

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 13, 2011

v

No. 293201
Wayne Circuit Court

KENNETH ANDRE HILL,

Defendant-Appellant.

LC No. 08-016400-FH

Before: FORT HOOD, P.J., and MURRAY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of possession of a firearm by a felon, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to concurrently serve three to five years' imprisonment for both the possession of a firearm by a felon and CCW convictions. Defendant was also sentenced to serve two years' consecutive imprisonment for the felony-firearm conviction. We affirm defendant's convictions and sentences, but remand for correction of the judgment of sentence to reflect that the sentences for felony-firearm and CCW are to run concurrently.

On appeal, defendant first asserts he was denied the effective assistance of counsel at trial. However, a motion for a new trial or an evidentiary hearing was not made before the trial court, which is required to preserve this issue. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Because no motion was filed in the trial court, our review is limited to the existing record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

To establish ineffective assistance of counsel, a defendant bears the heavy burden of showing that counsel's performance was deficient and that he was prejudiced by the deficiency. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). There is a presumption that counsel's challenged actions were sound trial strategy, and the attorney's deficiency must be so serious that counsel was not performing as guaranteed by the Sixth Amendment. *Id.* A defendant must show that the error prejudiced him to the point that the outcome would have been different if trial counsel had not committed the error. *Id.*

Defendant first argues that trial counsel should have moved to suppress his statement to the police. A separate hearing is required when the voluntariness of the statement is at issue.

People v Walker (On Rehearing), 374 Mich 331, 337; 132 NW2d 87 (1965). Admission of the statement would be precluded if it was determined that the statement was made involuntarily. *Id.* Determinations about the credibility, truthfulness and authenticity of a statement are left for the trier of fact. *People v Spivey*, 109 Mich App 36, 37; 310 NW2d 807 (1981).

Defendant is unable to show that his statement was made involuntarily; therefore, a motion to suppress his statement would have been futile. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002). A confession is involuntary if it was obtained by threat, violence, promise or the exertion of an improper influence. *People v Paintman*, 139 Mich App 161, 171; 361 NW2d 755 (1984). Nothing in the record indicates that defendant's statement was made involuntarily. Although defendant claims to have been in pain, he indicated to the investigating officer that he was fine and, according to the officer, he did not appear to be under the influence of alcohol or drugs. Defendant was also read his constitutional rights and initialed the written statement of those rights to indicate he understood them prior to making the statement.

We reject defendant's challenge to his statement on the basis of its authenticity. The statement was abruptly halted when the investigating officer asked defendant how he could get in touch with the female he claimed left the gun behind in the van. Defendant refused to sign the statement that the investigator had helped him write. It was for the trier of fact to determine whether the statement made by the investigator was authentic. Therefore, a motion to suppress would have been futile and defendant's right to the effective assistance of counsel was not violated.

Defendant also claims that his right to the effective assistance of counsel was violated by trial counsel's failure to investigate and secure security tapes from the hospital. Although a failure to reasonably investigate could violate a defendant's right to the effective assistance of counsel, deference is given to trial counsel's strategic decisions. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Failure to call a witness or present evidence is presumed to be sound trial strategy unless a defendant is denied a defense that may have altered the trial. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). Our review is limited to the existing record because defendant did not move for a new trial or an evidentiary hearing.

Despite not determining whether security tapes existed, defendant was still able to present his defense that the gun belonged to someone else. Evidence was presented to the jury that the gun had been left in the vehicle by a friend while defendant was in the hospital, and security tapes would have only provided corroboration to that testimony. However, there is nothing in the record to suggest that security tapes actually existed, let alone that they supported defendant's defense that the gun was placed in the van by a friend. Defendant's right to the effective assistance of counsel was not violated.

Defendant also asserts on appeal that the trial court erred by sentencing him to consecutively serve the CCW and felony-firearm sentences, an argument with which the prosecution agrees.

The felony-firearm statute, MCL 750.227b, requires that a felony-firearm sentence be served consecutively and prior to the sentence for the underlying felony. *People v Clark*, 463 Mich 459, 464; 619 NW2d 538 (2000). However, CCW cannot serve as the underlying felony to

support a felony-firearm conviction. *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994).

There is an ambiguity in defendant's judgment of sentence. The jury was instructed that possession by a felon was the underlying felony offense to support the felony-firearm conviction. Defense counsel also reminded the court during sentencing that the sentence for a CCW conviction must run concurrently with the felony-firearm sentence. Yet, the judgment of sentence reads that "CT 1. IS CONCURRENT WITH CT. 2 AND CONSECUTIVE TO CT. 3." This language is ambiguous as to whether the felony-firearm sentence (count 1) runs consecutively with the CCW sentence (count 2) or possession by a felon sentence (count 3). Because CCW is one of the few offenses that cannot support a felony-firearm conviction, we remand to the trial court to have the judgment of sentence clarified to reflect that the possession by a felon and CCW sentences are to be served concurrently, while the felony-firearm and possession by a felon sentences are to be served consecutively.

Defendant's convictions and sentences are affirmed but the matter is remanded for correction of the judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Christopher M. Murray
/s/ Deborah A. Servitto