

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 1, 2012

v

DELRAY DEQUAN ALLEN,
Defendant-Appellant.

No. 302080
Genesee Circuit Court
LC No. 10-026583-FH

Before: SAAD, P.J., and K. F. KELLY and M. J. KELLY, JJ.

PER CURIAM.

Defendant Delray Dequan Allen appeals by right his jury convictions of carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant as a habitual offender, third offense, MCL 769.11, to serve two concurrent terms of seven to 120 months in prison for carrying a concealed weapon and being a felon in possession of a firearm. It also sentenced defendant to serve two years in prison for the felony-firearm conviction with credit for 199 days served. Because we conclude that there were no errors warranting relief, we affirm.

Defendant argues that his trial counsel was ineffective because she allowed the admission of a stipulation that defendant had been convicted of an unnamed prior felony for purposes of the felon in possession charge, leaving the jury to speculate about the nature of the felony. Because the trial court did not hold an evidentiary hearing, our review is limited to the facts contained in the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). In order to warrant relief, defendant must show that his trial lawyer's conduct fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the error, the outcome of the lower court proceeding would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). In establishing this type of error, defendant bears a heavy burden and must overcome a strong presumption that his lawyer's decisions were motivated by sound trial strategy. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

In order to convict defendant of being a felon-in-possession, the prosecutor had to present evidence that defendant was ineligible to possess a firearm under the statute as a result of a prior felony conviction. See MCL 750.224f; *People v Perkins*, 473 Mich 626, 630-632; 703 NW2d 448 (2005). Although a felony conviction is a required element of establishing a defendant's guilt of a charge of felon in possession, the prosecutor and defense counsel may agree to stipulate that the defendant has been convicted of a prior felony in order to minimize any prejudice to the defendant. *People v Green*, 228 Mich App 684, 691-692; 580 NW2d 444 (1998). Indeed, defendant has a right to stipulate to his status as a convicted felon in order to prevent the jury from discovering the exact nature of the prior conviction. *People v Swint*, 225 Mich App 353, 377-378; 572 NW2d 666 (1997).

In this case, the prosecutor and defense counsel stipulated that defendant had been convicted of a felony and, as a result, was ineligible to possess a firearm. Defendant argues that his counsel was ineffective because she allowed the stipulation even after a prospective juror asked if defendant's prior felony was violent or nonviolent. The juror thought that the nature of the felony was relevant. However, by the end of the exchange between the juror, the Court, and the attorneys, the prospective juror appeared to understand that whatever the nature of the prior felony, defendant was not eligible to possess a handgun.

Defense counsel's decision to stipulate to a prior felony was an issue of trial strategy. Defense counsel conducted voir dire, was familiar with the credibility and demeanor of the witnesses and defendant, understood the evidence and the testimony, and was aware of the prosecution's strategy. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). As such, she was in a better position to make a decision regarding the stipulation of defendant's prior felony than this Court. This Court "will not second-guess counsel regarding matters of trial strategy, and . . . will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Moreover, defendant has failed to show that, but for his trial lawyer's decision to stipulate that he was not eligible to possess a firearm, the proceeding would have turned out differently. Whether defense counsel stipulated to a prior felony or allowed admission of evidence of defendant's marijuana conviction, the only element at issue was defendant's "possession" of the firearm. The jury obviously rejected the testimony that defendant had no knowledge or possession of the gun when it rendered its guilty verdict. Accordingly, the jury must have believed the testimony of the state troopers, who stated that defendant told them that he took possession of the gun and placed it under the driver's seat of the car. Defense counsel's strategic decision to stipulate to an unnamed prior felony did not render her performance deficient merely because defendant was not acquitted of the charges. *Pickens*, 446 Mich at 330.

Defendant also argues that this Court should order the correction of a clerical error on the judgment of sentence. However, the trial court has already corrected this error upon the stipulation of the prosecution. Accordingly, there is no error for this Court to correct.

There were no errors warranting relief.

Affirmed.

/s/ Henry William Saad

/s/ Kirsten Frank Kelly

/s/ Michael J. Kelly