

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES KWESI BROWN,

Defendant-Appellant.

UNPUBLISHED

March 4, 2004

No. 243810

Wayne Circuit Court

LC No. 02-001212

Before: Schuette, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of arson of a dwelling house, MCL 750.72, entered after a bench trial. We affirm.

I. FACTS

Defendant was charged with assault with intent to commit murder, MCL 750.83, and arson of a dwelling house. Witnesses testified that defendant waived his *Miranda*¹ rights and made two inculpatory statements. The trial court acquitted defendant of assault with intent to commit murder but convicted him of arson of a dwelling house on an aiding and abetting basis.

At a *Ginther*² hearing on remand, trial counsel testified that he considered filing a motion for a *Walker*³ hearing to seek to have defendant's statements suppressed, but concluded after speaking with defendant and examining the statements that it was unlikely such a motion would be granted. Another attorney testified that she recommended a motion to suppress be filed because defendant maintained that the police told him he would not be charged if he made a statement and acted as a witness. Defendant testified that the police told him he would be charged if he did not cooperate and that he was not informed of his *Miranda* rights until after he made his first statement. The trial court concluded that counsel did not render ineffective assistance and denied defendant's motion for a new trial.

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

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

³ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

II. STANDARD OF REVIEW

We review a trial court's findings of fact on a motion to suppress for clear error and the ultimate decision de novo. *People v Darwich*, 226 Mich App 635, 637; 575 NW2d 44 (1997).

III. ANALYSIS

A statement made by an accused during a custodial interrogation is inadmissible unless the accused voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. The prosecution may not use a custodial statement unless it demonstrates that prior to questioning, the accused was informed of his rights. *Miranda, supra*, 444. The ultimate question of whether a person was in custody and thus entitled to *Miranda* warnings before interrogation is a mixed question of law and fact which must be answered independently by the reviewing court after a de novo review of the record. Absent clear error, we will defer to the trial court's historical findings of fact. *People v Mendez*, 225 Mich App 381, 382-383; 571 NW2d 528 (1997). Compliance with *Miranda* does not dispose of the issue of the voluntariness of a confession. *People v Godbaldo*, 158 Mich App 603, 605-606; 405 NW2d 114 (1986). In determining voluntariness, the court should consider the totality of the circumstances, including the duration of detention and questioning, the defendant's age, intelligence, experience, and physical and mental state, and whether the defendant was threatened or promised leniency. *People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997). We give great deference to the trial court's assessment of the credibility of the witnesses. *People v Brannon*, 194 Mich App 121, 131; 486 NW2d 83 (1992).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.*, 600.

Police witnesses testified that defendant was advised of his rights, that he waived his rights and agreed to make the statements, and that he was neither threatened nor promised leniency. If a suppression hearing had been held and the trial court had heard the same evidence at that hearing, it would have been entitled to accept the testimony given by the officers and to reject that given by defendant. *Brannon, supra*. A motion to suppress defendant's statements would have been denied. *Givans, supra*. Counsel's decision to refrain from filing such a motion was a matter of trial strategy. We do not substitute our judgment for that of trial counsel on matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Counsel did not render ineffective assistance by failing to bring a meritless motion. *Carbin, supra*; *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Bill Schuette
/s/ Patrick M. Meter
/s/ Donald S. Owens