

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 20, 2012

v

CARY LEE STOKES,

No. 306909
Saginaw Circuit Court
LC No. 10-034413-FH

Defendant-Appellant.

Before: TALBOT, P.J., and BECKERING and M. J. KELLY, JJ.

PER CURIAM.

Cary Lee Stokes appeals as of right his jury trial conviction of two counts of felonious assault,¹ two counts possession of a firearm during the commission of a felony (“felony-firearm”),² possession of a firearm by a felon (“felon in possession”),³ and possession of a short-barreled shotgun.⁴ Stokes was sentenced as a third habitual offender⁵ to concurrent terms of two to eight years’ imprisonment for each the felonious assault convictions, and two to ten years each for the felon in possession and possession of a short-barreled shotgun convictions, to be served consecutive to concurrent terms of two years’ imprisonment for each felony-firearm conviction. We affirm Stokes’s convictions and remand to the trial court for proceedings consistent with this opinion.

Stokes argues that he did not knowingly and intelligently waive his right to counsel before undertaking his own defense. We disagree. This Court “engage[s] in a de novo review of the entire record[,]” but reviews “for clear error the trial court’s factual findings regarding a

¹ MCL 750.82.

² MCL 750.227b.

³ MCL 750.224f.

⁴ MCL 750.224b.

⁵ MCL 769.11.

defendant's knowing and intelligent waiver of [Sixth Amendment] rights[.]”⁶ Additionally, “[w]e review questions of law de novo.”⁷

“[A] defendant ‘has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.’”⁸ To determine whether a defendant has validly waived his right to counsel for purposes of electing self-representation it must be established that:

(1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business.⁹

Additionally, the trial court must comply with the applicable court rule, which states that in order to “permit the defendant to make an initial waiver of the right to be represented by [counsel]” the court must first:

(1) advis[e] the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and (2) offer[] the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.¹⁰

Substantial, not necessarily literal, compliance by the trial court with the above is sufficient to permit a defendant to elect self-representation.¹¹ “Substantial compliance requires that the court discuss the substance of both *Anderson* and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures.”¹²

The prosecution's theory of the case was that Stokes assaulted his former girlfriend, her current boyfriend, and her minor son, with a firearm, which was discharged during the melee. At

⁶ *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004) (citations and quotations omitted).

⁷ *Id.* at 640-641 (citation and quotations omitted).

⁸ *People v Russell*, 471 Mich 182, 188; 684 NW2d 745 (2004), quoting *Faretta v California*, 422 US 806, 807; 95 S Ct 2525; 45 L Ed 2d 562 (1975).

⁹ *Russell*, 471 Mich at 190, citing *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976).

¹⁰ MCR 6.005(D).

¹¹ *Russell*, 471 Mich at 191.

¹² *Id.* (citation and quotations omitted).

the start of trial, Stokes asked if he could exercise his right to represent himself. During the exchange that followed, Stokes acknowledged that he understood the charges against him. Additionally, the court appropriately advised him of the risks associated with self-representation and that he would be held to the same standard as the prosecution. Stokes stated that he did not “feel as though [he] could do any worse,” and indicated that he was prepared to represent himself. The court then granted his request, with an appointed attorney acting as stand-by counsel. Then, on the second day of trial, Stokes indicated that he still wished to represent himself.

Stokes correctly asserts that when he initially asked to represent himself, the trial court did not explain that he was charged with felon in possession and possession of a short-barreled shotgun, or that he was subject to possible sentence enhancements because of his habitual offender status. The court did, however, read the six charges against Stokes from the felony information in Stokes’s presence during voir dire before Stokes asked to represent himself. Also before the court recited the charges, Stokes clearly stated that he understood the charges against him. Additionally, our Supreme Court has found that if a defendant has been advised of “the nature of the charge and possible punishments . . . at his arraignment,” the trial court’s failure to “specifically address the charged offense and the range of possible punishment is not enough to defeat a finding of substantial compliance with the waiver procedures[.]”¹³ Here, at Stokes’s May 17, 2010, arraignment, the court explained that Stokes was charged with felon in possession, which carried a maximum penalty of five years’ imprisonment, a five thousand dollar fine, or both. At Stokes’s July 12, 2010, arraignment defense counsel acknowledged receipt of and waived a formal reading of the felony information, which was amended on that date to include the charge of possession of a short-barreled shotgun and the possible penalties related to Stokes’s habitual offender status. Because Stokes waived a reading of the felony information, he may not now claim error.¹⁴ Moreover, Stokes was served with a copy of the amended felony information on November 1, 2010, which included all of his charges, the maximum statutory sentences for each charge, and the possible sentence enhancement based on his habitual offender status.¹⁵ Accordingly, we find that the trial court substantially complied with *Anderson* and MCR 6.005(D), and relief is not warranted.¹⁶

Stokes next argues that because he was sentenced based on the trial court’s misconception regarding the application of the habitual offender statute, he is entitled to resentencing. We agree that the record is not clear and could be interpreted to reach such a

¹³ *People v Adkins (After Remand)*, 452 Mich 702, 731; 551 NW2d 108 (1996), overruled in part on other grounds *Williams*, 470 Mich at 641 n 7.

¹⁴ *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000).

¹⁵ Stokes was served the amended felony information by mail and a proof of service is contained in the lower court record.

¹⁶ *Russell*, 471 Mich at 190-191.

conclusion. This unpreserved issue is reviewed for plain error affecting Stokes's substantial rights.¹⁷

Although a trial court may not modify a valid sentence once formally imposed, it may correct an invalid sentence in a post-sentencing proceeding.¹⁸ A sentence "is invalid if . . . the court fails to exercise its discretion because it is laboring under a misconception of the law[.]"¹⁹ Where a trial court failed to exercise discretion at sentencing because of an erroneous belief that it had no such authority, the case must be remanded for resentencing.²⁰

Stokes's felony-firearm convictions had fixed terms of two years' imprisonment.²¹ Stokes's other convictions, however, were subject to the habitual offender statute, which states:

[i]f the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, the court . . . may sentence the person to imprisonment for a maximum term that is not more than twice the longest term prescribed by law for a first conviction of that offense or for a lesser term.²²

Thus, under the relevant statute, when a defendant is a habitual offender, the sentencing court has discretion, and is not mandated, to impose a maximum sentence that is twice the statutory maximum.²³

Stokes's felony-firearm conviction carries a statutory maximum sentence of four years' imprisonment.²⁴ Additionally, his felon in possession and possession of a short-barreled shotgun convictions have statutory maximum penalties of five years' imprisonment.²⁵ At sentencing, the trial court stated as follows:

[O]n Counts III and VI, sentence you to serve the mandatory 24 months in a penal institution with credit for 69 days served, which will run preceding and

¹⁷ *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

¹⁸ *People v Whalen*, 412 Mich 166, 169-170; 312 NW2d 638 (1981).

¹⁹ *Id.*

²⁰ *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994).

²¹ MCL 750.227b(1).

²² MCL 769.11(1)(a).

²³ *People v Mauch*, 23 Mich App 723, 730-731; 179 NW2d 184 (1970); *People v Ash*, 128 Mich App 265, 269; 340 NW2d 646 (1983), overruled on other grounds *People v Nelson*, 234 Mich App 454, 463; 594 NW2d 114 (1999); *People v Bonilla-Machado*, 489 Mich 412, 416; 803 NW2d 217 (2011).

²⁴ MCL 750.82(1).

²⁵ MCL 750.224f(3); MCL 750.224b(2).

consecutive to your sentence on Counts I, II, IV and V of not less than 24 months not to exceed 96 months on Counts I and II, and not to exceed 96 months on Count IV and V with credit for zero days served.

Then, after a brief adjournment, the court continued:

The Court misspoke itself on Counts IV and V, which is possession of a firearm by a felon. The maximum term is . . . 120 months. I said it was 96 months.

So on those two Counts, the sentence will be not less than 24 months not to exceed 120 months; on the two felony assaults, it will be not less than 24 months not to exceed 96 months, so the record is clear what—the statutory requirements as imposed by legislature.

While it is not entirely clear, the record could be interpreted to mean that Stokes's sentences for his felonious assault, felon in possession and possession of a short-barreled shotgun convictions were based on the court's misconception of the law regarding the application of the habitual offender statute. As such, we remand this matter to the trial court for clarification regarding whether the court was aware that it had discretion to apply the enhanced maximum sentence, and whether it exercised such discretion when it sentenced Stokes. If the trial court was aware of and exercised its discretion when it sentenced Stokes, nothing further need be done. If, however, the trial court was unaware of and failed to exercise its discretion when it sentenced Stokes, then we find that resentencing is necessary.²⁶

Stokes raises several unpreserved issues in a Standard 4 Brief,²⁷ which are reviewed by this Court for plain error affecting Stokes's substantial rights.²⁸ We have reviewed all of the issues and find that they lack merit.

First, Stokes asserts that defense counsel rendered ineffective assistance. Stokes properly invoked his right to represent himself during trial. Thus, he cannot complain that his own failure to investigate witness Don Spicer or raise motions regarding alleged jurisdictional and procedural errors constituted ineffective assistance.²⁹ Additionally, the record evidence fails to establish that defense counsel's performance before trial was deficient or that "but for counsel's [alleged] error, the result of the proceedings would have been different."³⁰ As such, reversal is not warranted.

²⁶ *Whalen*, 412 Mich at 169-170; *Green*, 205 Mich App at 346.

²⁷ Supreme Court Administrative Order 2004-6.

²⁸ *Carines*, 460 Mich at 774.

²⁹ *People v Dennany*, 445 Mich 412, 438 n 14; 519 NW2d 128 (1994).

³⁰ *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Next, Stokes claims that the prosecution knowingly presented false testimony. Stokes's claim is not supported by the record. Additionally, mere inconsistent testimony does not demonstrate that the prosecutor knowingly presented false testimony, so Stokes's argument must fail.³¹

Stokes also alleges that because his conviction of possession of a short-barreled shotgun was proved by the same act as his conviction of felonious assault, his convictions for both violate double jeopardy. Stokes's argument, however, lacks merit as "the statutory elements of the offense[s] . . . each require[] proof of a fact that the other does not[.]"³²

Stokes further contends that the complaint and warrant failed to meet the constitutional standards. Review of the complaint and warrant reveals no error.³³ Stokes also asserts that the felony information was improperly amended to describe the weapon as both a handgun and a shotgun, thus he was unable to defend against the charges. Stokes admittedly failed to object to the amended felony information. In fact, before trial, defense counsel acknowledged receipt of the felony information containing this discrepancy. As such, this issue was waived.³⁴ Moreover, the jury, which is presumed to follow its instructions, was appropriately instructed that the weapon was a shotgun.³⁵ Thus, any error was harmless. Furthermore, the record demonstrates that Stokes was appropriately bound over to circuit court and personal jurisdiction was properly obtained.³⁶ Thus, reversal is not warranted.

Finally, Stokes asserts that remand is necessary because the prosecution failed to produce alleged res gestae witness, Spicer. "[T]he prosecution has neither the obligation to produce at trial, nor the obligation to call as a witness at trial, a res gestae witness."³⁷ Rather, the prosecution has the "obligation to provide notice of known witnesses and reasonable assistance to locate witnesses on defendant's request."³⁸ "[A]n evidentiary hearing is no longer required simply because the prosecution did not produce a res gestae witness."³⁹ Here, Stokes never requested assistance to locate Spicer so that he could testify. Thus, relief is not warranted.

³¹ *People v Parker*, 230 Mich App 677, 690; 584 NW2d 753 (1998).

³² *People v Williams*, 294 Mich App 461, 469; 811 NW2d 88 (2011) (citation and quotations omitted); MCL 750.224b; MCL 750.82.

³³ *People v Manning*, 243 Mich App 615, 621-622; 624 NW2d 746 (2000).

³⁴ *Carter*, 462 Mich at 216.

³⁵ *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011).

³⁶ MCR 6.110(G).

³⁷ *People v Cook*, 266 Mich App 290, 292-293 n 2; 702 NW2d 613 (2005).

³⁸ *Id.* at 295 (citation and quotations omitted).

³⁹ *Id.* at 295-296.

Affirm Stokes's convictions and remand to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Jane M. Beckering
/s/ Michael J. Kelly