

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM ALTON SIZER, JR.,

Defendant-Appellant.

UNPUBLISHED

December 12, 2000

No. 219177

Ingham Circuit Court

LC Nos. 95-069064

98-073011

98-073012

Before: O’Connell, P.J., and Zahra and MacKenzie,* JJ.

PER CURIAM.

Defendant appeals as of right from his pleas of guilty to five counts of embezzlement of over \$100, MCL 750.174; MSA 28.371, and two counts of larceny by false pretenses in excess of \$100, MCL 750.218; MSA 28.415. The trial court sentenced defendant to concurrent terms of three and one-half to ten years’ imprisonment and ordered him to pay full restitution. We affirm.

Defendant claims that he is entitled to resentencing because the trial court did not properly consider his ability to pay before it ordered him to pay restitution. Because defendant did not raise this argument in the lower court, or object to the trial court’s restitution order, this issue is unpreserved. *People v Ho*, 231 Mich App 178, 192; 585 NW2d 357 (1998). Even if defendant had preserved this claim, we are satisfied that the trial court adequately contemplated defendant’s ability to pay when it considered the information contained in the presentence report. See *People v Grant*, 455 Mich 221, 242-244; 565 NW2d 389 (1997).

Defendant next argues that the trial court erred in sentencing him to a minimum term that exceeded the *Killebrew*¹ cap to which he and the prosecutor agreed. Because defendant did not raise this issue in the lower court, our review is for plain error that affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). When the prosecutor and a defendant enter into a binding agreement regarding the disposition of sentence, the trial court may not deviate from the agreement without first allowing the defendant to

¹ *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

withdraw his guilty plea. *People v Killebrew*, 416 Mich 189, 207; 330 NW2d 834 (1982). The record in this case is unclear regarding whether the *Killebrew* agreement was still in effect in 1998 when the trial court resentenced defendant. Assuming that it was, we are satisfied that the trial court's actions did not impair defendant's substantial rights such that he can prevail on this unpreserved claim. Furthermore, vacating defendant's sentence is not warranted because the trial court's alleged error did not "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Carines, supra* at 772; *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000). The trial court's sentence on remand only exceeded by two months the sentence to which he agreed. Further, one week later the trial court sentenced defendant to an identical concurrent term for his false pretenses convictions. Therefore, even if the trial court had adhered to the agreement, defendant would still have had to serve the three and one-half-year minimum term for his false pretenses convictions.

Defendant also contends that the attorney who represented him on the embezzlement charges was ineffective in failing to request that his guilty plea be withdrawn when the trial court exceeded the *Killebrew* cap. Because defendant did not move for a new trial or a *Ginther*² hearing, this Court's review is limited to errors that are apparent from the record. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). To succeed on his claim that he did not receive effective assistance of counsel, defendant must satisfy this Court that counsel's performance fell below an objective standard of reasonableness, and that he suffered prejudice as a result. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Effective assistance of counsel is presumed, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The defendant must also overcome the presumption that counsel's decisions were the product of sound trial strategy. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). A criminal defendant is entitled to effective assistance of counsel at sentencing. *People v Newton (After Remand)*, 179 Mich App 484, 493; 446 NW2d 487 (1989). The decision to address the court during sentencing is a tactical choice reserved to the competence of trial counsel. *Id.* at 494. Here, after a review of the record, we are satisfied that trial counsel's actions can properly be attributed to sentencing strategy. We will not second-guess counsel's strategic decisions with the benefit of hindsight. *Rockey, supra* at 76-77.

Defendant also argues that his due process rights were violated because the prosecutor waited until 1997 to bring the charges that led to defendant's false pretenses convictions. We disagree. Defendant did not raise this issue below. An allegation of prosecutorial vindictiveness involves an issue of due process. *People v Laws*, 218 Mich App 447, 452; 554 NW2d 586 (1996). This Court reviews constitutional issues de novo. *People v Brown*, 239 Mich App 735, 750; 610 NW2d 234 (2000). We review the charging decisions of the prosecutor for an abuse of power to determine whether the prosecutor acted in contravention of the constitution or the law. *People v Barksdale*, 219 Mich App 484, 488; 556 NW2d 521 (1996).

The prosecutor has broad discretion in determining what charges to bring and when to bring them, and the judiciary will not question the prosecutor's actions and thereby usurp the prosecution's authority. *People v Farmer*, 193 Mich App 400, 402; 484 NW2d 407 (1992).

² *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973).

Judicial review of prosecutorial decisions is limited to circumstances where the prosecutor's actions are unconstitutional, illegal, ultra vires, or where they constitute an abuse of power. *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999); *People v Morrow*, 214 Mich App 158, 161; 542 NW2d 324 (1995).

Our review of the record did not reveal any evidence of actual prosecutorial vindictiveness. *People v Ryan*, 451 Mich 30, 36; 545 NW2d 612 (1996). We see no objective evidence in the record to suggest that the prosecutor deliberately penalized defendant for his exercise of a procedural, statutory, or constitutional right. *Id.* We are also satisfied that a presumption of prosecutorial vindictiveness is not warranted here, since the facts in this case do not suggest a "reasonable likelihood of vindictiveness." *United States v Goodwin*, 457 US 368, 373; 102 S Ct 2485; 73 L Ed 2d 74 (1982). That the prosecutor did not file the false pretense charges until defendant's case was pending before our Supreme Court is not necessarily evidence of vindictiveness. The delay may just as likely have been attributable to the need to prepare and gather evidence to support the charges. Because the record lacks any evidence that the prosecutor abused his discretion in bringing the false pretenses charges, we will not second-guess his decisions. *Barksdale*, *supra* at 489.

We are also satisfied that defendant received effective assistance of counsel for his false pretenses convictions. Having found no evidence to suggest presumed or actual prosecutorial vindictiveness, defense counsel was not required to raise an objection. *People v Kuplinski*, ___ Mich App ___: ___ NW2d ___ (Docket No. 220272, issued 10/17/00), slip op at 11.

Defendant finally contends that counsel was ineffective for failing to raise the issue of double jeopardy with respect to defendant's convictions of false pretenses after his convictions of five counts of embezzlement. The guarantee against double jeopardy protects against multiple prosecutions and multiple punishments for the same offense. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997). We reject defendant's argument. Because the charges did not arise out of a single act, occurrence, episode or transaction, defendant was not prosecuted twice for the "same offense." See *People v White*, 212 Mich App 298, 305-306; 536 NW2d 876 (1995); *People v Shively*, 230 Mich App 626, 629-631; 584 NW2d 740 (1998). Because the Double Jeopardy Clause was not implicated in this case, defendant's contention that his counsel was ineffective for failing to raise the issue is without merit. *Kuplinski*, *supra*, slip op at 11.

Affirmed.

/s/ Peter D. O'Connell
/s/ Brian K. Zahra
/s/ Barbara B. MacKenzie