

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
July 16, 2013

v

TERRY RICHARDO PRICE,
Defendant-Appellant.

No. 309423
Wayne Circuit Court
LC No. 11-010073-FH

Before: FORT HOOD, P.J., and FITZGERALD and RONAYNE KRAUSE, JJ.

PER CURIAM.

The trial court convicted defendant of first-degree home invasion, MCL 750.110a(2), possession of burglar's tools, MCL 750.116, and resisting or obstructing a police officer, MCL 750.81d(1). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 84 months to 20 years for the first-degree home-invasion conviction, 58 months to 10 years for the possession of burglar's tools conviction, and 46 months to 10 years for the resisting or obstructing conviction. Defendant appeals as of right. We affirm.

Police officers observed defendant riding a bicycle at 6:15 a.m. while carrying a 42-inch flat screen TV and a purse.¹ When the officers stopped defendant, he stated that he had gotten into an argument with his girlfriend and had taken her belongings. When the officers attempted to handcuff defendant, he resisted by flailing his arms and legs. Officers found a crow bar in defendant's pants pocket. When the police went to the address on the identification in the purse, they discovered that the doors to a Florida room were open and that the lock had been damaged. The homeowner identified the TV and purse that were found in defendant's possession. Defendant declined to testify.

After defendant's conviction, the trial court denied defendant's motion for a new trial that was based on ineffective assistance of counsel. Defendant now argues that the trial court abused its discretion by denying his motion for a new trial without conducting an evidentiary hearing to determine whether counsel was ineffective for advising defendant not to testify.

¹ The purse contained the identification of a nearby homeowner.

When a defendant's claim of ineffective assistance of trial counsel "depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with his motion for a new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately." *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). "When a defendant asserts that his assigned lawyer is not adequate or diligent . . . , the judge should hear his claim and, *if there is a factual dispute*, take testimony and state his findings and conclusion." *Id.* at 441-442 (emphasis added). The trial court's denial of a defendant's request for a *Ginther* hearing does not warrant relief where this Court is not persuaded that defendant has demonstrated any issue for which further factual development would advance the claim. See *People v Chapo*, 283 Mich App 360, 368-369; 770 NW2d 68 (2009). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "A substantial defense is one that might have made a difference in the outcome of the trial." *Chapo*, 283 Mich App at 371 (citation and internal quotation marks omitted).

Defendant asserted in a post-trial affidavit that he found the TV and purse in front of the owners' house and thought the items had been discarded. He denied having a pry bar in his possession when he was stopped by the police. Defendant also averred that he did not resist or obstruct the police. Rather, defendant claimed:

They tried to pull me off my bicycle while my foot was caught. I tried to prevent myself from falling on my face. I still suffered [sic] a scar as a result of the police trying to pull me off the bicycle.

Defendant stated that he wanted to testify, but trial counsel advised him not to because he could be impeached with his prior convictions and because defense counsel "had everything covered."

Even if development of a factual record would be necessary to determine the nature and competency of counsel's advice to defendant relative to the decision to testify, further development of a factual record is not necessary to determine that there is no reasonable probability that the implausible account set forth in defendant's affidavit would have made a difference in the outcome of the trial. Defendant's account would require the trier of fact to believe that in the brief period between 5:30 a.m. when homeowner Duante Anderson left the house and 6:15 a.m. when Officer Passalacqua saw defendant on his bicycle, an unknown individual broke into the Anderson home, carried the large TV and purse outside, then abandoned the items, where defendant discovered them, picked them up, and begin biking away. Defendant's account would also require that the trier of fact disbelieve the police testimony that a crow bar was discovered inside the front pocket of defendant's pants. In addition, defendant's contention that his struggle with the police was attributable to his foot becoming stuck in the pedal of the bicycle would require that the trier of fact determine that Officer Passalacqua and her partner unnecessarily summoned other officers for assistance, and that Officers Passalacqua, Strigner, and Mason falsely testified that defendant flailed his arms and legs as the officers attempted to subdue him. In these circumstances, further factual development is not necessary to analyze the merits of defendant's ineffective assistance of counsel claim. Regardless of whether counsel accurately advised defendant concerning the dangers of testifying, defendant was not prejudiced by his failure to testify and present the account set forth in his affidavit.

In sum, we are not persuaded that defendant has demonstrated any issue for which further factual development would advance his ineffective assistance of counsel claim. Accordingly, the trial court did not err in rejecting defendant's claim that he was denied the effective assistance of counsel without first conducting a *Ginther* hearing. *Chapo*, 283 Mich App at 368-369.

Affirmed.

/s/ Karen M. Fort Hood
/s/ E. Thomas Fitzgerald
/s/ Amy Ronayne Krause