

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN TROY CARTER,

Defendant-Appellant.

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UNPUBLISHED

December 18, 2003

No. 242374

Wayne Circuit Court

LC No. 01-009225-01

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

PER CURIAM.

Defendant appeals as of right from a nonjury conviction of third-degree fleeing and eluding, MCL 257.602a(3), for which he was sentenced as an habitual offender, fourth offense, MCL 769.12, to two to fifteen years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that he is entitled to a new trial due to ineffective assistance of counsel. Specifically, he contends that he had mental health issues that warranted a forensic evaluation to determine competency and/or criminal responsibility and possibly presentation of an insanity defense. Because defendant failed to raise this issue below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Relief is not available unless defendant shows that counsel's representation was unreasonable and counsel's error affected the outcome of the proceedings. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233; 661 NW2d 553 (2003).

The record shows that counsel presented a reasonable, albeit unsuccessful, defense of mistaken identity. The decision to argue one defense over another is considered a matter of trial strategy. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Ineffective assistance of counsel can take the form of failure to investigate and present an insanity defense only if the defense is meritorious and the failure to present it deprived the defendant of a reasonably likely chance of acquittal. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988); *People v Snyder*, 108 Mich App 754, 756-757; 310 NW2d 868 (1981).

The trial court file contains a notation that the September 10, 2001 pretrial conference was adjourned for a month because “Δ in ment. hosp.” The presentence report indicated that defendant reported a history of mental illness and stated that he was on psychotropic medication “to medicate his mood swings and his delusions of hearing voices.” The record shows that before trial, counsel knew that defendant was in a mental hospital. However, it does not show whether defendant was being treated for a diagnosed mental illness or merely evaluated, or the nature of any mental illness. Nor does it show that counsel knew that defendant had a history of mental illness or that defendant required, but was not taking, psychotropic medication at the time of the offense. In his affidavit in support of a motion for remand filed in this Court, which was denied, defendant asserts that counsel visited him the day before trial at the Wayne County Jail’s mental health ward:

That during said visit, I advised Trial Counsel that I was taking Medications to control the voices I was hearing as well as my mood swings – and that said medications and my mental condition were effecting my understanding of the case.

Because defendant has not shown that counsel had reason to believe that defendant may have been suffering from a mental illness that rendered him legally insane at the time of the offense, MCL 768.21a(1), defendant has not shown that counsel was ineffective for failing to obtain an evaluation for criminal responsibility. Because mental illness short of legal insanity will not relieve a defendant from criminal responsibility, *People v Carpenter*, 464 Mich 223, 237; 627 NW2d 276 (2001), and there is nothing in the record to show that defendant was legally insane at the time he committed the offense, he has not shown that he had a meritorious insanity defense and thus has not shown that counsel was ineffective for failing to present such a defense.

Nor has defendant shown ineffective assistance of counsel with respect to a competency evaluation. At trial, defendant testified clearly and cogently in his own behalf, without any indication that he was unable to understand the charges or assist counsel in his defense.

Defendant next contends that he is entitled to resentencing because the trial court erred in scoring prior record variables five and six. Because defendant did not raise the scoring issue at or before sentencing, it is not preserved for appeal. MCR 6.429(C); *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002). The issue may, however, be reviewed for plain error at least where “the trial court’s error resulted in a sentence that was not within the appropriate legislative guidelines range.” *People v Kimble*, 252 Mich App 269, 276-277 n 5; 651 NW2d 798 (2002), lv gtd 468 Mich 870; 659 NW2d 231 (2003).

Third-degree fleeing and eluding is a class E offense. MCL 777.12. The guidelines as scored placed defendant in the D-I category, for which the guidelines were five to twenty-three months. MCL 777.66. Because defendant was an habitual offender fourth, the upper end of the guidelines range was doubled, MCL 777.21(3)(c), making the guidelines five to forty-six months. If defendant’s prior record score were reduced by fifteen points, he would still be in the D-I category and the guidelines range would still be five to forty-six months. Because the alleged errors did not change the guidelines range and defendant was sentenced within that range, the error was harmless and defendant is not entitled to relief. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993). For the same reason, defendant is not entitled to relief on the alternative theory of ineffective assistance of counsel. *People v Wilson*, 252 Mich App 390, 394, 396-397; 652 NW2d 488 (2002).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Helene N. White