

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHEL N. GIBBS,

Defendant-Appellant.

UNPUBLISHED
September 2, 2003

No. 239717
Wayne Circuit Court
LC No. 01-005229

Before: Markey, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of attempted carrying a concealed weapon, MCL 750.227; MCL 750.92, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b, entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Officer Burris testified that he and Officer Johnson made a traffic stop of a vehicle that contained two occupants. Burris approached the passenger side of the vehicle while Johnson approached the driver's side. Burris stated that when Johnson asked the driver, defendant, to step out of the vehicle, he saw a gun between the driver's seat and the center console. Burris stated that while Johnson escorted defendant to the police vehicle, he monitored the passenger. Thereafter, he secured the passenger and Johnson retrieved the gun. Burris indicated that the police vehicle had a taping unit and that the encounter with defendant would have been recorded on videotape.

The trial court found defendant guilty of attempted carrying a concealed weapon, felon in possession of a firearm, and felony-firearm. The trial court sentenced defendant as a third habitual offender to concurrent terms of five months' to two and one-half years' for attempted carrying a concealed weapon and five months' to five years' for felon in possession of a firearm, and to a consecutive two-year term for felony-firearm. Defendant received credit for thirty-three days served in jail.

Another panel of this Court granted defendant's motion to remand the matter to the trial court for an evidentiary hearing on the issue of ineffective assistance of counsel pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). The evidence at the hearing on remand established that trial counsel could have obtained the tape prior to trial if he had contacted the police, and that initially, trial counsel believed that the tape was exculpatory. Trial counsel

acknowledged that when he viewed the tape for the first time he stated that he would have used it for impeachment purposes at trial; however, upon further examination of the tape and consideration of the matter, he was no longer certain that he would have used the tape. He observed that at no point on the tape did either officer handle a gun from defendant's vehicle, and noted that the tape contained possible incriminating information that he would not have wanted to put before a jury.

The trial court found that trial counsel did not render ineffective assistance. The trial court found that the tape did not contradict the testimony the officers gave at trial, did not contradict Burris' testimony that he observed the gun when Johnson removed defendant from the vehicle, and did not establish that the officers did not discover a gun in defendant's vehicle.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.*, 600. Counsel is presumed to have afforded effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that counsel rendered ineffective assistance at trial. Defendant asserts that had trial counsel obtained and viewed the tape prior to trial, he could have undermined the claim that a gun was discovered in the vehicle. He contends that had counsel utilized the tape, it is reasonably probable that the outcome of the trial would have been different. We disagree. Even assuming that trial counsel erred by simply assuming that the tape did not exist because the prosecution did not provide it, defendant has failed to establish that counsel's performance resulted in prejudice. The trial court viewed the tape and found that it did not establish that the officers did not discover a gun in defendant's vehicle, and that it did not contradict the officers' trial testimony. The trial court's conclusions after viewing the tape demonstrate that had the tape been played at trial it would not have changed the trial court's determination that defendant was guilty. Defendant has failed to show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Carbin, supra*. Defendant has not overcome the presumption that counsel rendered effective assistance at trial. *Rockey, supra*.

Prior to accepting a waiver of jury, a trial court must advise the defendant in open court of the constitutional right to trial by jury. The trial court must ascertain, by addressing the defendant directly, that the defendant understands the right to trial by jury and that the defendant voluntarily chooses to waive that right and to be tried by the court. A verbatim record must be made of the waiver proceeding. MCR 6.402(B). We review a trial court's determination that a defendant validly waived his right to a jury trial for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997).

At the final pretrial conference defense counsel informed the court that defendant wished to waive his right to a jury trial, and that he had signed the waiver form. In response to the trial court's inquiries, defendant stated that he understood that he had the right to have a jury of

twelve persons decide his case, but that he wished to waive a jury and have a trial by the court. He acknowledged his signature on the waiver form. The trial court granted defendant's request to waive the jury.

Defendant argues that his jury waiver was invalid because the trial court did not ascertain that he voluntarily chose to waive his right to a jury. We disagree. The responses that defendant gave to the trial court's direct questions indicate that defendant understood that he had the right to have a jury trial, but that he wanted the court to decide the case without a jury. Defendant acknowledged that he signed the waiver form. The trial court complied with MCR 6.402(B). The trial court's questioning was sufficient to allow it to properly ascertain that defendant understood his right to have a jury trial and that he voluntarily waived that right. *Id.*, 596; *People v Shields*, 200 Mich App 554, 560; 504 NW2d 711 (1993). Defendant does not claim that he was coerced into waiving his right to a jury trial. Reversal is not warranted on this basis. *Leonard, supra*.

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Henry William Saad