

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
September 27, 2011

v

BILLY GLEN LEWIS,  
Defendant-Appellant.

No. 297078  
Kent Circuit Court  
LC No. 09-002385-FH

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Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right from his bench trial convictions of two counts of possession of child sexually abusive material, MCL 750.145c(4); two counts of using a computer to commit a crime, MCL 752.796; and possession of marijuana, MCL 333.7403(2)(D). The trial court sentenced him to concurrent terms of 1.5 to 10 years' imprisonment for each of the abusive material convictions, to 1.5 to 15 years' imprisonment for each of the computer-related convictions, and to 93 days in jail for the marijuana conviction. We affirm.

Defendant first argues that ineffective assistance of counsel deprived him of a fair trial in violation of the Sixth Amendment, because defense counsel argued that the trial court should convict defendant of a lesser charge.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations omitted; emphasis removed).]

Counsel's conduct must be evaluated "from counsel's perspective at the time." *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). There is a strong presumption that counsel's conduct was a part of a "sound trial strategy under the circumstances." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defendant filed a motion in this Court for a *Ginther* hearing. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). This Court denied that motion for failure to satisfy the requirements of MCR 7.211(C)(1). *People v Lewis*, unpublished order of the Court of Appeals, entered October 1, 2010 (Docket No. 297078). Review is therefore limited to the record. See *People v Dixon*, 217 Mich App 400, 408; 552 NW2d 663 (1996).

Defendant was charged with two counts of making child sexually abusive material, MCL 750.145c(2). This Court in *People v Hill (Hill I)*, 269 Mich App 505, 517-519; 715 NW2d 301 (2006), abrogated in part by *People v Hill (Hill II)*, 486 Mich 658; 786 NW2d 601 (2010),<sup>1</sup> held that making child sexually abusive material included downloading child sexually abusive material from the Internet and saving it to a storage device. In the present case, after the police found defendant in possession of hundreds of images of child sexually abusive material, defendant admitted to downloading the images from the Internet and saving them to a flash drive. Defense counsel argued that *Hill I*, *id.* at 517-519, was wrongly decided, and that defendant's situation was distinguishable. Additionally, he argued that defendant should be convicted of the lesser charge of possession of child sexually abusive material, MCL 750.145c(4), instead of making child sexually abusive material, MCL 750.145c(2).

Defendant was initially convicted of two counts of making child sexually abusive material. Subsequently, however, the Supreme Court in *Hill II*, 486 Mich at 674, held that downloading child sexually abusive material from the Internet and saving it to a storage device for personal use constituted only possession of child sexually abusive material, MCL 750.145c(4). Thereafter, following an appeal to and a remand by this Court, defendant's two convictions for making child sexually abusive material were vacated by the trial court, and convictions for possession were entered.

Defendant now argues that defense counsel rendered ineffective assistance of counsel by effectively entering a guilty plea. Defendant cites *People v Fisher*, 119 Mich App 445; 326 NW2d 537 (1982), to support this argument. In *Fisher*, 119 Mich App at 446, 448-450, defense counsel asked the trial court to find the defendant guilty but mentally ill, which carried the same potential penalties as a guilty plea. This Court found that because the penalties were the same, counsel's actions were the functional equivalent of a guilty plea. *Id.* at 446. In contrast, defense counsel herein asked the trial court to convict defendant of possession of child sexually abusive material, which carried a much lesser potential prison sentence than making child sexually abusive material. We conclude that defense counsel did not violate *Fisher*. Additionally, on this record,<sup>2</sup> we cannot conclude that defense counsel's decision was objectively unreasonable; rather, it was a matter of sound trial strategy. This Court will not second-guess defense counsel's

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<sup>1</sup> Because of the procedural posture of the case, the Supreme Court opinion was based on a different Court of Appeals opinion than the one reported at 269 Mich App 505.

<sup>2</sup> Defendant claims that any concession by counsel to guilt regarding possession must be supported by a waiver by defendant on the record. However, defendant cites no authority in support of this position. We reiterate that defendant bears the burden of establishing ineffective assistance of counsel. *Rodgers*, 248 Mich App at 714.

tactic of admitting guilt to a lesser offense. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994); *People v Wise*, 134 Mich App 82, 98; 351 NW2d 255 (1984).

We reject defendant's argument that defense counsel conceded defendant's guilt to his highest charge. Indeed, the law changed *after defendant was convicted*. Claims of ineffective assistance of counsel are reviewed from counsel's perspective at the time of the conduct. *Strickland*, 466 US at 689. Therefore, at the time of defense counsel's conduct he did not completely concede defendant's guilt. Defense counsel did not provide ineffective assistance of counsel.

Next, defendant argues that defense counsel had no trial strategy for acquittal. Defendant must overcome a strong presumption that counsel acted under a sound trial strategy, *Toma*, 462 Mich at 302, and our review of the record reveals that counsel's trial strategy was readily apparent. He tried to suppress damning evidence and distinguish defendant's case from adverse precedent. Defendant has not met his burden of demonstrating ineffective assistance of counsel.

Defendant also argues that defense counsel rendered ineffective assistance of counsel because he failed to call a computer expert to testify, failed to examine the computer drives, and failed to consult adequately with defendant about his decision not to testify. Defendant was entitled to have an attorney that thoroughly investigated any potential defenses. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Defendant, however, has failed to establish that an expert could have or would have testified, what an expert would have testified about, that review of the computer drives would have assisted the case, or that counsel failed to adequately consult defendant. Defendant has not established the factual predicates to support his claims of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Additionally, defendant has failed to establish that even if defense counsel's conduct was objectively unreasonable in failing to engage in the aforementioned conduct, counsel's failures prejudiced his case. *Rodgers*, 248 Mich App at 714.

Defendant additionally argues that defense counsel provided inadequate assistance of counsel by failing to move to suppress defendant's statements to the police. It is unclear on what grounds an objection existed, and defendant provides no authority in support of this hypothetical objection. Counsel is not required to make frivolous objections. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001). Defendant has failed to show that defense counsel's actions were objectively unreasonable or affected the outcome of the trial. *Rodgers*, 248 Mich App at 714.

Affirmed.

/s/ Peter D. O'Connell

/s/ Patrick M. Meter

/s/ Jane M. Beckering