

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYON CARTER,

Defendant-Appellant.

UNPUBLISHED
February 26, 2008

No. 275690
Wayne Circuit Court
LC No. 03-011169-01

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

PER CURIAM.

Defendant appeals as of right from jury convictions of assault with intent to commit murder, MCL 750.83, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive prison terms of 7-1/2 to 15 years for the assault conviction, and two years for the felony-firearm conviction.¹ This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Alex Moore testified that after meeting some friends to play basketball, he was walking home when he noticed three cars drive by. He became concerned that they were following him when he saw two of the cars pass by again, so he crossed the street. When the cars stopped, Moore ducked between two houses but could not go any further because there were dogs in the yard. While evaluating his options, defendant, someone Moore knew from the neighborhood, got out of one of the cars. Defendant walked up to Moore and said, "Cat, you gon' die tonight." Defendant then pulled out a gun and shot him. Moore ran and was shot several more times.

Defendant's sole claim on appeal is that trial counsel was ineffective for failing to call a witness, Marcus Gwyn, who would have testified that he saw Moore after the shooting and, in reference to the shooting, Moore said, "I don't know who did it, really." Although defendant raised this issue in a motion for a new trial, he did not request an evidentiary hearing on this

¹ Plaintiff argues that this Court lacks jurisdiction over this appeal because the circuit court docket entries do not reflect the trial court's December 21, 2006, reissued judgment of sentence. However, the circuit court included a copy of the December 21, 2006, judgment with the claim of appeal that it filed on defendant's behalf. Therefore, we reject plaintiff's challenge to this Court's jurisdiction.

issue, so our review is limited to the facts on the record.² *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

The general rule is that effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). 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). The defendant must also overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

“Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. 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) (citations omitted). “Ineffective assistance of counsel may be established by the failure to call witnesses only if the failure deprives defendant of a substantial defense.” *People v Julian*, 171 Mich App 153, 159; 429 NW2d 615 (1988). “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).

The record shows that defendant was represented by Gerald Lorence and that Lorence's associate, Phillip Comorski, conducted the trial. Defendant's mother did not testify at the evidentiary hearing, but submitted an affidavit in which she stated that she told Lorence before trial that Moore had been canvassing the neighborhood, asking people if they knew who shot him, and Gwyn was one of the persons to whom he spoke. She also stated that Lorence was aware of the information Gwyn possessed. Nevertheless, defense counsel stipulated below that Lorence did not know about Gwyn's proposed testimony. At the hearing, Gwyn testified to what Moore had said. He notified defendant's cousin, but apparently never spoke to Lorence and did not say anything to Comorski until after defendant had been convicted. Defense counsel stipulated that Comorski did not know about Gwyn's proposed testimony before trial.

Defense counsel is not ineffective for failing to pursue information of which he was not aware. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Having conceded that both attorneys were unaware of Gwyn's proposed testimony before trial, defendant cannot seek relief based on a position contrary to that taken below. *Living Alternatives for the Developmentally Disabled, Inc v Dep't of Mental Health*, 207 Mich App 482, 484; 525 NW2d 466 (1994).

² Defendant raised this issue in one of two posttrial motions filed below and the court did hold an evidentiary hearing. However, defendant withdrew the motion premised on ineffective assistance of counsel and the hearing was limited to defendant's claim that Gwyn's testimony was newly discovered. The trial court initially granted a new trial, but this Court reversed that decision in *People v Carter*, unpublished opinion per curiam of the Court of Appeals, issued September 29, 2005 (Docket No. 261681).

Even absent defendant's concession, we cannot conclude that the failure to call Gwyn at trial deprived defendant of a substantial defense. Moore had testified that there were at least four people in three separate cars. Defendant and another person were in one car and someone who looked like defendant's friend Mike was in another car. He did not know who was in the third car. Moore ran away after being shot by defendant. While running away, he heard more gunshots "coming from everywhere" but did not see who fired them. Gwyn testified that Moore approached him and said that he had heard that defendant had implicated Gwyn in the crime. When Gwyn denied involvement, Moore implied that he had not thought it was true and added, "man, I don't know who did it, really." Moore denied even speaking to Gwyn and there is nothing in the record to indicate that Moore meant that he did not know the identity of anyone who might have shot him or that he meant that he did not know who was involved in the shooting apart from defendant and possibly his friend Mike, and the latter is wholly consistent with his trial testimony that multiple shots were fired "from everywhere" and he did not see who fired them. Therefore, defendant has failed to show that counsel was ineffective for failing to call Gwyn to testify.

Affirmed.

/s/ Michael J. Talbot
/s/ Mark J. Cavanagh
/s/ Brian K. Zahra