

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID HUGH O'QUINN,

Defendant-Appellant.

UNPUBLISHED

May 9, 2006

No. 260156

Wayne Circuit Court

LC No. 04-006350-01

Before: White, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of larceny from a person, MCL 750.357, and was sentenced as a fourth habitual offender, MCL 769.12, to six to fifteen years' imprisonment. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the trial court erred when it denied his request for appointment of new counsel on the first day of trial. We disagree.

This Court reviews a trial court's decision regarding substitution of appointed counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). Appointment of substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973). Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel as to a fundamental trial tactic. *People v Williams*, 386 Mich 565, 574; 194 NW2d 337 (1972). A trial court is obligated to inquire into the truth of a defendant's allegations that there is a dispute that has led to a destruction of communication and a breakdown in the attorney-client relationship. *People v Bass*, 88 Mich App 793, 802; 279 NW2d 551 (1979).

In the present case, while the court did not permit defendant a full opportunity to explain his dispute with counsel, the court did ascertain that defendant sought to assert the very defense that counsel planned to assert. Defendant failed to show that a legitimate difference of opinion had developed regarding a fundamental trial tactic. Under these circumstances, the trial court did not abuse its discretion when it denied defendant's motion to dismiss appointed counsel.

Defendant also argues that trial counsel was ineffective in failing to require the court to verify at sentencing his prior convictions. Again, we disagree.

A defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against objective reasonableness under the circumstances according to prevailing professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). Second, the defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial, *Strickland, supra* at 687-688; *Pickens, supra* at 309, so that there is a reasonable probability that but for counsel's unprofessional error(s) the trial outcome would have been different, *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Moreover, constitutional error warranting reversal does not exist unless counsel's error was so serious that it resulted in a fundamentally unfair or unreliable trial. *Lockhart v Fretwell*, 506 US 364, 369-370; 113 S Ct 838; 122 L Ed 2d 180 (1993); *United States v Cronin*, 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

MCL 769.12, the statute under which defendant's sentence was enhanced, provides that the enhancement provided for under that statute is applicable when a defendant has three or more convictions for felonies or attempted felonies. MCL 769.13 governs the enhancement of a defendant's sentence based on prior convictions. MCL 769.13(5) provides:

(5) The existence of the defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing scheduled for that purpose before sentencing. The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:

- (a) A copy of a judgment of conviction.
- (b) A transcript of a prior trial or a plea-taking or sentencing proceeding.
- (c) Information contained in a presentence report.
- (d) A statement of the defendant.

In the present case, the presentence report indicated that at the time of sentencing defendant had seven prior felony convictions. Accordingly, the prosecution was entitled to seek enhancement of defendant's sentence pursuant to MCL 769.12. Regardless of the reasonableness of trial counsel's actions in failing to require verification of defendant's prior convictions or to object when the court sentenced defendant in reliance on these prior convictions, defendant cannot demonstrate that a reasonable probability exists that, but for trial counsel's omissions, the outcome of his sentencing proceeding would have been different. Therefore, defense counsel's failure to require verification of defendant's prior convictions and his failure to object when the court sentenced defendant in reliance on these prior convictions cannot form the basis for reversal on the ground of ineffective assistance.

Affirmed.

/s/ Helene N. White
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot