

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 15, 2012

v

MAURICE TEPHAROL CLARK,
Defendant-Appellant.

No. 301317
Wayne Circuit Court
LC No. 10-005861-FH

Before: O'CONNELL, P.J., and SAWYER and TALBOT, JJ.

PER CURIAM.

Maurice Tepharyl Clark appeals as of right his jury trial conviction of carrying a concealed weapon,¹ felon in possession of a firearm (felon-in-possession),² and possession of a firearm during the commission of a felony (felony-firearm),³ third offense. Clark was sentenced as a fourth habitual offender⁴ to two to 20 years' imprisonment for each of the carrying a concealed weapon and felon-in-possession convictions, and 10 years' imprisonment for the felony-firearm conviction. We affirm.

On the early morning of May 7, 2010, Clark and Rannie Lee Hinson were stopped by two Detroit police officers after they were found walking in the middle of the street. Hinson immediately complied with one of the officer's commands to step toward the police vehicle. Before Clark complied, however, he walked up the driveway of a nearby residence, appeared to remove a firearm from his person and place it in front of a vehicle that was parked in the driveway. Once Clark was detained and handcuffed, the gun was recovered. Both Clark and Hinson were arrested.⁵

¹ MCL 750.227.

² MCL 750.224f.

³ MCL 750.227b.

⁴ MCL 769.12.

⁵ Clark initially had a jury trial which resulted in a mistrial due to a hung jury. He was then retried which is the case underlying this appeal.

Clark argues that the trial court abused its discretion by refusing to appoint substitute defense counsel as there was a clear difference of opinion by Clark and his attorney regarding trial tactics, and defense counsel was not adequately prepared for trial. We disagree. “A trial court’s decision regarding substitution of counsel will not be disturbed absent an abuse of discretion.”⁶

An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced. Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic.⁷

Professional judgment and trial strategy are matters entrusted to counsel and do not warrant appointing substitute counsel.⁸ Additionally, a “mere allegation” of lack of confidence in counsel “is not good cause to substitute counsel.”⁹

In support of his request for substitute counsel, Clark advised the trial court that he wanted to call a fingerprint technician to testify at trial that there were no fingerprints found on the gun, but his attorney refused. The fingerprint analysis report, however, was to be admitted at trial which demonstrated that there were no fingerprints on the firearm. Defense counsel’s decision regarding what evidence to admit to support that there were no fingerprints on the gun is a matter of trial strategy and does not constitute good cause for substitute counsel.¹⁰

Clark also informed the trial court that defense counsel was not adequately prepared for trial as counsel was not assigned to the case until 13 days before trial. Defense counsel also was not scheduled to receive transcripts of the testimony of two police officers from Clark’s first trial until two days before the retrial. The length of time between defense counsel being assigned and the receipt of transcripts and the start of trial alone, absent a showing of prejudice, does not establish inadequate preparation.¹¹ We find that Clark’s assertions represent mere allegations of lack of confidence in counsel, which do not warrant substitute counsel.¹² Thus, the trial court did not abuse its discretion when it denied Clark’s request for substitute counsel.

⁶ *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

⁷ *Id.*, quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

⁸ *Traylor*, 245 Mich App at 463.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 180 (1990).

¹² *Traylor*, 245 Mich App at 463.

Next, Clark asserts that the trial court's decision to preclude the fingerprint technician from testifying deprived him of his right to present a defense, and caused him to be impermissibly denied the opportunity to cross-examine witnesses. We disagree. This Court reviews the constitutional question of "[w]hether a defendant's right to present a defense was violated by the exclusion of evidence" de novo.¹³

Review of the record reveals that the trial court did not preclude Clark from calling the fingerprint technician as a witness at trial. Rather, during the hearing on Clark's motion for substitute counsel, the trial court found that defense counsel's decision not to call such a witness was not a basis for the appointment of new counsel as the evidence to be elicited from the technician was contained in the fingerprint analysis report. As such, Clark's argument must fail.¹⁴

Additionally, Clark contends that by allegedly precluding the fingerprint technician from testifying he was "denied the opportunity to cross-examine the People's expert witnesses and to inquire into why the People did not follow through with the DNA evidence." It is purely speculative that the fingerprint technician would have been qualified to testify regarding DNA evidence. Therefore, Clark's argument lacks merit.¹⁵

Clark also alleges multiple instances of ineffective assistance of counsel. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law."¹⁶ This Court reviews findings of fact for clear error and questions of constitutional law de novo.¹⁷ Because a *Ginther*¹⁸ hearing was not held, this Court's review "is limited to mistakes apparent on the record."¹⁹

"To demonstrate ineffective assistance, it must be shown that [Clark's] attorney's performance fell below an objective standard of reasonableness and this performance prejudiced him."²⁰ Prejudice is shown by Clark's demonstration that but for counsel's errors, the outcome of the proceedings would have differed.²¹ Counsel's assistance is presumed to be effective "when it comes to issues of trial strategy," which Clark has the burden of overcoming.²² This

¹³ *People v Likine*, 288 Mich App 648, 658; 794 NW2d 85 (2010).

¹⁴ *Id.*

¹⁵ *People v Fackelman*, 489 Mich 515, 528; 802 NW2d 552 (2011).

¹⁶ *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

¹⁷ *Id.*

¹⁸ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

¹⁹ *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

²⁰ *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004).

²¹ *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004).

²² *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Court “will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel’s competence.”²³

Clark asserts that defense counsel’s failure to call the fingerprint technician and Hinson as witnesses at trial constituted ineffective assistance. “[T]he failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense.”²⁴ Clark was still able to present the defense that he was not in possession of the gun that was retrieved by police without the testimony of either witness, as evidence was admitted that his fingerprints were not on the weapon. Because Clark was not deprived of a substantial defense, defense counsel’s actions do not constitute ineffective assistance.²⁵

Clark also contends that defense counsel’s failure to present a video from the police car from the time of the incident as evidence constituted ineffective assistance. Clark has provided no evidence that the video in fact exists. That notwithstanding, “[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy.”²⁶ As Clark has failed to establish the contrary, there was no ineffective assistance.

Clark further argues that defense counsel improperly advised him not to testify. The record supports that Clark was advised of his right to testify by defense counsel, which Clark waived on the record. The record does not support that the alleged advice not to testify was in error, and assuming arguendo that it was, Clark has failed to show that but for that error, the outcome of the case would have differed.²⁷ Therefore, counsel was not ineffective.

Finally, Clark asserts that his sentence for third offense felony-firearm should be vacated because he was only sentenced as a first offender for both of his prior felony-firearm convictions. We disagree. This Court reviews issues regarding statutory construction, which are questions of law, de novo.²⁸

The felony-firearm statute provides:

(1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, section 227, 227a or 230, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years.

²³ *Id.*

²⁴ *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

²⁵ *Id.*

²⁶ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

²⁷ *Solmonson*, 261 Mich App at 663-664.

²⁸ *People v Malone*, 287 Mich App 648, 654; 792 NW2d 7 (2010).

Upon a third or subsequent conviction under this subsection, the person shall be imprisoned for 10 years.²⁹

“[A] defendant may be convicted of felony-firearm (third offense) if the third offense is preceded by two convictions of felony-firearm, and both prior felony-firearm convictions have arisen from separate criminal incidents.”³⁰ Clark pleaded guilty and was convicted twice for felony-firearm arising from separate incidences before his conviction in the instant case. As a result, Clark was properly sentenced to 10 years’ imprisonment for his felony-firearm conviction and resentencing is not warranted.³¹

Affirmed.

/s/ Peter D. O’Connell
/s/ David H. Sawyer
/s/ Michael J. Talbot

²⁹ MCL 750.227b(1) (footnotes omitted).

³⁰ *People v Stewart*, 441 Mich 89, 95; 490 NW2d 327 (1992).

³¹ MCL 750.227b(1); *Stewart*, 441 Mich at 95.