

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
September 29, 2011

v

STEVEN DANIEL PITUCH,  
  
Defendant-Appellant.

No. 299513  
Macomb Circuit Court  
LC No. 09-000154-FH

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Before: SERVITTO, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of assault with a dangerous weapon, MCL 750.82, three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, two counts of carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm by a felon, MCL 750.224f. He was sentenced to serve concurrently two years' imprisonment for each of the felony-firearm convictions. As a fourth offense habitual offender, MCL 769.12, defendant was sentenced to 18 months' to 15 years' imprisonment for each of the assault with a dangerous weapon, CCW, and felon in possession convictions. These sentences were to run concurrently to one another, but consecutive to the sentences for the felony-firearm convictions. He appeals of right. We affirm defendant's convictions and sentences, but remand for correction of the judgment of sentence to reflect that defendant's sentences for CCW and felony-firearm are to run concurrently.

Defendant's various convictions stem from an October 2008 incident where he used a knife and a gun while attempting to retrieve his all-terrain vehicle from RPM Extreme Power Sports. On appeal, he asserts that various errors committed by trial counsel denied him the effective assistance of counsel. We disagree. On de novo review, we are limited to the facts on the record because the trial court denied defendant's motion for an evidentiary hearing. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). To establish a claim of ineffective assistance of counsel, defendant bears the heavy burden of showing that trial "counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

Defendant first claims that trial counsel should have moved for a forensic examination to determine whether defendant's brain injuries and addiction to prescribed medications affected his competency. "[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 that he is unable to assist in his defense." *People v Mette*, 243 Mich App 318, 331; 621 NW2d 713 (2000). However, some showing of incompetency must be made before a forensic examination can be obtained to determine whether defendant is incompetent. *People v Spry*, 74 Mich App 584, 590-592; 254 NW2d 782 (1977). After a thorough review of the record, we are unable to find any indication that a forensic examination was necessary. Defendant argues that he sustained trauma to his brain as a result of a past accident involving drywall; however, he does not offer any affidavits or other proof to support his claim. Nor did defendant's wife mention these alleged brain injuries when she described his other medical problems. Regarding the drywall incident, she described how "he lost his eye socket and his facial bones" as a result of being struck in the head by the drywall. Defendant also cites his wife's testimony to show that trial counsel should have known that he was addicted to prescription medications. Yet, while she testified that defendant was frequently on pain medication, she did not in any way indicate that defendant was actually addicted to the pain medication. Moreover, defendant has failed to offer any proof that would show how the pain medications would have rendered him incompetent. Therefore, defendant has not shown that it was objectively unreasonable for trial counsel to decide not to move for a forensic examination as there were no indications that defendant was mentally incompetent.

Defendant also takes exception to the fact that he only met with trial counsel twice before trial. There is no absolute minimum number of times a counsel need meet with a client in order to prepare for trial. What is important is the impact on counsel's preparation, and defendant advances nothing more in support than his own speculation that counsel could not have been prepared after meeting with him twice. There is nothing in the record itself that would suggest that counsel was unprepared.

Next, defendant contends that trial counsel's failure to contact anyone on a list of potential witnesses denied him the effective assistance of counsel. Failing to reasonably investigate could potentially deny a defendant the effective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). However, "[i]t must be shown that the failure resulted in counsel's ignorance of valuable evidence which would have substantially benefited the accused." *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). The defendant must also establish the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Here, defendant has failed to provide us with an offer of proof or affidavit showing the factual basis for the record he wishes to build at a *Ginther*<sup>1</sup> hearing. Instead we are left to speculate as to who the unnamed witnesses are and about what they might have testified. This is simply is not enough to warrant a *Ginther* hearing.

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant also argues that trial counsel's failure to investigate the complainant's background resulted in his inability to properly impeach the complainant during cross-examination. Defendant claims that he discovered that the complainant had previously been convicted of several felonies and had 11 personal protection orders entered against him. However, this evidence was inadmissible as the felony convictions were more than ten years old, MRE 609, and the existence of the personal protection orders would have been improper character evidence, MRE 404. Counsel cannot be deemed ineffective for failing to advocate a meritless position. *People v Payne*, 285 Mich App 181, 191; 774 NW2d 714 (2009).

Defendant also asserts that trial counsel failed to investigate the extent of the complainant's working relationship with the Clinton Township Police Department. He argues that this evidence could have been used during cross-examination to show that the responding officers disregarded defendant's claim that he had been assaulted by the complainant the night before the charged offenses occurred. The e-record does not support this contention. Defendant failed to provide or cite any evidentiary support for his assertion below. All the record contains is defendant's speculation that "[t]here is some allegation or evidence that the complainant may in fact have done work . . . on vehicle s either privately owned by members of the Clinton Township Police Department or by the . . . Department itself." This equivocal conjecture does not establish the factual basis of his allegation. Further, there is nothing in the testimonial record that even hints at any familiarity between the police department and the complainant. Finally, even if it is true that the complainant had worked on vehicles owned by the police department or privately by individual officers, defendant has failed to show how he was prejudiced by counsel's failure to explore the matter on cross-examination. Familiarity does not necessarily imply bias on the part of the police.

We also reject defendant's argument that counsel was ineffective for failing to introduce evidence that defendant received medical attention after being assaulted by the complainant the night before the charged offenses occurred. Failure to present evidence is presumed to be sound trial strategy unless a defendant is denied a defense that may have altered the trial. *Payne*, 285 Mich App at 190. Here, defendant has not presented any evidentiary support for his claim that he actually received medical attention. Moreover, even if the records do exist, defendant was still able to present his defense that it was the complainant who committed the assault. Because trial counsel had the discretion to determine which evidence to present, defendant has not established counsel's performance was deficient under an objective standard of reasonableness.

Finally, we note that because CCW is one of the crimes for which a defendant may not stand convicted of felony-firearm, MCL 750.227b(1), the sentences imposed for the CCW convictions must run concurrent with the felony-firearm sentences. See *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994).

We affirm defendant's convictions and sentences as modified by this opinion. We remand for entry of an amended judgment of sentence. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Jane E. Markey

/s/ Kirsten Frank Kelly