

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK DESHAWN CUMMINGS,

Defendant-Appellant.

UNPUBLISHED

November 28, 2006

No. 263182

Wayne Circuit Court

LC No. 05-001840-01

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of armed robbery, MCL 750.529, and was sentenced to five to twenty years' imprisonment. Defendant filed a postjudgment motion for a new trial on the ground that he was denied effective assistance of trial counsel. The trial court held a *Ginther*¹ hearing, concluded that defense counsel was not ineffective, and denied the motion. Defendant appeals as of right, challenging only the trial court's determination that defense counsel was not constitutionally defective. We affirm.

This case arose from an armed robbery that took place at a laundry facility in Detroit, on December 24, 2004. After defendant was arrested in connection with that crime, he admitted to a police officer that he had acted as a lookout for the perpetrators. Defendant asserts that his trial attorney was ineffective because he made no effort to suppress, or otherwise challenge, that confession.

The United States and Michigan Constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. The constitutional right to counsel is a right to the *effective* assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further show that there is a reasonable probability that, but for counsel's error,

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

Defendant argues that defense counsel should have sought to suppress his confession on the grounds that it was the result of coercion or duress, and was extracted outside the presence of counsel. See *People v Abraham*, 234 Mich App 640, 645, 647; 599 NW2d 736 (1999); *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). We review a trial court's factual findings for clear error, but its application of the law to the facts de novo. *People v Barrera*, 451 Mich 261, 269; 547 NW2d 280 (1996).

At trial, the police officer to whom defendant offered his statement testified that, at the time of the interview, defendant was not intoxicated, did not ask for food or access to a restroom, and demonstrated his ability to read his written notice of his constitutional rights. The officer gave an account of his going through those rights with defendant, defendant's initialing his understanding of each, and defendant's signing and dating the form.

At the posttrial evidentiary hearing, defendant's trial attorney agreed that defendant's confession was the major piece of evidence tying him to the crime. Asked why he did not file a motion to suppress that statement, counsel explained that his several conversations with defendant led him to understand that the statement was given "freely and voluntarily." Counsel maintained that he had advised defendant that his confession would be damaging, and broached the question whether it was voluntarily given, but that after three months of interaction with defendant, only on the day of trial did defendant suggest that he was ever under duress. Counsel explained,

When I'm looking at the confession, and he initials every one of those first five things; and in the second page when they check off all of those things, "have you been under medication," whatever, . . . I have no reason to doubt that unless the client tells me, "I was drugged. I was coerced." Then it's a different matter. He said nothing of that until the day of trial when he said something about duress.

The evidentiary hearing also brought to light that defendant had written a letter to the trial judge admitting that he had acted as lookout, but asserting that he did so under threat from the perpetrators, thus indicating that he participated in the crime under duress, not that he offered his statement under duress.

The trial court's statements from the bench included the following:

Why in the world would this man have a [suppression] hearing under these circumstances? If there was anything that had led him to believe that this was not a voluntary statement, I'm quite sure that he would have in fact made that motion.

But you don't just make it just because this is the only thing they've got out there. You've got to have some basis for the motion; and his client gave him no basis to question what was there.

And as a matter of fact, he almost nails it down by when he sends out that voluntary letter to the Judge saying the same thing.

We agree with the trial court, that, in light of defense counsel's account of receiving, in repeated communications, no indication of duress or other suspect interrogation tactics until the day of trial, counsel was not obliged to troll for such possibilities. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Nor, in light of defendant's similar confession in a letter to the judge, was counsel ineffective for not regarding defendant's last-minute mention of duress as revealing a promising avenue of cross-examination when the police witness testified to his confession.

Defendant thus fails to overcome the strong presumption that counsel saw no strategic advantage in trying to impugn the confession. See *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). Nor did admission of a confession to the police very similar to one also made to the court itself render the proceedings fundamentally unfair or unreliable. *Poole, supra*.

Affirmed.

/s/ Helene N. White

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly