

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL KYEITA BAGJETT,

Defendant-Appellant.

UNPUBLISHED

January 20, 2011

No. 294431

Genesee Circuit Court

LC No. 09-024588-FH

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM.

Defendant Samuel Bagjett appeals as of right his jury conviction of being a felon in possession of a firearm (felon in possession)¹ and possession of a firearm during the commission of a felony (felony firearm).² The trial court sentenced Bagjett as a fourth habitual offender³ to 12 to 60 months in prison for the felon in possession conviction, to be served consecutively to 24 months in prison for the felony-firearm conviction. We affirm. We have decided this appeal without oral argument.⁴

I. FACTS

On the evening of October 29, 2008, Anthony Ford, a probation officer for the Michigan Department of Corrections; Devon Bernitter, a police officer with the City of Flint Police Department; and John Miller, a special agent with the Bureau of Alcohol, Tobacco, Firearms, and Explosives, went to check on Bagjett, who was on probation for a felony conviction. On

¹ MCL 750.224f.

² MCL 750.227b.

³ MCL 769.12.

⁴ MCR 7.214(E).

making contact with Bagjett at his home, Ford and Miller asked whether there were any items in the house that Bagjett, as a probationer, should not have, such as guns, alcohol, or controlled substances. Bagjett indicated that there were weapons, pointing to a mattress where they were located. The officers discovered ammunition and guns underneath a mattress in the dining room of the house. Bagjett told the officers that the guns belonged to his cousin. Bagjett was then arrested.

Dennis Carrington, Bagjett's cousin, stated that he lived with Bagjett and that he had, while Bagjett was away from the residence, brought guns into the house and placed them under Bagjett's mattress because Carrington was using that mattress while Bagjett was away. Carrington knew that Bagjett, as part of his probation, was not allowed to be around guns and so he tried to get the guns out of the house before Bagjett returned. Carrington claimed that Bagjett did not know that there were guns in the house. The sole issue at trial was whether Bagjett possessed a firearm.

During deliberations at the conclusion of a three-day trial, the jury asked the trial court for clarification of the definition of possession. After consulting with the prosecutor and defense counsel in a side bar, the trial court gave the following instruction:

To help you with that possession issue, possession is more than this. Possession can mean either that I have physical control of it treated like I'm holding this pin right now or it could mean also that the person has the right to control the object, even though it's not in his or her actual possession. You can possess items in your home without walking around with everything that's in your home. I mean it's the right to control as well as physical possession.

Approximately 16 minutes later, the jury returned its verdict, pronouncing Bagjett guilty of felon in possession of a firearm and felony-firearm.

After sentencing, Bagjett moved for a new trial on the ground that he was denied the effective assistance of counsel. Bagjett's brief in support of the motion alleged that counsel was ineffective in four ways:

1. Failing to object to the prosecutor's misstatements of fact claiming that [Bagjett] said "he had weapons", "I have guns", and "he had guns". These claims were obviously false and, by not objecting, counsel may have invited jurors to accept them as true.
2. Eliciting testimony that officers (specifically Probation Officer Ford) had received "tips" that [Bagjett] had firearms in the house, exacerbated by his [i.e., counsel's] failure to request a limiting instruction that that information could not be used by jurors as proof that [Bagjett] had firearms in the house.
3. Arguing that the only issue in the case was [Bagjett's] knowledge of the firearms, when knowledge alone is insufficient to show constructive possession (which requires knowledge and right to control, *People v Mumford*, 60 Mich App

279; 230 NW2d 395 (1975)), denied [Bagjett] the opportunity to reach a verdict consistent with the testimony of both the officers and of [Bagjett's] cousin.

4. Failing to object to the prosecutor's closing argument which was one of the most blatant "civic duty" arguments possible; this case was not "about getting illegal guns off the streets of Flint" (an argument both improper and dishonest; there were no "illegal guns" in this case and there was no evidence that the guns seized were not returned to the streets).

After hearing oral arguments on the motion, the trial court denied the motion for new trial, stating in relevant part:

I have had an opportunity to review the motion and the trial wasn't terribly long ago. I think in the late summer or early fall last year. I don't remember all about the case, but I do remember the basic facts. . . .

* * *

As I indicated in my questioning of Mr. Ehlmann [Bagjett's appellate attorney], the real question when you get to this point in the proceedings were the errors so serious as to deprive the defendant of a trial whose result is fair and reliable, and when you put all this together as I heard the testimony come in, I think that the issue here, and probably the reason the case didn't get resolved short of trial was [Bagjett's] belief that knowledge was not enough, and that he did not understand the legal definition of possession.

But when I remember the testimony as it came in that he was living there with his cousin. That the guns were in the house. There was some talk about getting them out of the house because of his situation. That when the police came, it was [Bagjett] that pointed out, according to the testimony of the police officer, the location of the gun. The gun was there.

When I view all of that in its entirety, I don't believe that the results are not fair or reliable. It may not have been perfect, but just for example the—I don't know what counsel was thinking, but we had this dance around the issue why did the police show up at this location, and as Mr. Ehlmann indicated, Tony Ford from the probation department sort of dodged the bullet and said, well, we were there to check up on his probation, and we had some indications that things weren't all well. Well, maybe the jury could have thought something more serious was going on.

I don't know what—the fact that they had gotten a tip that they believed that there were guns in the house, and it's not that that was not true. That's really how it had happened, and whether the jury would have thought worse had that not been revealed, no one will ever know, but when I examine all of the evidence that came in, the acknowledgment of some of the evidence by [Bagjett], by the father,

by the cousin, I don't believe that there's been a showing that the results are not fair and reliable, and despite whatever errors someone may determine have been made, I am going to deny the motion.

II. EFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Bagjett's claim that he was denied the effective assistance of trial counsel raises a mixed question of fact and law. This Court reviews factual issues for clear error, while it reviews constitutional questions of law *de novo*.⁵ To prevail on an ineffective assistance of counsel claim, a defendant must show not only that his lawyer's conduct fell below an objective standard of reasonableness, but also that he was prejudiced as a result.⁶

B. ANALYSIS

Bagjett argues that he was deprived of a fair trial due to his trial counsel's failure to object to several evidentiary issues and due to the prosecutor's improper, or inaccurate, statements. The record, however, shows that Bagjett's trial attorney provided a capable defense and called several witnesses who testified in Bagjett's favor as to the key issue in this case, that is, whether Bagjett possessed a firearm. The jury verdict demonstrates that the jury did not believe Bagjett's version of events.

That a strategy does not work does not render its use ineffective assistance of counsel.⁷ Here, defense counsel conceded that guns were found in the house, but argued for the jurors to use "commonsense" and realize that defendant did not possess the guns because he was on probation for a different offense and possessing the guns would have been a violation of that probation.

Additionally, declining to raise objections can be consistent with sound trial strategy.⁸ At the beginning of his closing argument, the prosecutor said, "Ladies and gentlemen of the jury, when I first came to you I told you that this case was about getting an illegal gun off the street." Then at the conclusion of closing arguments, he stated: "and most important, most important because this case is about getting illegal guns off the streets of Flint." Those statements were very brief, and had defense counsel objected, it may have served to emphasize the argument in

⁵⁵ *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004).

⁶ *Strickland v Washington*, 466 US 668, 689-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Grant*, 470 Mich at 485-486.

⁷ *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008).

⁸ *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

the minds of the jurors. “We will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel’s competence.”⁹ Baggett has not overcome the strong presumption that trial counsel’s performance was strategic.

We affirm.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Kurtis T. Wilder

⁹ *Id.* at 242-243.