

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WYEL LAVANCE PRICE,

Defendant-Appellant.

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UNPUBLISHED

January 5, 2001

No. 215577

Oakland Circuit Court

LC No. 98-160795-FH

Before: Saad, P.J., and White, and Hoeksta, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of carrying a concealed weapon (CCW), MCL 750.227; MSA 28.424, and being a felon in possession of a firearm, MCL 750.224f; MSA 28.421(6). Defendant was sentenced to 2 to 7½ years' imprisonment for the CCW conviction and 2 to 7½ years' imprisonment for the felon in possession of a firearm conviction, the sentences to run concurrently. We affirm.

Defendant was a passenger in a vehicle proceeding south on Woodward Avenue in Pleasant Ridge. Pleasant Ridge Police Officer Michael Bunting and his partner noticed a temporary registration in the back window. Wanting to check the validity of the temporary registration, the officers activated their emergency lights to stop the vehicle. When the vehicle came to a stop in Ferndale, defendant got out of the car and ran north into an alley. Bunting followed defendant, lost sight of him for a time, and eventually apprehended him. Bunting did not see defendant throw or toss anything away during the chase.

Ferndale Police Officer Michael McCullough proceeded to the area and arrived approximately five minutes after the stop. McCullough, a canine handler, brought a track dog to the scene. Eventually, the track dog led McCullough to an area at the base of some heavy bushes where he observed a .22 caliber semi-automatic gun. The gun appeared to have been placed there recently. Defendant was arrested and charged with CCW and being a felon in possession of a weapon.

Defendant's first issue on appeal is that the evidence obtained by the police following the stop of the vehicle defendant was riding in should have been suppressed. An objection in the form of a motion to suppress must be made in order to advance as error the contention that illegally obtained evidence was admitted at trial. *People v Marji*, 180 Mich App 525, 533-534;

447 NW2d 835 (1989). In this case, defendant did not make a motion to suppress the evidence and, therefore, failed to properly preserve this issue for appellate review.

Defendant also asserts that he was denied the effective assistance of counsel. We disagree. Because defendant failed to move for a new trial or a *Ginther*<sup>1</sup> hearing before the trial court, this Court must review this issue on the basis of the existing record. *Marji, supra*, 180 Mich App 533. To establish a denial of effective assistance of counsel under the state and federal constitutions, a defendant must demonstrate that counsel's performance was deficient, falling below an objective standard of reasonableness, and the deficiency so prejudiced the defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Furthermore, the defendant must overcome a strong presumption that the challenged action is sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway, supra*, 446 Mich 687; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A defendant can overcome the presumption by showing that counsel failed to perform an essential duty and that the failure was prejudicial to the defendant. *People v Hampton*, 176 Mich App 383, 385; 439 NW2d 365 (1989).

Defendant argues that he was denied the effective assistance of counsel due to defense counsel's failure to move to suppress the evidence seized following the traffic stop. We disagree. Since defense counsel is not required to argue a meritless position, *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), the crux of this issue is whether a motion to suppress would likely have been successful. We conclude that such a motion would not have been successful.

In determining the merits of a motion to suppress in this case, there are several factors that require analysis. First, the threshold question is whether defendant, as a passenger in the vehicle, has standing to challenge the validity of the traffic stop. We agree with defendant that he does have standing. Next is the question whether the police officers had a legitimate reason for stopping the vehicle in which defendant was a passenger. We agree with defendant that the stop was improper. *Delaware v Prouse*, 440 US 648; 99 S Ct 1391; 59 L Ed 2d 660 (1979).

The last question in determining the success of a motion to suppress is whether defendant was actually seized, thereby implicating the Fourth Amendment. The prosecution argues that, because defendant fled immediately after the vehicle came to a stop, defendant was not seized and, therefore, the validity of the stop is inconsequential. We agree. The prosecution relies on *California v Hodari*, 499 US 621; 111 S Ct 1547; 113 L Ed 2d 690 (1991), for the proposition that, because defendant fled, he was not seized until after he abandoned the gun and, therefore, there was no Fourth Amendment issues in the recovery of the gun. Defendant has not addressed *Hodari*.

In *Hodari*, police officers wearing street clothes and a jacket with "Police" on the front and back were proceeding around a street corner in an unmarked vehicle when they saw four or

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

five youths huddled around a car parked at the side of the road. *Id.* at 622-623. When the youths saw the approaching vehicle, they fled. *Id.* at 623. The police officers became suspicious and gave chase. Officer Pertoso chased the defendant on foot and saw the defendant toss away what appeared to be a small rock. Immediately thereafter, Pertoso tackled the defendant and handcuffed him. *Id.* The small rock was found to be crack cocaine. In the juvenile proceedings against the defendant, the defendant moved to suppress the cocaine evidence. *Id.*

The United States Supreme Court held that a show of authority by a police officer does not constitute a seizure under the Fourth Amendment. *Hodari, supra*, 499 US 626:

[S]ince Hodari did not comply with [the police officer's show of authority] he was not seized until he was tackled. The cocaine abandoned while he was running was in this case not the fruit of a seizure. [*Id.* at 629.]

The Supreme Court further stated that if a suspect is arrested and then escapes, "for Fourth Amendment purposes there is [not] a continuing arrest during the period of fugitivity."

In this case, at the time defendant disposed of the gun, he was not seized. Defendant fled from the passenger side of the vehicle after it came to a stop. Bunting pursued defendant but lost sight of him during the chase, and then regained sight of defendant walking toward him on a sidewalk. The gun was located by a track dog that followed defendant's scent up an alley, across a parking lot, to a section of fence that had an opening, through the opening in the fence, and to the base of some heavy bushes, where the gun was found. At the time defendant presumably discarded the gun, defendant was not submitting to the authority of the police nor did the police have physical custody of him. Because defendant was not seized when he discarded the gun, he would not have succeeded in suppressing the gun, and counsel was not ineffective for failing to challenge the constitutionality of the stop.

Defendant raises several other claims of ineffective assistance of counsel. Defendant admits that even if counsel had challenged the authority of the Pleasant Ridge police to effect a stop in Ferndale, the charge would not have been dismissed. Thus, defendant suffered no prejudice. We will assume that counsel's decision not to present defendant's testimony was a matter of trial strategy, absent evidence to the contrary. Further, defendant appeared to have acquiesced in that strategy at trial. Nor has defendant shown ineffective assistance based on counsel's failure to excuse a juror who had been the victim of an armed robbery, where the juror stated that she could be fair. *People v Robinson*, 154 Mich App 92; 397 NW2d 229 (1986). Regarding counsel's failure to submit a theory of the case to be read by the court, the reading of theories was waived, as is often the case where the issues are not complicated and are adequately presented in argument. Defendant has shown no prejudice. Lastly, defendant has not shown that he was prejudiced by the amendment of the information, and has not shown that the instructions were inadequate.

Defendant's final issue is that he was denied a fair trial when the jury was informed of the specific nature of his prior felony - - armed robbery - -rather than the simple fact that he was a convicted felon. To preserve an issue regarding the admissibility of evidence, a defendant must object to the evidence at the trial. *People v Nimeth*, 236 Mich App 616, 625; 601 NW2d 393 (1999). Here, defendant failed to object, and the issue is not preserved. Further, because

defendant did not offer to stipulate to the prior felony conviction, the admission of the prior conviction was not an abuse of discretion. *People v Mayfield*, 221 Mich App 656, 661; 562 NW2d 272 (1997). Additionally, the trial court instructed the jury to only consider defendant's prior conviction in relation to the felon in possession charge.

Defendant also argues that counsel was ineffective for failing to assure that only the fact of conviction, and not the offense, was presented to the jury. We agree that counsel would have been more effective had he stipulated to the existence of a prior felony, and avoided mention of the nature of the felony. Nevertheless, we do not believe that the jury's being informed of the prior armed robbery conviction was outcome determinative.

Affirmed.

/s/ Henry William Saad

/s/ Helene N. White

/s/ Joel P. Hoekstra