

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES MARTY KING,

Defendant-Appellant.

UNPUBLISHED

March 27, 2008

No. 275194

Calhoun Circuit Court

LC No. 06-003246-FH

Before: O’Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Defendant was found guilty by a jury of two counts of resisting and obstructing a police officer, MCL 750.81d(1), and was sentenced as a fourth habitual offender, MCL 769.12, to consecutive terms of 46 to 180 months and 30 to 180 months. He appeals as of right. We affirm defendant’s convictions and sentences, but remand for the clerical correction of the amended judgment of sentence to reflect the imposition of consecutive sentences. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On July 20, 2006 police officers were at an apartment complex in Battle Creek after receiving information that a person involved in a number of recent crimes might be there. Two of the officers knocked on the door of Dawn Freeman’s apartment. When Ms. Freeman came to the door, the officers began to describe the person they were looking for, and she stated he was in the back bedroom. The officers announced themselves at the bedroom door and requested that defendant come out of the room.

Defendant held the door closed when Officer Palmer tried to open it. Palmer then kicked in the door after receiving permission from Ms. Freeman. The door landed on defendant. Testimony from the officers indicated that defendant struggled and it took at least three officers to secure his hands and handcuff him to ensure that he had no weapons. Defendant was charged with four counts of resisting and obstructing a police officer—one count for each officer involved in his detention and arrest.

The jury found defendant guilty of just two counts of resisting and obstructing a police officer. Defendant was later sentenced as a fourth habitual offender to consecutive sentences for the resisting and obstructing counts. The trial court’s judgment of sentence was amended on March 30, 2007 to correct the minimum sentence of one of the counts of resisting and

obstructing, but that amendment omitted the appropriate notation for consecutive sentences. Such omission was a clerical error that requires remand to the circuit court for correction.

On appeal, defendant asserts four claims of ineffective assistance of counsel and a claim that the trial court abused its discretion when it imposed consecutive sentences.

This Court's review is limited to the facts on the record because there was no evidentiary hearing concerning defendant's claims of ineffective assistance of counsel. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

"In order to merit reversing a criminal conviction because of ineffective assistance of counsel, a defendant must show that his trial counsel's conduct fell below an objective standard of reasonableness and was prejudicial, thereby denying the defendant a fair trial." *Id.* at 354. Defendant must "show that his counsel's performance was deficient, and that there is a reasonable probability that but for that deficient performance, the result of the trial would have been different." *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004).

Decisions concerning whether to call or question witnesses are presumed to be matters of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). There is a "strong presumption that counsel's performance was sound trial strategy." *Id.* at 396.

Defendant first argues that his trial counsel should have interviewed and called police Officers Hatch and Stansbury to the stand to cast doubt on the credibility of the four officers that did testify, especially concerning what happened at Ms. Freeman's apartment. One of those officers was on the outside perimeter of the apartment building during the incident, and the other was purportedly a booking officer at the jail. The four police officers who did testify were actually in the apartment during the incident. Based on the record available for review, defendant has not overcome the presumption of sound trial strategy concerning whether to call these officers who were not present in the apartment during the incident.

Defendant next argues that his trial counsel should have questioned Officer Palmer more about what happened at the police station and the jail following the incident at Ms. Freeman's apartment. This Court's review is limited to facts in the record, and there is nothing in the record relating to the events that transpired at the jail after defendant was removed from the apartment. Because there is nothing in the record to review, defendant cannot demonstrate that trial counsel's performance was deficient.

Defendant also argues that his trial counsel was not aware that consecutive sentences were a possibility until he reviewed the presentence investigation report (PSIR). Defendant's support for this argument is based on one statement at the sentencing hearing where counsel stated the court made him "aware of the fact of the statute and everything." That statement regarding an unspecified statute, in the context of the trial court's assertion that it had confused the significance of the issue with another case, is not enough to support defendant's argument that trial counsel's performance was deficient.

Defendant's fourth claim of ineffective assistance of counsel is that trial counsel should have negotiated a plea bargain for concurrent sentences. The record does not reflect that the prosecutor made a plea offer or that defendant intended to accept any such plea offer. Further,

even if the prosecution and defendant had reached an agreement that included a sentence recommendation, the trial court could have rejected the agreement. MCR 6.302(C)(3)(a). Therefore, even if the prosecution had offered a plea and defendant agreed to it, there is no guarantee that the trial court would have accepted the terms of the agreement. Accordingly, even if trial counsel's performance was deficient, defendant has not established that but for that deficient performance, the result would have been different.

Defendant's final argument on appeal is that the trial court abused its discretion when it imposed consecutive sentences instead of concurrent sentences. Whether a consecutive sentence may be imposed is a question of law that is reviewed de novo. *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003). A consecutive sentence is only allowed if specifically authorized by law. *Id.* Under MCL 750.81d(6), the imposition of consecutive sentences is discretionary with the court.

Defendant was sentenced as a fourth habitual offender, MCL 769.12, to two counts of resisting and obstructing and under MCL 750.81d. The PSIR indicates that defendant has thirteen prior felony convictions and fifteen prior misdemeanor convictions, and had additional pending charges for first-degree home invasion and breaking and entering. Also as noted in the PSIR, "Various sanctions have been imposed on this defendant, including six prior prison terms, all [of] which have done nothing to deter his criminal activity." Under the circumstances, the trial court did not err in imposing consecutive sentences as recommended in the PSIR and as allowed by statute.

Defendant's convictions and sentences are affirmed, but the matter is remanded to the trial court for correction of the amended judgment of sentence to reflect consecutive sentences. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher