

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS JAMES KINCADE,

Defendant-Appellant.

UNPUBLISHED

November 21, 1997

No. 190068

Recorder's Court

LC No. 85-2809

Before: Griffin, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant appeals by leave granted the April 26, 1991 order of the Recorder's Court denying his motion for new trial based on ineffective assistance of counsel.¹ We affirm.

This appeal stems from the 1985 shooting of an individual during a drug deal; defendant did not dispute the fact that he shot and killed the victim, but instead argued that the shooting was in self-defense. Defendant was convicted of first-degree murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b; MSA 28.424(2), and was sentenced to life in prison without parole for the murder conviction and two years in prison for the felony-firearm conviction. In 1986, defendant filed with this Court a motion to remand for an evidentiary hearing, arguing that he had been denied his constitutional right to the effective assistance of trial counsel. Although this Court granted defendant's motion, defendant, together with his appellate counsel, decided to abandon the ineffective assistance claim. Thereafter, a claim of appeal was filed in which defendant did not raise the ineffective assistance issue, and defendant's convictions were affirmed by this Court. *People v Kincade*, 162 Mich App 80; 412 NW2d 252 (1987).

Defendant then filed a motion for a new trial in the Recorder's Court; the motion was denied. Defendant filed a delayed application for leave to appeal from that order, which was denied by this Court, Unpublished order of the Court of Appeals, decided November 22, 1988 (Docket No. 104129), and by the Supreme Court, 432 Mich 909 (1989). Defendant again filed a motion for a new trial in the Recorder's Court, which was denied, and an application for leave to appeal from denial of that motion, which was also denied (Unpublished order of the Court of Appeals, decided March 15,

1990 [Docket No. 121864]). However, the Supreme Court remanded the matter with instructions “to provide a hearing on defendant’s claim that he should receive a new trial because he was denied effective assistance of counsel. MCR 7.302(F)(1).” *People v Kincaid*, 436 Mich 883; 461 NW2d 372 (1990). Hearings were held in the Recorder’s Court on January 23 and 24 and April 26, 1991, and the court again denied defendant’s motion for a new trial.

Defendant then filed a complaint in this Court for superintending control, and although the trial court was ordered to provide defendant with a copy of its decision and a transcript of the proceedings, the Court denied defendant’s request for superintending control. Contemporaneously with that complaint, defendant filed an appeal as of right from the trial court’s decision, but this Court dismissed the appeal for failure to file a final order. The Supreme Court then remanded the appeal to this Court for consideration as on leave granted, *People v Kincade*, 439 Mich 1022; 485 NW2d 504; 486 NW2d 666 (1992). This Court then held that defendant was not entitled to an appeal as of right of the appointment of appellate counsel. *People v Kincaid (On Remand)*, 206 Mich App 477, 481-482; 522 NW2d 880 (1994). The Court stated, however, that defendant would be entitled to file a delayed application for leave to appeal the trial court’s order denying his motion for a new trial. *Id.* at 483. The Supreme Court denied leave to appeal that decision in *People v Kincaid*, 448 Mich 930; 534 NW2d 520 (1995), and defendant subsequently filed the delayed application. This Court granted leave after hearing defendant’s motion for rehearing, and this appeal followed.

The issues before this Court arise from defendant’s claim of ineffective assistance of trial counsel (due to counsel’s failure to go to the crime scene prior to cross-examining the prosecution’s witnesses) and claim of ineffective assistance of appellate counsel (due to counsel’s decision not to act upon a remand order by this Court granting him a *Ginther*² hearing as part of his initial appeal as of right). The trial court considered these issues in 1991 in relation to defendant motion for a new trial,³ but found that defendant had failed to sustain his claims of ineffective assistance. After reviewing the record, we find that defendant’s claims are meritless.

Defendant first argues that the trial court erred by failing to grant him relief from judgment; this issue stems from defendant’s claim that he received ineffective assistance of trial counsel because trial counsel failed to visit the crime scene. We disagree and hold that the trial court did not err because defendant failed to demonstrate good cause for not raising this issue in his initial appeal and was unable to show that he was prejudiced by counsel’s purported errors. MCR 6.508(D)(3).

To establish ineffective assistance of counsel, a defendant must show that “counsel’s performance was below an objective standard of reasonableness under prevailing professional norms” and that “there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Claims of ineffective assistance must be evaluated under an objective standard of reasonableness. *Id.* at 687-688. Effective assistance of counsel is presumed, and a defendant bears a heavy burden of proving otherwise. *Id.* at 687. We believe that defendant has failed to meet this burden because he did not show that counsel’s failure to investigate the crime scene was unreasonable or that the result of the trial would have been altered had he visited the scene.

At defendant's 1991 *Ginther* hearing, defendant's trial counsel testified that he did not visit the scene of the crime because, in his professional opinion, the topography of the scene was not relevant to the primary issue in the case (whether defendant shot the victim in self-defense). The trial court found that counsel's failure to visit the scene did not impede his ability to adequately present defendant's claim of self-defense and that, if counsel had visited the scene, it would not have altered the result at trial. We believe that this conclusion is supported by the record. We find that trial counsel adequately advanced defendant's claim of self-defense, that his failure to visit the scene did not constitute a lack of preparation for trial, and that the result of the trial would not have been altered if trial counsel had visited the scene.

Defendant next argues that he received ineffective assistance of appellate counsel because appellate counsel failed to pursue his claim of ineffective assistance of trial counsel. We disagree, and hold that the trial court did not err in denying defendant's motion for a new trial on this basis. To establish a claim of ineffective assistance of appellate counsel, a defendant must show that counsel's performance was deficient, and, under an objective standard of reasonableness, that the error was so serious that counsel was not functioning as an attorney as guaranteed under the Sixth Amendment. *People v Hurst*, 205 Mich App 634, 640-641; 517 NW2d 858 (1994). To show that appellate counsel was ineffective for failing to raise an issue on appeal, a defendant must overcome the presumption that the failure to raise an issue was sound appellate strategy and must establish that the deficiency was prejudicial. *People v Reed*, 198 Mich App 639, 646-647; 499 NW2d 441 (1993), *aff'd* 449 Mich 375; 535 NW2d 496 (1995). Defendant has not done so.

First, defendant could not show that he was prejudiced by appellate counsel's failure to raise that issue, because, as we conclude above, his trial counsel was not ineffective. MCR 6.508(D)(3). Second, the record indicates that appellate counsel made a strategic decision not to pursue defendant's nonmeritorious claim of ineffective assistance of trial counsel and that defendant agreed with that decision. Thus, although appellate counsel may have failed to inform defendant of the remand order from this Court, such failure was not error because he and defendant decided to abandon the ineffective assistance claim. Finally, defendant mistakenly asserts on appeal that the order of remand constituted evidence that his Court found his claim of ineffective assistance meritorious. To the contrary, such an order of remand is only issued to permit a defendant to make a testimonial record as required by *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), and does not constitute an evaluation of the merits of the claim by this Court.

Affirmed.

/s/ Richard Allen Griffin

/s/ David H. Sawyer

/s/ Peter D. O'Connell

¹ The epic saga of the present application, but for the final act, is addressed in *People v Kincade (On Remand)*, 206 Mich App 477 (1994). That published decision provided the authorization for defendant's delayed application for leave to appeal.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³ Although the court treated defendant's motion on remand as a motion for new trial, defendant would have only been entitled to relief from judgment pursuant to MCR 6.501 *et seq*; *Kincaid, supra* at 482. Therefore, these issues will be reviewed as if the trial court denied defendant relief from judgment.