

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS DAVID REINWAND,

Defendant-Appellant.

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UNPUBLISHED

August 6, 1996

No. 173408

LC No. 93-001908-FH

Before: Hood, P.J., and Markman and A. T. Davis,\* JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of breaking and entering an occupied dwelling with the intent to commit a larceny. MCL 750.110; MSA 28.305. Subsequent to his jury conviction, defendant pled guilty to being an habitual offender fourth offense. MCL 769.12; MSA 28.1084. He was sentenced to a term of imprisonment of 12 to 20 years. We affirm.

Defendant's principle contention on appeal is that he was denied the effective assistance of appellate counsel because his initial appellate counsel failed to create a post-trial record to support claims that defendant had been denied effective assistance of trial counsel. To find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that he was thereby denied a fair proceeding. *People v Pickens*, 446 Mich 298, 302-03; 521 NW2d 797 (1994); *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). A defendant must further show that, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Although the performance of appellate counsel may be deemed ineffective assistance of counsel, *People v Lyons*, 442 Mich 895; 502 NW2d 41 (1993), defendant is not entitled to relief in the instant case. The only prejudice defendant experienced by appellate counsel's failure to seek a hearing to

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\* Circuit judge, sitting on the Court of Appeals by assignment.

determine the effectiveness of trial counsel, *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), was the right to file a motion for a new trial without a remand from this Court. We are not convinced that appellate counsel's failure to file such a motion here in light of trial counsel's conduct evidences appellate conduct falling below an objective standard of reasonableness. Further, had a *Ginther* hearing taken place by right, there is no way to know what the results would have been. Because such results are speculative, defendant has not carried his "heavy" burden of demonstrating that he suffered actual prejudice from the performance of his previous appellate counsel. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). It simply cannot be assumed that the trial court would have found that trial counsel was ineffective if defendant's previous appellate counsel had timely filed a motion for a new trial. Under such circumstances, defendant has not established the necessary prejudice to enable a finding that he was denied effective assistance of appellate counsel.

In addition, once new appellate counsel was appointed, a discretionary motion to remand for the purpose of a *Ginther* hearing was filed with this Court, which was denied. This Court was apprised of defendant's reasons why a *Ginther* hearing was needed but did not find them persuasive. Our additional review of trial counsel's performance leads us to a similar conclusion. We are not persuaded that trial counsel's performances fell below an objective standard of reasonableness which caused prejudice to defendant. While trial counsel can be second-guessed on several of his decisions, we find that he was actively engaged at trial and cognizant of significant issues. His failure, for example, to seek a limiting instruction concerning evidence of another breaking and entering by defendant with the same co-perpetrators on the same day as the charged offense must be viewed against the backdrop that counsel sought by a motion in limine to exclude such evidence altogether. With respect to the testimony of one of these co-perpetrators that he and defendant had been involved in previous "breaking and enterings", which testimony exceeded the court's ruling that he could only mention having been involved with a single previous breaking and entering on the same day as the instant offense, we find trial counsel's failure to object and call attention to the marginal additional impact of this testimony to be understandable trial strategy. Nor are we prepared to find ineffective assistance on the basis that counsel failed to object to the prosecutor's introduction of the MRE 404(b) evidence when it was brought to his attention only during discussion of pretrial motions in limine rather than with proper pretrial notice.<sup>1</sup>

Defendant next argues that his sentence significantly exceeded the recommendations of the sentencing guidelines. However, there is no relationship between the guidelines and an habitual offender's sentence. *People v Gatewood*, order of the Supreme Court, entered March 19, 1996 (Docket No. 104913); *People v Haacke*, \_\_\_ Mich App \_\_\_; \_\_\_ NW2d \_\_\_ (Docket No. 185082, issued 7/5/96). Nor, under the present circumstances, where defendant had prior convictions of felonious assault, felony-firearm, larceny in a building and breaking and entering; where defendant was on parole at the time of the instant offense; and where a mother was home alone with a baby when defendant violently kicked in the door of her home, do we find defendant's sentence to be disproportionate.

Finally, we do not find any error by the trial court in its refusal to appoint substitute counsel for defendant. Appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *Ginther*, supra at 441. Such a decision is reviewed for abuse of discretion. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1992). However, we do not find this issue to be preserved. Following defendant's objection at a pretrial conference to his appointed counsel, the court told defendant that it also wanted to hear from his counsel regarding defendant's lack of satisfaction and that defendant should discuss this matter with his counsel before the issue would be considered the court. Neither defendant nor his counsel ever raised the matter with the court thereafter. Indeed, defendant declined his own counsel's invitation to again raise the matter with the court prior to opening arguments. We do not find this issue to be properly before this Court.

Affirmed.

/s/ Harold Hood

/s/ Stephen J. Markman

/s/ Alton T. Davis

<sup>1</sup> A court's decision whether to admit evidence rests within its discretion. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). The court's decision here to admit the evidence of the prior breaking and entering on the basis that it had occurred immediately prior to the charged offense and was relevant to show defendant's plan, scheme or intent was not an abuse of discretion under MRE 404(b). *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). Nor was its conclusion that the probative value of this evidence outweighed any conceivable prejudicial effect. MRE 403.