

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 12, 2011

v

ERIC JAMES PETERSON,

Defendant-Appellant.

No. 296072
Calhoun Circuit Court
LC No. 2009-002034-FH

Before: O'CONNELL, P.J., and K.F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of carrying a concealed weapon, MCL 750.227(2), and possession of marijuana, MCL 333.7403(2)(d). The trial court sentenced defendant to concurrent terms of 18 months' probation. He appeals as of right. We affirm.

On June 1, 2009, defendant was at a Veterans' Administration (VA) facility for a health care appointment. VA police officers received information that defendant might have a weapon in his possession. Defendant consented to a VA officer's request to search his truck. As defendant and an officer approached the truck, defendant acknowledged that there was a loaded weapon in the truck. A VA officer found a loaded and holstered handgun wedged in between the truck's seats, covered with a trash bag box. The officer also found ammunition and packages containing marijuana cigarettes.

Defendant claimed he did not realize the weapon was in his vehicle until he drove into the parking lot that morning. The weapon was not registered in defendant's name, and he did not have a permit for carrying a concealed weapon. Additionally, defendant did not then have a medical marijuana card, although he told the VA officer that he used marijuana for medical purposes and that he was in the process of obtaining a card.

Defendant received court-appointed counsel. At status hearings and on the day of trial, defendant told the trial court that he did not want the court-appointed attorney to represent him. At trial, defendant initially stated he would represent himself if necessary. The trial court informed him that he would be bound by the rules of evidence and procedure. Defendant responded that he would have to find competent counsel. The trial court indicated that it was too late to find replacement counsel, and that the court-appointed counsel would continue to represent defendant.

During the half-day trial, the VA officer testified, as did a drug analysis technician. Defendant's counsel cross-examined the VA officer, but did not cross-examine the technician. Counsel also questioned defendant during his testimony and provided very brief opening and closing statements.

On appeal, defendant claims that his trial counsel's conduct amounted to ineffective assistance due to her minimal opening statement, her limited questioning of witnesses, her failure to prepare adequately, and her failure to allow defendant to assist in his defense.

The determination of whether a defendant has received ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *Id.* In this case, our review is limited to errors apparent on the record, because the trial court did not hold an evidentiary hearing on defendant's claim. *Id.*

"Effective assistance of counsel is presumed, and defendant bears the burden of proving otherwise." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). To meet his burden, defendant must show (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability that but for an error by counsel, the trial outcome would have been different, and the result that did occur was fundamentally unfair or unreliable. *Seals*, 285 Mich App at 17. We apply the strong presumption that counsel's decisions constituted sound trial strategy. *Petri*, 279 Mich App at 411. In particular, counsel's decision to waive an opening statement involves a subjective judgment "which can rarely, if ever, be the basis for a successful claim of ineffective assistance of counsel." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009), quoting *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). Similarly, the extent of examination or cross-examination of witnesses is a matter of trial strategy. See *Petri*, 279 Mich App at 413.

The issues raised by defendant, such as trial counsel's decisions to present an extremely brief opening statement, to pose minimal questions to the VA officer, and to ask no questions of the drug analysis technician, are all matters of trial strategy and are accompanied by a strong presumption that the decisions were sound. *Petri*, 279 Mich App at 411, 413; *Payne*, 285 Mich App at 190. Defendant has not overcome the presumption. The record contains nothing to demonstrate that a longer opening statement or additional cross examination would have, with reasonable probability, changed the result of the jury trial. Defendant admitted at trial that once he arrived at the VA facility, he realized the weapon was in his truck. He further admitted that there was marijuana in the truck. Defendant has not indicated on appeal what assistance he offered to counsel that would have changed the result of the proceedings.

Accordingly, defendant has not shown the existence of a reasonable probability that, but for counsel's alleged errors, the result of the proceedings would have been different. Therefore, defendant has not met his burden of establishing that his trial counsel was ineffective.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause