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).