

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BYRON MOORE,

Defendant-Appellant.

UNPUBLISHED

October 14, 2008

No. 276519

Ingham Circuit Court

LC No. 06-000750-FH

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of felon in possession of a firearm, MCL 750.224f, and carrying a concealed weapon in a motor vehicle (CCW), MCL 750.227. The trial court sentenced defendant as a habitual offender, fourth offense, MCL 769.12, to concurrent terms of 18 to 120 months imprisonment for each count. The trial court denied jail credit time against the instant sentences because defendant committed the instant offenses while on parole.

I. Basic Facts

This case involves an incident on April 5, 2006, when defendant was driving a car with passengers Vera Darling (Darling) and Linda Collinson (Collinson) (a/k/a Linda Wardel). According to Darling, she, defendant, Collinson, and “a drug dealer” had been at Collinson’s house earlier in the day. Darling testified that while at Collinson’s house, she witnessed defendant exit Collinson’s bedroom holding a gun. Darling stated that defendant then handed the gun to Collinson who carried the gun to the car. Darling had been roommates with Collinson and testified that she had never before seen that weapon. Darling believed that the gun belonged to defendant. According to Darling, after the three left the home, Collinson and defendant had a conversation in the car “discussing who and how much they were going to sell the gun for.” Darling testified that she believed they were going to sell the gun to Jimmy, owner of a hair salon, from whom they were going to buy heroin.

They drove to the parking lot of the hair salon, and Darling left the car to see if Jimmy had arrived. Jimmy had not arrived, so the three of them sat in the car, “waiting, smoking crack.” They did not sit in the parking lot for long because people from the surrounding businesses began to observe them. Darling testified that “[a]s soon as we left the parking lot we basically got pulled over.” She stated that when defendant realized they were about to be pulled over, he was “telling Linda to hide the gun.”

Lansing Police Department Officer Richard Ballor testified that, at about 9:45 a.m., he executed a traffic stop of a Pontiac Sunfire because it had “a large crack extending across the width of the vehicle’s front windshield.” He identified defendant as the driver of the vehicle. He indicated that Darling was sitting in the right front passenger seat and Collinson was in the right rear seat. Ballor testified that defendant stated he did not have a driver’s license because it was expired and provided Ballor with a picture ID from the Michigan Department of Corrections. Ballor asked defendant out of the vehicle for questioning.

According to Ballor, the owner of the vehicle was not present. Defendant consented to Ballor searching the vehicle. Ballor had Darling and Collinson exit the vehicle, conducted *Terry*¹ searches, and had them sit on the curb. Ballor testified that he identified a towel wrapped around an object which was “directly underneath where [Collinson] had been seated,” which was “not wedged underneath the seat” and was “clearly visible.” Ballor lifted the towel and found a black semiautomatic handgun clearly visible. Ballor then notified dispatch to send another officer to the scene. Ballor testified that he overheard defendant “pleading with Ms. Collinson to take responsibility for the gun” and that defendant became “very agitated and just very upset.”

Darling stated that both she and defendant initially responded “no” when asked by Ballor if there “was anything in the car.” Darling recalls that after Ballor found the gun and called for backup, defendant “started crying saying, tell them it’s your gun, Linda. Tell them it’s your gun. I’m going back to prison. Tell them it’s your gun.” Ballor recalls Collinson’s initial statement to him as being, “can’t you just make this go away or take this and we’ll go away?” Ballor testified on re-cross examination that, Collinson’s “first statement was whether I would confiscate the weapon and let her leave.” Ballor testified that she also indicated to him that “[we] were just going to sell it,” and that [w]e weren’t going to do anything with it.” Defendant and Collinson were eventually arrested and the gun was transported to the police department. No identifiable latent fingerprints were found on the gun.

Lee McCallister, special operations officer at the Lansing Police Department, and Officer Howard Swabash (now retired) conducted an interview of defendant after the arrest on May 25, 2006. When Swabash asked defendant if he had any knowledge of the gun, defendant initially did not admit to any knowledge. Later during the interview, according to McCallister’s testimony, defendant admitted to “handling the gun at one point inside the house, and that he knew that Linda had brought the gun into the car.” McCallister questioned Collinson about the gun and testified that “[s]he stated that the gun was hers.” The written statement of defendant’s interview includes the following sentences:

On April 5th or 6th, 2006, I was at 220 Barnes Street at Linda Collinson’s house. . . . She showed me a couple of pistols and asked me if I was interested in buying the guns. . . . I handled the guns and I told her I wasn’t interested. . . . Linda made some calls, and then she wanted to be dropped off on Baker Street after I took Vera to buy some drugs. . . . Linda was going to sell the gun on Baker Street now that I think about it.

¹ *Terry v Ohio*, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

Swabash testified that he reread defendant's written statement to him before defendant signed it. Defendant stated that this was not an accurate statement and that he was under the impression that he was signing paperwork for another part of the interview when he signed this statement. Defendant testified that he neither handled the weapon nor said that he did to the officers.

Defendant testified that he went to Collinson's house after work on April 5, 2005. He then testified as follows:

As I came out of the bathroom Linda was standing in her doorway. She had two weapons. And she said to me, she says, do you know where I can get rid of these at? No. Are you interested in buying any weapons? I told her, no, I don't want any weapons. I am not interested in them. And so she held them out. And then I said, No, no, I don't know anybody that can use them.

Defendant testified that he merely told Collinson to tell the truth; that the gun was not his. Defendant also stated that Collinson said that the gun was her boyfriend's and that defendant had no knowledge of it. A jury convicted defendant.

After trial, this Court granted defendant's motion to remand to the trial court for and evidentiary hearing and motion for new trial. *People v Moore*, unpublished order of the Court of Appeals, entered November 19, 2007 (Docket No. 276519). On January 2, 2008 the motions for new trial and evidentiary hearing were denied.

II. Ineffective Assistance of Counsel

A. Standard of Review

"A claim of ineffective assistance of counsel involves a mixed question of fact and constitutional law." The trial court's factual findings are reviewed for clear error, and its constitutional determinations are reviewed de novo." *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005) (citation omitted).

B. Analysis

Defendant argues that defense counsel provided ineffective assistance of counsel by failing to request, discover, and make use of Darling's criminal record as impeachment evidence.

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. [*McGhee, supra*, 268 Mich App at 625 (citations omitted).]

“Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. There is accordingly a strong presumption of effective assistance of counsel.” *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008) (citation omitted). “The defendant also must overcome the presumption that the challenged action was trial strategy.” *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). In order to overcome the presumption of sound trial strategy, the defendant must show that his counsel’s failure to prepare for trial resulted in counsel’s ignorance of, and hence failure to present, valuable evidence that would have substantially benefited the defendant. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Failure to present evidence only rises to ineffective assistance if defendant is deprived of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990) “A substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

Darling’s testimony was important to prosecution’s case as she testified that defendant held the gun at Collinson’s house, cleaned it, wrapped it and carried it to the car. Her testimony recounted a conversation between Collinson and defendant in the car about selling the gun and that defendant told Collinson to hide the gun, after which “[s]he put it under her.” Darling stated that defendant told Collinson to tell Ballor that it was her gun. Darling stated that the gun did not belong to her or to Collinson.

Defendant cites to his trial counsel’s disclosure demands to show that no criminal histories of the prosecution witnesses were requested. Defendant asserts that a check on the Michigan Offender Tracking Information System reveals that Darling has two prior convictions for theft. Defendant asserts that in 1998, Darling was convicted of first-degree retail fraud and in 1999, convicted of attempted larceny in a building.

It was established at trial that Darling had been previously arrested for solicitation, but not that she had prior convictions. Darling admitted that she was going to trade the gun for heroin and also that she was smoking crack cocaine in the car before the arrest. Defense counsel stated during closing arguments that, “[i]t comes down to two people, Vera Darling and Byron Moore, both of them convicted felons. As far as credibility is concerned it is up to you.” However, the prosecution made clear in his rebuttal closing that no evidence of her convictions had been presented:

Now, another issue that was addressed was credibility. One thing Defense counsel said was that Vera was a convicted felon. Not that I am aware of and not from any of the evidence we’ve heard on the stand. I just don’t know that to be true and we certainly haven’t heard evidence of that.

Also, as far as Vera’s credibility, I didn’t hear anything that contradicted, as far as from her story from when we started until today any contradictions in her story. Her testimony was clear. She even admitted to things that she did that was wrong, like smoking cocaine. In fact, she said they were all smoking cocaine. She wasn’t trying to hide anything. She just told you the truth. If she was trying to hide something you might think she would want to leave that out, but she didn’t. She told you the truth.

Given defense counsel's reference to Darling as a convicted felon during closing, we cannot assume that counsel's failure to impeach Darling's testimony with her prior convictions was a reasonable trial strategy.

However, we conclude that defendant failed to prove this "deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different." Here, there was evidence presented challenging Darling's credibility. Specifically, Ballor testified that she had been arrested for solicitation, she admitted to illegal drug use and that she was intended to purchase illegal drugs. Although defense counsel could have further impeached Darling, we cannot conclude that the failure to mention these two larcenies was so significant to create a reasonable probability that the jury would have decided the case differently. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

III. Jail Credit

A. Standard of Review

Defendant failed to raise these issues in the trial court and thus did not properly preserve them. *Fast Air, Inc, supra*, 235 Mich App at 549. This Court reviews unpreserved issues for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. Analysis

Defendant first argues that he is statutorily entitled to credited 280 days against the instant sentences for time spent in jail between his arrest on April 5, 2006 and his sentencing on January 10, 2007. We disagree.

Defendant was on parole when he was arrested and was thus subject to a parole detainer. As explained by a unanimous conflict panel in *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004):

When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense. MCL 791.238(2). A parole detainee who is convicted of a new criminal offense is entitled, under MCL 791.238(2), to credit for time served in jail as a parole detainee, but that credit may only be applied to the sentence for which the parole was granted. *People v Stewart*, 203 Mich App 432, 433; 513 NW2d 147 (1994); *People v Brown*, 186 Mich App 350, 359; 463 NW2d 491 (1990).

Thus, any jail time credit is applied to the sentences for which defendant was on parole at the time of his arrest, not the instant sentences. See *People v Filip*, 278 Mich App 635; 754 NW2d 660 (2008); *People v Stead*, 270 Mich App 550; 716 NW2d 324 (2006).

Defendant further argues the above rule is unfair because he served the minimum sentence on the paroled offense and the parole board allegedly does not credit defendant with time served on sentences underlying paroled offenses. In *People v Filip*, 278 Mich App 635, 754

NW2d 660 (2008), the defendant similarly argued, “that because a parolee has necessarily served his or her minimum sentence, the parolee could never get credit for jail incarceration stemming from a new violation.” This Court disagreed explaining that,

MCL 791.238(2) specifically dictates that a parole violator “is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment.” And any remaining portion of the original sentence must be served before a sentence for a second offense may begin. Thus, just because a parolee has served his or her minimum sentence, it does not follow that the credit must therefore be applied against his or her new sentence when he or she remains liable to continue serving out the maximum sentence. Moreover, if a defendant is not required to serve additional time on the previous sentence because of the parole violation, then the time served is essentially forfeited. [*Filip, supra* at 642.]

Defendant’s claim must be rejected.

Defendant further claims that the failure to credit time served to the instant sentences violates the Due Process, Equal Protection and Double Jeopardy Clauses. However, as explained above, any jail time that is not credited to defendant does not implicate the instant sentences, but the sentence underlying the paroled offense. In *People v Watts*, 186 Mich App 686, 687 n 1; 464 NW2d 715 Mich App (1991), the defendant argued that “that he was denied credit for time served for the parole violation.” Indeed, the “prosecutor apparently agree[d] with this because he urges that we order that defendant be given credit for forty-seven days served against the sentence he was serving while on parole.” *Id.* Despite the prosecution’s concession, this Court held that “we obviously have no jurisdiction to enter an order affecting that case because it is not before us.” *Id.* The same is true here, and defendant’s claimed violations of the Due Process, Equal Protection and Double Jeopardy Clauses do not implicate the sentences imposed in the instant case, only the sentence underlying the paroled offense. *Watts* further noted if the parole board refuses to grant defendant jail credit against the paroled sentence that “defendant may, of course, enforce his rights in an appropriate proceeding.” *Id.*; But see *Filipa, supra* at 642 (“if a defendant is not required to serve additional time on the previous sentence because if the parole violation, the time served is essentially forfeited”). Regardless, we reject defendant’s claim that the denial of jail credit against the instant sentences violated his right to Due Process, Equal Protection and Double Jeopardy Clauses.

We affirm.

/s/ Joel P. Hoekstra
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra