

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
December 19, 2013

v

LANTZ HOWARD WASHINGTON,  
  
Defendant-Appellant.

No. 312825  
Branch Circuit Court  
LC No. 11-069575-FH

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Before: WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Defendant, Lantz Howard Washington, appeals as of right his conviction, following a jury trial, of possession with the intent to deliver marijuana.<sup>1</sup> We affirm.

I. FACTS

A. BACKGROUND FACTS

After Officer Benjamin Bordner stopped Washington for speeding, Washington consented to a search of his vehicle. Officer Bordner found marijuana in Washington's engine compartment. After Officer Bordner arrested Washington, Washington participated in a videotaped interview. During the interview, which was played for the jury, Washington nodded when Officer Bordner asked him if the marijuana was a graduation present for his stepson. Washington stated that he was trying to build a relationship with his stepson. Washington subsequently claimed that he did not know that the marijuana was in his vehicle.

At trial, Washington testified that someone else must have put the marijuana in his vehicle. According to Washington, the day before he was pulled over, he left his car at the house of his son, Lantz T. Washington, where he witnessed his son and a friend smoking marijuana. When he picked his car up from his son's house, he did not speak with his son. Washington testified that when he appeared to admit to Officer Bordner that he knew that the marijuana was in his vehicle, he was confused.

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<sup>1</sup> MCL 333.7401(2)(d)(iii).

## B. PROCEDURAL HISTORY

During the first day of trial, defense counsel indicated that he intended to call Lantz T. Washington and Wendell Burrell as witnesses, stating that “[t]hey’re allegedly on their way.” Lantz T. Washington and Burrell did not appear in court. During the second day of trial, defense counsel stated that neither Burrell nor Lantz T. Washington were present, and that

yesterday they tried to get a ride here but were unable to procure that ride. Today they are going to try to be here. It’s my understanding they could be a little late. They were supposed to call either the Court or my office . . . if they were going to be late. They are not here, so I will move forward with my client, Mr. Washington.

Defense counsel subsequently presented Washington’s testimony. After Washington testified, Burrell and Lantz T. Washington still were not present. Defense counsel explained to the trial court that

even though the subpoena for [Lantz T. Washington] was sent yesterday to his parole agent, that way he would have authorization to leave and be here, and confirmation through my office that he was on his way yesterday, but unfortunately, they never showed up. It’s my understanding that they couldn’t get a ride. I have no confirmation of any phone calls. I just called, checked with my office. There are no messages at my office . . . .

Defense counsel also stated that the witnesses were family members or close friends of Washington’s family. The trial court ruled that the parties would proceed to closing statements.

The jury found Washington guilty of possession with the intent to deliver marijuana.

## II. INEFFECTIVE ASSISTANCE OF COUNSEL

### A. STANDARD OF REVIEW

A defendant’s ineffective assistance of counsel claim “is a mixed question of fact and constitutional law.”<sup>2</sup> When reviewing an ineffective assistance of counsel claim, this Court reviews for clear error the trial court’s findings of fact, and reviews de novo questions of law.<sup>3</sup> When the trial court has not conducted a hearing to determine whether a defendant’s counsel was ineffective, our review is limited to mistakes apparent from the record.<sup>4</sup>

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<sup>2</sup> *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

<sup>3</sup> *Id.*

<sup>4</sup> *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

## B. LEGAL STANDARDS

A criminal defendant has the fundamental right to effective assistance of counsel.<sup>5</sup> To prove that his defense counsel was not effective, the defendant must show that (1) defense counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that counsel's deficient performance prejudiced the defendant.<sup>6</sup>

## C. APPLYING THE STANDARDS

Washington contends that defense counsel rendered ineffective assistance when he failed to subpoena Lantz T. Washington and Burrell. We disagree.

Here, the trial court found that defense counsel's performance was not objectively unreasonable. The record indicates that defense counsel took steps to secure the presence of Burrell and Lantz T. Washington at trial. The witnesses were a family member and a close family friend of Washington. Trial counsel also indicated that he sent a subpoena to Lantz T. Washington's parole officer on the first day of trial. Trial counsel stated that the witnesses did not attend the first day of trial because of transportation issues and did not call to indicate why they did not attend the second day of trial. However, Lantz T. Washington and Burrell both indicated in their affidavits that they did not speak with anyone in defense counsel's office or state that they were unable to secure a ride and stated that they did not receive subpoenas until after the trial.

We conclude that the trial court did not clearly err when it determined that defense counsel's performance was objectively reasonable. Given the trial court's finding, it appears that the trial court did not believe Lantz T. Washington's and Burrell's statements in their affidavits. This Court does not resolve questions of credibility on appeal.<sup>7</sup> While Lantz T. Washington's affidavit indicates that he required a subpoena to receive permission from his parole officer the first day of trial and did not receive one, defense counsel testified that he gave Lantz T. Washington's parole officer a copy of the subpoena on the first day of trial. Additionally, while the record is silent regarding whether defense counsel issued Burrell a subpoena, the record discloses no reason why defense counsel should have known that Burrell would require a subpoena to appear in court. We conclude that the trial court did not clearly err when it found that defense counsel's actions were objectively reasonable.

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<sup>5</sup> US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

<sup>6</sup> *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

<sup>7</sup> *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Washington also has not shown that defense counsel's failure to call Burrell or Lantz T. Washington prejudiced him. A defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.<sup>8</sup>

Here, during a videotaped interview, Washington responded by nodding when Officer Bordner asked him if the marijuana was a gift for his stepson. While trying to explain his statement to Officer Bordner at trial, Washington testified that he told Officer Bordner, "Yes, I was taking him the gym shorts, the mari—the laptop and the computer." Additional testimony included that Washington's explanation for events changed several times and that he may have attempted to flee the scene. Given the overwhelming evidence of Washington's guilt, we conclude that it is not reasonably likely that the result of the proceeding would have been different had defense counsel taken other steps to secure the witnesses' presence.

### III. THE 180-DAY RULE

#### A. STANDARD OF REVIEW AND ISSUE PRESERVATION

This Court reviews de novo issues of statutory interpretation.<sup>9</sup>

#### B. LEGAL STANDARDS

MCL 780.131(1) provides the basis for the 180-day rule:

Whenever the department of corrections receives notice that there is pending in this state any untried warrant, indictment, information, or complaint setting forth against any inmate of a correctional facility of this state a criminal offense for which a prison sentence might be imposed upon conviction, the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney of the county in which the warrant, indictment, information, or complaint is pending written notice of the place of imprisonment of the inmate and a request for final disposition of the warrant, indictment, information, or complaint.

The prosecutor's failure to commence an action within 180 days of receiving notice from the Department of Corrections (the Department) divests the trial court of jurisdiction and the charge must be dismissed.<sup>10</sup>

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<sup>8</sup> *Pickens*, 446 Mich at 312.

<sup>9</sup> *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

<sup>10</sup> MCL 780.133; MCR 6.004(D)(2); *People v Lown*, 488 Mich 242, 256; 794 NW2d 9 (2011).

### C. APPLYING THE STANDARDS

Washington contends that the prosecutor's failure to comply with the 180 day rule divested the trial court of jurisdiction over Washington's case. We disagree.

The prosecutor cannot violate the 180-day rule if it was never triggered.<sup>11</sup> The 180-day rule is triggered when the Department delivers a written notice of incarceration and request for disposition to the prosecutor.<sup>12</sup>

Here, the Department never sent a notice of incarceration to the prosecutor. Thus, we conclude that the prosecutor did not violate the 180-day rule because the Department never triggered it.

We reject Washington's argument that the prosecutor's awareness of his incarceration was sufficient to trigger the 180-day rule. This Court enforces clear and unambiguous statutory language as written.<sup>13</sup> MCL 780.131(1) provides that "the inmate shall be brought to trial within 180 days after the department of corrections causes to be delivered to the prosecuting attorney . . . written notice of the place of imprisonment of the inmate and a request for final disposition . . ." MCL 780.131(1) thus provides a very specific triggering condition: delivery of the notice. It does not provide that the statute becomes operative on the prosecutor's *awareness* of a defendant's incarceration. Thus, we conclude that Washington's assertion that the prosecutor's awareness of his incarceration was sufficient to trigger the 180-day rule lacks merit.

### IV. SENTENCING CREDIT

#### A. STANDARD OF REVIEW

This Court reviews de novo issues of statutory interpretation.<sup>14</sup>

#### B. LEGAL STANDARDS

MCL 769.11b provides that a defendant is entitled to sentencing credit for time served if he or she is incarcerated before trial because he or she is unable to furnish bond:

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

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<sup>11</sup> *People v Rivera*, 301 Mich App 188, 192; 835 NW2d 464 (2013).

<sup>12</sup> *Id.*; *Williams*, 475 Mich at 255-256.

<sup>13</sup> *People v Smith-Anthony*, 494 Mich 669, 676; 837 NW2d 415 (2013).

<sup>14</sup> *People v Stone*, 463 Mich 558, 561; 621 NW2d 702 (2001).

MCL 791.238(2) provides:

A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner and is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment.

Thus, a parole violator's incarceration as a result of violating parole does not count as time served.<sup>15</sup>

### C. APPLYING THE STANDARDS

Washington contends that he was unable to furnish bond for his offense on the basis of his status as a parole violator and, therefore, he is entitled to a sentencing credit for time served under MCL 769.11b. We disagree.

A parolee who is incarcerated because he or she has violated parole is not incarcerated “because of being denied or unable to furnish bond . . . .”<sup>16</sup> The parolee is incarcerated because he or she has resumed serving time on the remaining portion of an earlier sentence.<sup>17</sup> Thus, MCL 769.11b does not apply to a parolee who is incarcerated pending the resolution of new criminal charges unless he or she has reached his or her maximum discharge date.<sup>18</sup>

Here, there is no indication that Washington was near his maximum discharge date for his prior offense. According to the information available on the Department's Offender Tracking Information System, Washington was sentenced for his prior offense on November 16, 2004, to a maximum term of 10 years.<sup>19</sup> The trial court sentenced Washington in the current case on September 24, 2012. Thus, Washington was not incarcerated because he was unable to furnish bond; he was incarcerated because he had resumed serving time on the remaining portion of his earlier sentence. We conclude that the trial court did not err when it determined that Washington was not entitled to a sentencing credit for time served under MCL 769.11b.

Further, we are not persuaded that MCL 769.11b is unjust on the basis of the length of Washington's pretrial incarceration. “Before the enactment of [MCL 769.11b], a criminal defendant had no right to sentence credit for the period he was confined before the sentence was imposed.”<sup>20</sup> A parole violator has no right to sentencing credit inside the parameters of MCL

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<sup>15</sup> *People v Idziak*, 484 Mich 549, 578-579; 773 NW2d 616 (2009).

<sup>16</sup> *Id.* at 566-567, quoting MCL 769.11b.

<sup>17</sup> *Id.* at 568.

<sup>18</sup> *Id.* at 566-567, 567 n 17.

<sup>19</sup> See <<http://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=229621>> (accessed December 13, 2013).

<sup>20</sup> *People v Prieskorn*, 424 Mich 327, 333; 381 NW2d 646 (1985).

769.11b, and no one has a right to sentencing credit outside the parameters of MCL 769.11b. Because Washington has no right to such credit, its denial was not an injustice.

#### V. CONCLUSION

We conclude that defense counsel's failure to subpoena Lantz T. Washington or Burrell did not constitute ineffective assistance of counsel. We conclude that the prosecutor's knowledge of Washington's incarceration did not trigger the 180-day rule and that the prosecutor did not violate that rule in this case. And we conclude that the trial court properly denied Washington's request for sentencing credit under MCL 769.11b.

We affirm.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Elizabeth L. Gleicher