

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 20, 2011

v

VERTDELL JEMELL BURNETTE,

Defendant-Appellant.

No. 297136
Kalamazoo Circuit Court
LC No. 2009-000714-FH

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

PER CURIAM.

Defendant appeals as of right from his jury convictions of fleeing and eluding, second degree, MCL 257.602a(4), and retail fraud, third degree, MCL 750.356d(4), for which he was sentenced as a fourth habitual offender, MCL 769.12. We affirm.

Defendant was accused of stealing a package of soap from a grocery store, fleeing in his car, and disregarding a police officer's signal to stop. The prosecutor originally charged defendant with fleeing a police officer, fourth degree, MCL 257.602a(2), and retail fraud, third degree, MCL 750.356d(4). The prosecutor also filed a notice of intent to seek an enhanced sentence on the ground that defendant was an habitual offender.

On the date set for trial, defense counsel moved to adjourn in order to seek a competency evaluation. Defense counsel indicated that she was having difficulty communicating with defendant and that defendant might have difficulty helping with his defense. The trial court granted the motion and ordered defendant to appear for a competency examination at the Center for Forensic Psychiatry.

Defendant missed two scheduled competency evaluations. He informed his counsel that he lacked transportation to the evaluations. At a subsequent scheduling conference, the court set a new trial date to allow defendant time to make another competency evaluation appointment. Defendant never attended a competency evaluation. On the first day of trial, the trial court indicated that competency was now a "non-issue" given defendant's failure to present himself for an evaluation.

The prosecutor then moved to amend the information to increase the charge to second-degree fleeing and eluding, on the basis of defendant's two prior fleeing and eluding convictions.

The trial court granted the motion, finding that the amendment neither prejudiced nor surprised defendant.

On appeal, defendant argues that he was unfairly surprised by the trial court's decision to allow amendment of the information, and that had he known of the increased penalty from the higher charge, he would have appeared for his competency evaluation.

We review a trial court's decision to amend the information for an abuse of discretion. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008). A trial court may allow the information to be amended before, during, or after trial to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant, or would not allow a sufficient opportunity to defend at trial. MCL 767.76; MCR 6.112(H); see generally *People v McGee*, 258 Mich App 683, 693; 672 NW2d 191 (2003).

Here, defendant cannot establish prejudice or surprise from the amendment of the information. Defendant was notified seven months before trial that the prosecutor would seek enhancement of his sentence as an habitual offender. Defendant's two prior fleeing and eluding convictions, which were the basis for the amendment of the information, were listed in the habitual offender notice. Moreover, defendant's theory of the case remained the same after the amendment. Finally, defense counsel indicated that defendant was ready to proceed to trial and acknowledged on the record that defendant had notice of the earlier fleeing and eluding convictions. Under these facts the trial court did not abuse its discretion by granting plaintiff's motion to amend the information.

To the extent that defendant raises the issue of competency to stand trial, this issue was not preserved, and thus is reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "The conviction of an individual when legally incompetent violates due process of law." *In re Carey*, 241 Mich App 222, 227; 615 NW2d 742 (2000). A defendant is presumed competent to stand trial unless his mental condition prevents him from understanding the nature and object of the proceedings against him or the court determines he is unable to assist in his defense. MCL 330.2020(1).

Defendant acknowledges that he failed to appear for a competency evaluation. He hypothesizes that he would have taken the evaluation more seriously if he had known that he would be facing a second-degree fleeing and eluding charge. We cannot accept this hypothesis. Defendant presented nothing to the trial court to indicate that the penalties in the original information affected his decisions regarding the evaluation. Defendant has not established any error regarding the competency issue, much less a plain error that affected the fairness, integrity, or public reputation of the proceedings. *Carines*, 460 Mich at 763-764.

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Jane M. Beckering