

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD PATTERSON,

Defendant-Appellant.

UNPUBLISHED

September 17, 1996

No. 172899

LC No. 93-007604

Before: Gribbs, P.J., and Young and W. J. Caprathe,* JJ.

PER CURIAM.

Defendant appeals as of right from a jury conviction of aggravated stalking, MCL 750.411i; MSA 28.643(9). The lower court sentenced defendant to two to five years in prison. We affirm.

Defendant first contends that his conviction should be vacated because the aggravated stalking statute is unconstitutionally vague and overbroad. This Court in a recent case has rejected the arguments that are raised by defendant. *People v White*, 212 Mich App 298, 308; 536 NW2d 876 (1995).

Defendant also contends on appeal that he was denied effective assistance of counsel. Defendant's motion in this Court for a remand for a hearing pursuant to *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973), was granted. To justify reversal of an otherwise valid conviction on the basis of ineffective assistance of counsel, a defendant must demonstrate "that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). The defendant must overcome the presumption that counsel's actions could be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). "If there is a 'reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different,' the assistance is considered ineffective." *People v Pubrat*, 451

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

Mich 589, 596; 548 NW2d 595 (1996). We find that defendant has failed to demonstrate that he was denied effective assistance of counsel.

Defendant alleges five areas of deficiency. First, he contends that counsel did not properly prepare for trial. We disagree. At the *Ginther* hearing, counsel presented sufficient facts to establish proper preparation.

Next, defendant asserts that counsel failed to attempt to clarify the anti-stalking injunction or to challenge its content or constitutionality. The injunction was valid and constitutional. A claim for ineffective assistance is not established by counsel's failure to argue a frivolous or meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant further states that counsel was ineffective because he failed to properly advise defendant when defendant decided, in the midst of trial, to plead guilty. The record at trial and at the *Ginther* hearing, however, establishes that counsel properly advised defendant, assuring that his plea was voluntarily and knowingly made. *People v Effinger*, 212 Mich App 67, 70; 536 NW2d 809 (1995).

Defendant next asserts that he was denied effective assistance by his counsel's failure to call several witnesses and abandonment of his defense strategy. The decision to call witnesses is a matter of trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In order to overcome the presumption that counsel's conduct was sound trial strategy, defendant must show that the failure to call the witnesses deprived him of a substantial defense that would have affected the verdict. *Id.* Defendant has failed to make this showing, and the record indicates that counsel never abandoned his trial strategy.

Finally, defendant states that counsel failed to provide effective assistance because he was not qualified or competent to assume defendant's representation. We find that counsel adequately prepared himself under the circumstances, studying the statute and seeking out the aid and advice of other lawyers with expertise in the field, as mandated under Rule 1.1 of the Michigan Rules of Professional Conduct.

Defendant next asserts on appeal that the anti-stalking injunction under which he was charged was invalid as there was a subsequent, superseding injunction, ordered by the court and entered in defendant's divorce decree, establishing penalties of only ninety days in jail or a fine of \$500. We disagree. The two injunctions were clearly entered for different purposes. At the time of defendant's divorce from the victim, the divorce provisions specifically permitted a court to enter a preliminary injunction during a divorce proceeding to enjoin a party from entering onto certain premises, and assaulting, beating, molesting or wounding a person. 1978 PA No. 318, MCL 552.14(3); MSA 25.94(3). Violation of such an order subjected the violator to the court's contempt powers. 1978 PA No. 318, MCL 552.14(5); MSA 25.94(3). This Court has stated that this contempt provision serves to vindicate the court's authority: "contempt is designed to punish offenses against the court." *People v Szpara*, 196 Mich App 270, 272; 492 NW2d 804 (1992), quoting *People v McCartney (On Remand)*, 141 Mich App 591, 596; 367 NW2d 865 (1985).

The stalking statutes, MCL 750.411h and 750.411i; MSA 28.648(8) and 28.648(9), are distinct and separate from the provision permitting the issuance of injunctive orders against a party in a divorce action. The stalking statutes criminalize certain conduct. Indeed, the anti-stalking injunction entered against defendant enjoined him from “stalking . . . [the victim] including but not limited to, frightening, intimidating, harassing or molesting . . . [or] following [the victim]” The anti-stalking injunction barred conduct not addressed in the divorce-related injunction. The permanent mutual injunction in the divorce decree contained no language rescinding or altering the terms of the anti-stalking injunction. Therefore, we conclude that the anti-stalking injunction was valid at the time of defendant’s arrest.

Finally, defendant contends that his sentence of two to five years on his aggravated stalking conviction violated the principle of proportionality established in *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990), which requires a sentence to be proportionate to the seriousness of the circumstances of the offense and offender. *Id.* Reviewing the lower court’s sentence for an abuse of discretion, *People v Parrish*, 216 Mich App 178, 184; 549 NW2d 32 (1996), we find that defendant’s sentence did not violate the principle of proportionality. The lower court judge stated that in making her sentencing decision, she considered the conclusions and recommendations made in the PSIR, indicating that defendant could not grasp the seriousness of his behavior and should be incarcerated. In addition, the court noted her concern for the safety of the victim and the minor children of the victim and defendant. Therefore, we find that the sentence was proportional to the offense and the offender and the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Roman S. Gribbs
/s/ Robert P. Young, Jr.
/s/ William J. Caprathe