

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE DUNSON,

Defendant-Appellant.

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UNPUBLISHED  
November 1, 1996

No. 186491  
LC No. 94-000598

Before: Michael J. Kelly, P.J., and Hoekstra and E.A. Quinnell,\* JJ.

PER CURIAM.

Defendant was found guilty at a bench trial following the failure of the entry of a plea, as offered by defendant under *People v Cobbs* 443 Mich 276; 505 NW2d 208 (1993), of murder, second degree, MCL 750.317; MSA 28.549 and felony firearm, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to ten to twenty years on the murder conviction and two years consecutively on the felony firearms conviction. Defendant appeals as of right.

Defendant claims that he was denied effective assistance of counsel when his attorney allowed the case to proceed to bench trial before the same judge that heard the aborted guilty plea. This court recognizes that defense counsel may have a strategic reason for keeping the same judge after an aborted guilty plea. Defense counsel's actions are presumed to be sound trial strategy. Defendant has not offered any proof of judicial bias nor given evidence of his attorney's reasons for the decision. There is no indication that defense counsel's decision was unsound. *People v Cocuzza*, 413 Mich 78; 318 NW2d 465 (1982). Defendant has failed to carry his burden and has shown neither cause nor prejudice. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Defendant also claims that his attorney's representation was ineffective because the attorney failed to urge the lesser offense of manslaughter and failed to argue self defense at trial. The record belies this claim abundantly. The manslaughter aspect was vigorously explored at trial. In his closing argument defense counsel first summarized the testimony and then stated: "now as much as the prosecutor would like to believe that this is not instance of manslaughter, I will approach the Court that

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

it is very likely just that. In fact, that's what exactly what I think it is". For six more pages defense counsel explored the ramifications of the proofs and compared and contrasted the mens rea for manslaughter and second degree murder in the context of the evidence presented. Defense counsel closed by arguing: "So I am suggesting to the court to do what is justice in this case, to find a finding of manslaughter". Appellate counsel's argument on this aspect of the appeal is frivolous at best and inexplicable at worst.

On the question of self defense, appellant's argument is unsupported with any case law and since the trial court made a finding that there was no basis for a claim of self defense no reversible error can be shown. A defendant is denied effective assistance of counsel where his attorney fails to pursue a defense which "might well have made a difference in the outcome of the trial". *People v McVay*, 135 Mich App 617; 354 NW2d 281 (1984). However, in resolving an ineffective assistance claim this court will not substitute it's judgment for that of trial counsel in matters of trial strategy. Clearly trial counsel decided to focus on the manslaughter theory and to rely on defendant's testimony that the gun went off accidentally after it was handed to defendant instead of urging that the defendant fired it intentionally but in self defense.

Lastly, defendant claims the sentence violated the principle of proportionality. This argument also is completely meritless. The sentence was within the guidelines and was at the lower end of the guidelines. A minimum sentence which is within the guidelines is presumptively valid. *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995). A limited criminal record is not an unusual circumstance which overcomes the presumption. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994).

Defendant was not denied effective assistance of counsel nor did his sentence violate the principal of proportionality.

Affirmed.

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

/s/ Edward A. Quinnell