

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 10, 2013

v

SETH NATHAN STAPLES,
Defendant-Appellant.

No. 312233
Washtenaw Circuit Court
LC No. 12-000178-FH

Before: MURPHY, C.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant of possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(iii), and the trial court sentenced defendant to 18 months' probation. Defendant appeals as of right. We affirm.

Defendant's conviction arises from a search of his vehicle that yielded 225 grams of marijuana. Defendant's sole claim on appeal is that he was denied the effective assistance of counsel at trial because defense counsel failed to inform him that he did not have a viable defense and that if he went to trial instead of pleading guilty he would not be eligible to receive probation under the Holmes Youthful Trainee Act (HYTA), MCL 762.11 *et seq.* He asserts that he would have pleaded guilty if he had known he would be ineligible for HYTA if he went to trial and was found guilty.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law, reviewed for clear error and *de novo*, respectively. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because this claim is unpreserved, review is limited to errors apparent on the record. *People v Lockett*, 295 Mich App 165, 186; 814 NW2d 295 (2012).

"The right to trial counsel is guaranteed by the United States Constitution and the Michigan Constitution. [US Const, Am VI; Const 1963, art 1, § 20.] Where the issue is counsel's performance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Defendant also has the burden of establishing the factual predicate to support his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

The HYTA gives courts the discretion to assign criminal defendants, between the ages of 17 and 19, to probation under youthful trainee status. MCL 762.11(1). Such assignment delays the proceedings against the defendant until the terms of probation are completed. If the probation is completed, the defendant is discharged and the proceedings against the defendant are dismissed. MCL 762.14(1). However, the trial court maintains the discretion to terminate the defendant's youthful trainee status at any time. MCL 762.12. If the status is revoked, an adjudication of guilt is entered and the proceedings are resumed. *Id.* As a prerequisite to receiving probation under the HYTA, the defendant must plead guilty. MCL 762.11(1).

The record is silent with respect to whether defense counsel informed defendant of the eligibility requirements for youthful trainee status. Defendant's claims of error rely on his affidavit that he attached to his motion for remand and his brief on appeal, and were not part of the lower court record or the record before this Court on appeal. However, our review of defendant's claim of ineffective assistance of counsel is limited to errors apparent on the record. Therefore, we decline to consider the affidavit. Consequently, defendant fails to establish a factual predicate, on the basis of the record properly before us, for his claim of ineffective assistance of counsel. *Hoag*, 460 Mich at 6.

Moreover, defendant does not explain, and cannot show, how the proceedings would have been different but for defense counsel's alleged constitutionally deficient representation. Defendant does not allege that the prosecutor offered a plea bargain to defendant that included HYTA status. He also does not allege that the trial judge agreed to youthful trainee status as part of a *Cobbs*¹ agreement offered to induce a plea. The mere fact that defendant may have been eligible for youthful trainee status does not automatically entitle defendant to a sentence that included youthful trainee status had he pleaded guilty as charged. The granting of youthful trainee status rests in the discretion of the sentencing judge. MCL 762.11(1); *People v Khanani*, 296 Mich App 175, 179; 817 NW2d 655 (2012). Defendant fails to make any argument demonstrating a reasonable probability that probation under the HYTA would have been granted.² Therefore, even if defendant could establish that his trial counsel's performance was deficient, defendant nevertheless fails to show a reasonable probability that the outcome of the proceedings was affected. *Odom*, 276 Mich App at 415.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello

¹ *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

² The record reveals that defendant was on probation at the time of the present offense.