STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

TERRANCE CONTRELL UNDERWOOD,

Defendant-Appellant.

UNPUBLISHED
February 18, 2021

No. 350890
Calhoun Circuit Court
LC No. 19-001433-FH

Before: BOONSTRA, P.J., and BORRELLO and RICK, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of possession of a firearm by a felon (felon-in-possession), MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, carrying a firearm when committing a felony (felony-firearm), MCL 750.227b, and four counts of assaulting, battering, wounding, resisting, obstructing, opposing, or endangering a police officer performing his or her duties (resisting arrest), MCL 750.81d(1). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to a prison term of 4 to 20 years for the felon-in-possession conviction, consecutive and subsequent to the statutory two-year prison term for felony-firearm. It further sentenced him to concurrent prison terms of 4 to 20 years for the CCW conviction and 46 to 180 months for each resisting arrest conviction. Defendant was on parole at the time of his arrest and therefore received no credit for time served. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

At approximately 2:00 a.m. on May 4, 2019, Officer Thomas Wirebaugh of the Battle Creek police department stopped a vehicle for minor traffic violations. Officer Wirebaugh was in uniform and in a marked patrol car. Defendant was the driver of the vehicle; a woman was in the passenger's seat. Defendant handed Officer Wirebaugh his driver's license. Officer Wirebaugh had been informed at the beginning of his shift that there was a felony warrant for defendant's

arrest.[1] Officer Wirebaugh told defendant that there was a warrant for his arrest and asked defendant to exit the vehicle. Defendant refused, telling Officer Wirebaugh that he wanted to speak to his supervisor and would wait in the car until the supervisor arrived.

Officer Jeffrey Johnson arrived shortly after Officer Wirebaugh stopped defendant; he was also in uniform and driving a marked patrol car. After Officer Wirebaugh radioed for additional assistance, Officer Alexander Barton, Corporal Jim Bailey, and Sergeant Kurt Roth arrived, all also in uniform. Officer Wirebaugh testified that defendant's vehicle was "completely surrounded by patrol cars, red and blue lights" and that multiple officers were telling defendant to get out of the vehicle and that he was under arrest. He also testified that Sergeant Roth pointed to the sergeant stripes on his uniform, informed defendant that he was a supervisor, and told defendant that he needed to get out of the vehicle. Sergeant Roth confirmed that he informed defendant that he was under arrest and asked him to exit the vehicle. Defendant still refused to do so, as did his passenger. Officer Wirebaugh reached through the open passenger-side window and unlocked the vehicle's doors. As Officer Wirebaugh removed the passenger, Officer Johnson placed defendant in handcuffs. Officer Wirebaugh estimated the total time of the traffic stop to be over ten minutes.

Corporal Bailey was assigned to the K-9 unit and had brought his police dog to the traffic stop. He testified that he told defendant to exit the vehicle and warned defendant that if he did not, they would have to use force to remove him, which might risk defendant being bitten by the dog. Defendant refused his commands.

Officer Johnson searched defendant and discovered a semi-automatic pistol tucked into the waistband of defendant's pants. Sergeant Roth and Corporal Bailey saw Officer Johnson find the gun in defendant's pants. Officer Barton, as a crime technician, collected the firearm as evidence.

Before trial, defendant filed several in propria persona motions, including a motion to dismiss his appointed counsel. The motion asserted that defendant's appointed counsel had pressured him into waiving his preliminary examination. The motion did not specifically request that the trial court appoint substitute counsel for defendant. On the first day of trial, the trial court stated that it had reviewed defendant's motions and that they were denied. The trial court also noted that there were "no longer any valid plea offers in this matter." Defendant then asked to address the court, and stated that he had not received discovery materials related to his case to enable him to prepare for trial and that he did not want his appointed counsel to represent him. Defendant stated that his family had called the office of an attorney whom defendant was "trying" to get to represent him and had "talked to his secretary." Defense counsel stated that he had mailed to defendant all of the documents he had received, and had given defendant a copy of the police report while in the district court. The trial court told defendant that the day of trial was "not the time to be making a phone call" regarding hiring his own attorney, and that the trial would proceed that day.

[1] As will be discussed later in this opinion, this warrant was for a parole violation. None of the prosecution's witnesses testified to that fact or to any specifics about the warrant.

The trial proceeded. The police officers involved in the traffic stop testified as witnesses for the prosecution. Footage from a video recorder mounted on Officer Johnson's patrol vehicle was also played for the jury without audio.

After the close of the prosecution's proofs, and outside the presence of the jury, defendant's counsel asked to place on the record that defendant, despite his counsel's recommendation, wished to call his parole officer, Brandon Hultink (Hultink), as a defense witness, as well as testify himself. Defendant confirmed that he wished to do so, although he stated that he believed "the officer said numerous times that I was on parole on the stand." The trial court informed him that although the officers had mentioned an arrest warrant, they had not testified that he was on parole; in fact, as the prosecution noted, the audio had been removed from the video played for the jury specifically to avoid the jury hearing that he was on parole. Nonetheless, defendant stated that he wished to have Hultink testify because "everything revolves around me being on parole." When the court asked him if he understood that, by having Hultink testify, he was not only "opening the door" to cross-examination regarding his parole status, but that he would be permitting the prosecution to play the audio portion of the video for the jury afterward, defendant responded "absolutely" and elaborated that he was "okay with it. Whatever she want [sic] to do that's fine. Audio, the video, that's fine. . . . I'm fine with that, sir."

Defendant's parole officer then testified that defendant had been on parole for nine or ten months, and that the warrant for defendant's arrest had been issued after he was informed, by a member of defendant's family, of a possible parole violation. Specifically, the information Hultink received was that defendant was carrying a firearm. Hultink stated that he did not know if there was a separate police report concerning this complaint, but believed it was "incorporated within the incident that the police report is [sic] for the incident that occurs on May 4th that we are here for today." On cross-examination by the prosecution, Hultink stated that a condition of defendant's parole was that he cooperate with police searches of his person and property.[2]

Defendant testified and denied committing any traffic infractions before he was pulled over. He admitted that he was informed that there was a warrant for his arrest, that he was told he was under arrest, that he had refused to exit the vehicle in response to requests from multiple officers (although he denied knowing Sergeant's Roth's rank or being told that he was a supervisor), and that he had a firearm in his possession at the time.

The parties stipulated that defendant had a prior conviction that rendered him ineligible to possess a firearm at the time of offenses charged. The jury convicted defendant as described. After trial, defendant filed an in propria persona motion with the trial court entitled "Motion for Ineffective Assistance of Counsel." The motion contained case citations and brief descriptions of three federal cases involving claims of ineffective assistance of counsel, but did not make any specific argument concerning how defendant's trial counsel had been ineffective or request any

[2] It appears from defendant's statements before Hultink took the witness stand that he believed that the report that had led to the parole violation was false, and that Hultink's testimony, perhaps in combination with his own, would reveal this fact to the jury.

particular relief from the trial court. The trial court denied defendant's motion without oral argument.

At sentencing, while addressing the court, defendant stated that "the PSI guy" (presumably, Michigan Department of Corrections agent Marlon James (James), who had prepared defendant's presentence investigation report (PSIR)), had visited him five days before sentencing and, according to defendant, had "indicated that there was a plea of 38 months which the prosecutor or a judge never really presented that opportunity for me to accept that 38 months." Defendant stated that he believed he had received ineffective assistance of counsel and had gone to trial with no defense. The trial court noted that nothing in its record indicated that defendant was ever offered a specific sentence agreement, and that he had not accepted the one plea agreement the prosecution had offered in June. The trial court also elaborated on its reasons for denying defendant's motion for dismissal of his counsel, stating that it was a "delaying tactic . . . simply to avoid going to trial on that day." The trial court also opined that defendant's counsel was not ineffective, noting that defendant "got up on the stand and basically admitted [his] guilt to the jury."

The trial court sentenced defendant as described. This appeal followed.

I. DENIAL OF MOTION FOR SUBSTITUTE COUNSEL

Defendant argues that the trial court erred by denying his pretrial motion for substitute counsel. We disagree. We review for an abuse of discretion a trial court's decision regarding the substitution of counsel. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Strickland*, 293 Mich App 393, 397; 810 NW2d 660 (2011). Further, although defendant did not explicitly request such relief from the trial court on the first day of trial, it is clear from the context of his statements that he sought a continuance or adjournment in order to obtain substitute counsel. Such requests are also reviewed for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999).

"Appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process." *Strickland*, 293 Mich App at 397 (citation omitted). Good cause for the appointment of substitute counsel can exist where there is a legitimate difference of opinion between a defendant and his counsel with regard to a fundamental trial tactic. *Id.* (citation omitted). Factors to consider when reviewing a defendant's motion for a continuance to obtain substitute counsel are "(1) whether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision." *Echavarria*, 233 Mich App at 369.

Defendant's pretrial motion made no specific request for relief from the trial court—e.g., to appoint substitute counsel, to allow defendant to substitute retained counsel, to allow defendant to represent himself. And on the first day of trial, defendant did not ask the court to appoint a different attorney to represent him—rather, defendant appeared to be seeking more time in order to obtain substitute, retained counsel. If defendant's statements at trial were a request for the

appointment of substitute counsel, defendant did not demonstrate the requisite good cause or demonstrate that substitution would not unreasonably disrupt the judicial process. *Strickland*, 293 Mich App at 397 (citation omitted). Defendant's stated issues with his attorney were that his attorney had not visited him enough, and that he was not provided with enough "paperwork" from the case to prepare for trial. Defendant stated that he had his "charges," (presumably the information), but did not have a police report. Defense counsel represented that he had provided a police report to defendant at the preliminary examination, and that he had mailed defendant the few documents had received in the case.

Neither of defendant's stated grievances was a legitimate difference of opinion over a fundamental trial tactic. *Strickland*, 293 Mich App at 397. Defendant argued in a pretrial motion that the parole violation warrant for his arrest was based on a false statement made to his parole officer, that this false statement was documented in the police report filed the day before his arrest, and that if he had obtained more discovery material from his attorney, he could have argued that the officers lacked probable cause to arrest him. On appeal, defendant argues that this constituted good cause for the substitution of counsel. We disagree. Defendant did not specifically refer to this theory in either his pretrial motion to dismiss his counsel or his statements on the first day of trial. And defendant has not presented any evidence that the police report contained false statements; indeed, the complainant reported that defendant was seen carrying a firearm on the evening of May 2, 2019, and defendant was arrested with a firearm in the early morning hours of May 4, 2019. Defense counsel stated in open court that he gave defendant the police report at his preliminary examination in May. Moreover, defendant was in fact permitted by his counsel to pursue his theory that the warrant for his arrest was based on a false statement. We conclude that defendant has not demonstrated good cause for the substitution of counsel. *Strickland*, 293 Mich App at 397. For the same reasons, defendant has not shown a legitimate reason for the trial court to have granted a continuance on the first day of trial. *Echavarria*, 293 Mich App at 369.

Defendant additionally has failed to demonstrate that substitution would not have unreasonably burdened the judicial process, and we agree with the trial court that defendant's statements on the first day of trial were merely an attempt to delay trial. *Strickland*, 293 Mich App at 397; *Echavarria*, 293 Mich App at 369. Defendant's pretrial motion for dismissal of his counsel was filed approximately two weeks before trial, but, as stated, it lacked any claim for specific relief from the trial court and made no mention of retained counsel. On the first day of trial, for the first time, defendant informed the trial court that he wished to retain a specific attorney, but it was clear that the process had gone no further than leaving a message with the attorney's secretary. Defendant was arrested in May 2019 and was tried in August 2019; he has not explained why, if he had wished to substitute retained counsel, he could not have done so sooner. Under these circumstances, we agree with the trial court that defendant's statements on the first day of trial showed that he had been dilatory. *Id.*

In any event, defendant cannot show that he was prejudiced by the trial court's actions. *Id.* Again, defendant was permitted to pursue his theory that his arrest warrant was based on a false statement. In light of the fact that the statement was that defendant had been seen carrying a firearm, and that defendant was apprehended carrying a firearm less than thirty-six hours later, it is difficult to see how either the substitution of counsel or an adjournment would have made a difference in defendant's chances of success with his chosen defense. Moreover, the record is clear that defendant chose to pursue this tactic, and to testify himself, against his attorney's advice,

and that defendant gave testimony admitting to the elements of the offenses with which he was charged. Defendant has not demonstrated that either the appointment of substitute counsel or a continuance to allow him to retain counsel would have made a difference in the outcome of the proceedings against him. *Id.*; see also *People v Solomon*, 220 Mich App 527, 533-534; 560 NW2d 651 (1996) (noting that the decision to testify belongs to the defendant and must be honored, even against his counsel's advice).

The trial court did not abuse its discretion by declining to grant defendant's pretrial or first-day-of-trial motions for substitute counsel. *Strickland*, 293 Mich App at 397; *Echavarria*, 293 Mich App at 368.[3]

II. HABITUAL OFFENDER NOTICE

Defendant also argues that he is entitled to resentencing because the prosecution did not serve him with a notice of its intent to seek a habitual offender, fourth offense sentencing enhancement and did not file a proof of service to that effect. We disagree. We review this issue de novo as a question of law. *People v Head*, 326 Mich App 526, 542; 917 NW2d 752 (2018).

MCL 769.13 provides in relevant part that the prosecution must file written notice of its intent to seek a habitual offender enhancement within 21 days after the defendant's arraignment or the filing of the information if the arraignment is waived, and must serve that notice upon defendant or his attorney within that time and file a proof of service with the court. See MCL 769.13(1)-(2). MCL 769.13(2). These requirements are also codified in a court rule, MCR 6.112(F). Here, the court record contains a written notice of the prosecution's intent to seek a habitual offender, fourth offense enhancement, filed with defendant's bindover packet and transfer from the district court when defendant was bound over for trial on May 21, 2019. The same notice was also filed with the felony information on May 30, 2019. The record does not, however, contain a proof of service regarding that written notice. The record indicates that defendant's arraignment was waived, and that a pretrial conference was held on June 27, 2019, although that conference was apparently not transcribed.

The purpose of the notice requirement is "to provide the accused with notice, at an early stage in the proceedings, of the potential consequences should the accused be convicted of the underlying offense." *Id.* at 543 (citations omitted). Therefore, the prosecution's failure to file a

[3] Although defendant requests that this Court, if it declines to reverse his convictions, remand for an evidentiary hearing on the issue of his counsel's effectiveness, his arguments on this issue relate to the trial court's alleged abuse of discretion in not finding good cause to appoint substitute counsel. To the extent defendant's argument involves a claim that his counsel was ineffective during pretrial, defendant has not established the factual predicate for his claim that his attorney did not provide him with discovery materials. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Further, we see no need to remand for an evidentiary hearing in light of the fact that defendant and his counsel already stated their respective positions on the record before the trial court—defendant that he did not receive discovery materials, and his counsel that he provided all discovery materials he had received.

proof of service according to MCL 769.13(2) and MCR 6.112(F) may be harmless if defendant actually received notice of the prosecution's intent to seek such an enhancement and defendant was not prejudiced. *Id.* at 543-544.

Defendant states in an unnotarized declaration attached to his brief on appeal that he did not receive notice of the prosecution's intent at the time of his bindover; however, as stated, such notice does appear in the bindover packet filed with the circuit court on that date. Defendant also states in the declaration that he did not receive this notice at the pretrial hearing, which occurred 27 days after the information was filed, and, as stated, was not transcribed. However, apart from defendant's declaration , which is not properly before this Court, there is nothing in the record to indicate that defendant and his counsel were unaware of the prosecution's intent to seek habitual offender sentencing. Defendant stated at the first day of trial that he had received his "charges" at some point, and both the felony complaint and the information (the two lower court documents that list the charges against him) contained notice of the prosecution's intent. Additionally, defendant's counsel stated that he mailed a copy of the information to defendant, although he did not state the date upon which he did so; it can be inferred from counsel's statement that counsel received a copy of the information, and therefore the notice, at some point before trial. See *Head*, 323 Mich App at 544-545 (finding the lack of a proof of service harmless when the "charging documents in the lower court file all apprised defendant of his fourth-offense habitual-offender status," and the defendant had not shown that he or his attorney had never received those documents). And, as will be further discussed later in this opinion, at sentencing the trial court referred to a plea offer in June that included a reduction to habitual offender, second offense, indicating, at a minimum, that defendant and his counsel should have had notice that the prosecution would be seeking a habitual offender enhancement of some kind. Defendant's counsel did not appear surprised or unprepared to address the issue of sentencing enhancement at sentencing. See *id.* at 545 (noting that the conclusion that the defendant was not prejudiced by the lack of a proof of service was supported by "the fact that defendant and defense counsel exhibit no surprise at sentencing when defendant was sentenced as a fourth-offense habitual offender").

Under these circumstances, and although the prosecution did not file a proof of service of its notice of intent to seek a sentencing enhancement, such an error is harmless and does not require resentencing. *Id.* at 543-544.[4]

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that his counsel was ineffective in failing to inform him of a plea offer. Defendant has not established the factual predicate for this claim and, accordingly, we disagree.

[4] We note, however, that the preliminary examination and the arraignment were waived and the pretrial hearing was, for some reason, not transcribed. In such circumstances, it would be especially prudent for the prosecution to file a proof of service after serving the notice of intent on defendant or his attorney, because there is an extremely limited record of the relevant time frame for this Court to review.

"To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). It is the defendant's burden to establish the factual predicate for his or her claim of ineffective assistance of counsel. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defense counsel may be ineffective for failing to inform a defendant of a plea offer. *People v Walker*, 328 Mich App 429, 433; 938 NW2d 31 (2019). In order to succeed on a claim of ineffective assistance of counsel premised on his counsel's failure to convey a plea offer, a defendant must establish not only that his counsel failed to convey the offer but that "(1) he would have accepted the plea offer; (2) the prosecution would not have withdrawn the plea offer in light of intervening circumstances; (3) the trial court would have accepted the defendant's plea under the terms of the bargain; and (4) the defendant's conviction or sentence under the terms of the plea would have been less severe than the conviction or sentence that was actually imposed." *Id.* (citations omitted); see also *Lafler v Cooper*, 566 US 156, 164; 132 S Ct 1376; 182 L Ed 2d 398 (2012).

Here, defendant has not established that the plea offer of which his counsel allegedly failed inform him in fact ever existed. Defendant stated at sentencing that a "PSI guy" had visited him five days before sentencing and had "indicated" that there was a plea of "38 months" at one point. The trial court noted at sentencing that the record contained no evidence of this plea offer. This Court has also found none. The PSIR itself states that "there is no sentencing agreement in this case." Even if James did make some sort of statement to defendant concerning "38 months," there is simply no evidence that James was correct that such a plea offer had existed before trial. Defendant has therefore failed to establish the factual predicate for his claim. *Hoag*, 460 Mich at 6. Nor has defendant demonstrated that a remand for a *Ginther*[5] hearing is necessary to expand the record. Defendant had the opportunity to address this issue before the trial court with his counsel and the prosecution present, yet none of the parties or the trial court confirmed the existence of this plea offer. Even further, evidence concerning whether James actually made such a statement would not aid defendant in proving that such a plea offer had actually existed.

Affirmed.

/s/ Mark T. Boonstra
/s/ Stephen L. Borrello
/s/ Michelle M. Rick

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