

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROGER LEE APPS,

Defendant-Appellant.

UNPUBLISHED

August 7, 2007

No. 268328

Roscommon Circuit Court

LC No. 05-004987-FH

Before: Smolenski, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of operating a vehicle under the influence of intoxicating liquor (OUIL), MCL 257.625(1)(a), third offense, MCL 257.625(9), operating a vehicle on a suspended license, MCL 257.904(1), and operating a vehicle without insurance, MCL 500.3102. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to three to 20 years in prison for OUIL, third offense, 30 days in jail for operating a vehicle on a suspended license, and 30 days in jail for operating a vehicle without insurance. Defendant appeals as of right. We affirm.

Defendant's sole argument on appeal is that trial counsel rendered ineffective assistance. Specifically, defendant contends that his trial counsel's failure to move to suppress defendant's statements was objectively unreasonable and resulted in prejudice. We disagree.

We review the trial court's findings of fact for clear error, and review the ultimate decision whether counsel rendered ineffective assistance de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In addition, because no separate evidentiary hearing was held below, this Court is limited to a review of mistakes apparent from the record. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

A criminal defendant has the right to the effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, the defendant must show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). That is, defendant must show that counsel's error was so serious that the defendant was deprived of a fair trial, i.e., the result was unreliable. *LeBlanc, supra* at 578.

As a threshold matter, in order for a defendant to succeed on a motion to suppress, the defendant must demonstrate that his statements were made during a custodial interrogation. *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987). A custodial interrogation is a “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.* at 387, quoting *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Whether an accused was in custody depends on the totality of the circumstances. The key question is whether the accused could reasonably believe that he or she was not free to leave. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999).

In *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000), this Court held that the defendant was not in police custody when he was questioned at a hospital while lying on a cot wearing a neck brace after an automobile accident. A deputy entered the hospital room and asked the defendant how many beers he had consumed, to which the defendant responded “four.” This Court concluded that the “defendant neither had been formally arrested nor had been ‘subjected to a restraint on freedom of movement of the degree associated with a formal arrest.’” *Id.* at 25, quoting *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997).

In this case, defendant was similarly situated on a hospital bed after sustaining injuries in the accident. Defendant had not been formally arrested or restrained by the officer. The officer testified that, in his opinion, defendant understood why he was being interviewed. It did not appear to the officer that defendant’s condition rendered him unable to understand or properly answer the questions. In addition, there is no evidence that defendant’s statements were involuntary. The officer further testified that defendant originally claimed that his injuries resulted from being assaulted. In *Peerenboom*, *supra* at 199, the Court observed that, a defendant’s “presence of mind to lie weighs strongly in favor of finding that [his] statements were the product of [his] own free and unconstrained will, as opposed to having resulted from an impairment of [his] self-determination.” After the officer informed defendant that he was aware of the accident, defendant admitted that he had been drinking, went off the road, and smashed his truck. After this admission, defendant still had the presence of mind to refuse a blood test. Hence, defendant could have reasonably believed that he was free to leave the hospital, and free to disregard the officer’s questions. Therefore, a motion to suppress defendant’s statements would have been without merit. Because defendant’s trial counsel was not required to advocate a meritless position, *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), we conclude that defendant’s trial counsel’s performance did not fall below an objective standard of reasonableness.

Even if defendant had prevailed on a motion to suppress, the evidence at trial overwhelmingly showed that defendant operated the truck and was intoxicated when the accident occurred. Thus, even without defendant’s admissions to the officer, the result of the proceedings would not have changed. Therefore, any error would not warrant relief. *Toma*, *supra* at 302-303.

Affirmed.

/s/ Michael R. Smolenski
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly