

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE ANTHONY LEE,

Defendant-Appellant.

UNPUBLISHED

May 13, 2008

No. 275089

Bay County Circuit Court

LC No. 05-010495-FH

Before: Fort Hood, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of one count of resisting and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced as a second habitual offender, MCL 769.10, to two days' incarceration and six months' probation. For the reasons set forth in this opinion, we affirm.

In May 2003, defendant was arrested on a charge of resisting and obstructing a police officer. The case stemmed from an encounter defendant had with members of a multi-jurisdictional police task force that was investigating narcotics trafficking in Bay City, Michigan. The case against defendant was later dismissed without prejudice when the police officers involved were unavailable to testify on the day of trial. There is evidence in the record that defendant subsequently filed a 42 USC 1983 civil rights lawsuit against the officers. After the lawsuit was filed, defendant was re-charged with resisting and obstructing. Before trial, defense counsel filed a motion to dismiss the charge against defendant, arguing that the prosecutor's actions constituted vindictive prosecution of defendant in retribution for the pending federal case. The trial court denied defendant's motion and the case proceeded to trial.

Defendant first argues that the lower court erred in denying his motion to dismiss the charge against him because the prosecution acted vindictively in re-charging him after he filed his § 1983 lawsuit. In his motion to dismiss, defendant argued that the prosecutor's actions constituted presumptive vindictive prosecution. However, defendant appears to argue on appeal that re-charging him with a crime that had earlier been dismissed was actual vindictive prosecution, an assertion requiring different proofs. See *People v Ryan*, 451 Mich 30, 36; 545 NW2d 612 (1996). Generally, "[a]n objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground." *People v Kimble*, 470

Mich 305, 309; 684 NW2d 669 (2004). Therefore, we review this claim of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant's claims are substantially derived from a line of United States Supreme Court cases beginning with *North Carolina v Pearce*, 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969) and its progeny, *Colten v Kentucky*, 407 US 104; 92 S Ct 1953; 32 L Ed 2d 584 (1972); *Chaffin v Stynchcombe*, 412 US 17; 93 S Ct 1977; 36 L Ed 2d 714 (1973); *Blackledge v Perry*, 417 US 21; 94 S Ct 2098; 40 L Ed 2d 628 (1974); *Bordenkircher v Hayes*, 434 US 357; 98 S Ct 663; 54 L Ed 2d 604 (1978); and *United States v Goodwin*, 457 US 368, 373; 102 S Ct 2485; 73 L Ed 2d 74 (1982). In this line of cases, the United States Supreme Court announced the rule that vindictiveness occurs when an agent of the State pursues a course of action whose objective is to penalize a person's reliance or assertion of their legal rights. When such actions are proven they are deemed to be "patently unconstitutional." *Chaffin, supra*, 412 US at 32, 33. Generally, prosecutorial vindictiveness occurs when a prosecutor violates a criminal defendant's due process rights by prosecuting the defendant for asserting a protected statutory or constitutional right. *Ryan, supra* at 35-36. There are two types of prosecutorial vindictiveness—presumed and actual. *Id.* at 36. Actual vindictiveness occurs when there is "objective evidence of an 'expressed hostility or threat' suggest[ing] that the defendant was deliberately penalized for his exercise of a procedural, statutory, or constitutional right." *Id.*, quoting *United States v Gallegos-Curiel*, 681 F2d 1164, 1168 (CA 9, 1982). In other cases, vindictiveness is presumed in those circumstances where "action detrimental to the defendant has been taken after the exercise of a legal right[.]" *Goodwin, supra* 457 US at 373. Presumed vindictiveness requires a "reasonable likelihood" that the prosecution acted vindictively. *Id.* For purposes of determining whether a prosecutor's conduct poses a realistic likelihood of vindictiveness, a court considers the "prosecutor's 'stake' in deterring the exercise of a protected right and the unreasonableness of [the prosecutor's] actions." *United States v Poole*, 407 F3d 767, 774 (CA 6, 2005).

In this case, the defendant was charged with resisting and obstructing a police officer in violation of MCL 750.81d(1). He was initially scheduled for trial on July 8, 2004. However, defense counsel asserts, and the prosecutor does not dispute, that at the time of defendant's first trial, the officers involved in the case were on vacation and therefore unable to testify. As a result, the trial court dismissed the charge without prejudice. On May 31, 2005, defendant and his brother filed a § 1983 lawsuit against the officers. According to statements made by the prosecutor at the motion to dismiss, the filing of the lawsuit prompted police officers to telephone the prosecutor and inquire about the status of the resisting and obstructing charge. The charge was thereafter reinstated, and defendant was subsequently convicted and sentenced.

In *Bordenkircher, supra*, the United States Supreme Court stated:

In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation" so long as "the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification." [*Bordenkircher, supra* 434 US at 364 (footnote omitted).]

In this case, there is no evidence that the decision to reinstate the charge was motivated by defendant's filing of the § 1983 lawsuit. Rather, the evidence indicates that the filing of the § 1983 lawsuit reminded the prosecutor that they had forgotten to reinstate the charge against defendant.¹ Because the prosecutor possesses the discretion to prosecute a particular case, *Bordenkircher, supra*, and defendant proffered no objective evidence below or on appeal that the prosecutor expressed any type of hostility or threat to defendant based on his pending lawsuit, *Ryan, supra* at 36, we cannot find that the prosecutor engaged in actual vindictiveness in this matter.

Likewise, defendant has not demonstrated presumed vindictiveness. Defendant relies exclusively on the timing of the prosecutor's actions in re-charging him soon after he filed his § 1983 lawsuit against the officers. In terms of the circumstances of this case, the fact that the prosecutor chose to re-charge defendant after the filing of his federal civil lawsuit does not, in and of itself, raise a reasonable likelihood that the prosecutor acted vindictively. Moreover, the explanation for the timing of the two events offered by the prosecutor during the hearing on defendant's motion to dismiss underscores the fallacy of defendant's argument. Defendant's assertion that the police forced or cajoled the prosecutor to reinstate the criminal charges with the specific intent of "punishing" defendant for the filing of his civil action is not supported by any evidence. Based on our reading of the record, defendant has not demonstrated that the prosecution was actually or presumptively vindictive. Accordingly, defendant has not established plain error on the part of the trial court in denying defendant's motion to dismiss the charge.

Defendant next argues that there was insufficient evidence adduced at trial to support his conviction for resisting and obstructing. Specifically, defendant argues that the prosecution failed to introduce sufficient evidence that he was aware that the police officer who first approached him was an officer when he resisted and obstructed him. We disagree. In reviewing de novo the sufficiency of the evidence in a criminal case, we view both direct and circumstantial evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997); *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). All conflicts in the evidence are to be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

In relevant part, MCL 750.81(d)(1) provides:

¹ The prosecutor's statements at the hearing on the motion to dismiss indicate that the prosecutor had simply forgotten to reinstate the charge against defendant and that defendant's filing of the § 1983 lawsuit reminded the prosecutor to do so: "It's quite possible, your Honor, that if . . . the lawsuit hadn't been filed and no one's attention had been brought to the file, it may not have been filed. . . ." The prosecutor maintained throughout the motion to dismiss that it was always the intent of his office to reissue the charge, stating: "I don't know if it sat around on a desk or if it just got filed away and so it got forgotten. . . . And in looking at it, it certainly was going to be re-authorized."

[A]n individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both.

At trial, the defense introduced the testimony of witnesses who claimed that the officers did not identify themselves as such during the confrontation with defendant and were not readily identifiable by their clothing. In contrast, the prosecution introduced evidence that the officers did verbally identify themselves and were wearing police apparel that night. Resolving the conflicting evidence in favor of the prosecution, *Terry, supra* at 452, we conclude that the prosecution offered sufficient evidence from which a rational jury could find defendant guilty as charged.

Finally, defendant argues that his trial counsel was ineffective for failing to file a motion to suppress evidence garnered from what he characterizes as an illegal investigatory stop. Again, we disagree. Both the United States and Michigan Constitutions protect against unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. A defendant who asserts that he has been denied the effective assistance of counsel must establish that (1) the performance of his trial counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the trial would have been different. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). Because defendant failed to move for an evidentiary hearing or a new trial on the issue of ineffective assistance of counsel, our review is limited to the existing record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

This Court has explained that there are three categories of encounters between police and citizens:

“The first category is an arrest, for which the Fourth Amendment requires that police have probable cause to believe that a person has committed or is committing a crime. The second category is an investigatory stop, which is limited to a brief, non-intrusive detention. This is also a Fourth Amendment ‘seizure,’ but the officer need only have specific and articulable facts sufficient to give rise to a reasonable suspicion that a person has committed or is committing a crime. The third category involves no restraint on the citizen’s liberty, and is characterized by an officer seeking the citizen’s voluntary cooperation through non-coercive questioning. This is not a seizure within the meaning of the Fourth Amendment.” [*People v Bloxson*, 205 Mich App 236, 241; 517 NW2d 563 (1994), quoting *United States v Johnson*, 910 F2d 1506, 1508 (CA 7, 1990) (citations omitted by *Bloxson* Court).]

In this case, it is clear that the police officers had the requisite reasonable suspicion to conduct an investigatory stop at the time of the confrontation with defendant. It was uncontested at trial that the officers observed a vehicle parked facing eastward in the westbound lane of traffic with its back end extending into the road. It was also undisputed that defendant and his brother were standing within a few feet of the driver’s side of the vehicle, speaking with the

occupant of the vehicle. One of the task force officers testified that, in his experience, these facts were “suspicious in nature” and indicative of “drug activity” transpiring. Based on these facts, the officers did not act unreasonably in stopping the men to investigate. Therefore, trial counsel cannot be faulted for failing to move to suppress the evidence confiscated as a result of the stop. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998) (“Trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile.”).

Affirmed.

/s/ Karen M. Fort Hood

/s/ Michael J. Talbot

/s/ Stephen L. Borrello