STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 1, 2008
v	No. 278346 St. Clair Circuit Court
DALE KENNETH DABELSTEIN, Defendant-Appellant.	LC No. 06-002283-FH

Before: White, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for possession of a controlled substance, marijuana, second offense, MCL 333.7403(2)(d), MCL 333.7413(2), and resisting and obstructing a police officer, MCL 750.81d. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

A fight involving four men who took turns beating a fifth man occurred outside Joe King's backyard gate. King called the police, and the group fled. King told the responding police officers what had happened, and he pointed out a man down the street as one of the men involved in the fight. Upon receiving King's identification of defendant as having been involved in the fight, the officers approached defendant on foot. The officers identified themselves to defendant, and said that they needed to talk to him about a reported fight.

Defendant had both hands in his pockets, and the officers demanded that he remove them for the purpose of officer safety. Despite the fact that the officers made the request several times, defendant failed to obey, made a profane comment, and proceeded to walk away.

A third officer, who was driving a fully marked patrol vehicle, responded to the scene to see if the other officers needed assistance. This officer moved his patrol car to block defendant from leaving the area, and told defendant to remove his hands from his pockets. Defendant, however, moved to walk away from him as well. The officers secured defendant and searched his person, finding a bag containing marijuana in his pocket.

At trial, all three officers were asked if they heard someone yelling that they had the wrong person during the confrontation with defendant. One officer did recall hearing someone yell, but the person was never identified or interviewed.

Doug Pretzer, a defense witness, testified that he heard a commotion while he was walking in the area, and saw five officers around someone lying face down on the ground. He was unable to see exactly what was happening because there were officers on the man lying on the ground and officers standing around him. On cross-examination, Pretzer admitted the he had no knowledge of what occurred before the officers had defendant on the ground.

Nicole Tyler, also a defense witness, testified that she was with defendant and a group of friends, and that they witnessed a commotion after which a man with a bloody face approached their group. Defendant walked the man away, while the group kept moving. Defendant had fallen behind the group when the officers arrived. Tyler testified that she never heard the officers identify themselves or order defendant to remove his hands from his pockets.

Defendant testified that King yelled obscenities at him as he passed by King's house with his friends. Defendant observed a group of people running away from King's home and saw a person lying on the ground. The person got up, approached defendant, and then ran off after a brief conversation with defendant. Defendant stated that he saw a black car, not a fully marked patrol vehicle, pull into the intersection in front of him. Defendant jumped back from the vehicle, and the next thing he knew, he was on the ground with police officers on top of him. Defendant denied that he was asked to remove his hands from his pockets or that the officers identified themselves. He stated that during his confrontation with the police, Larry Burgess was yelling at the police that they had the wrong person.

Defendant was convicted as charged. Defendant requested that this Court remand the matter for an evidentiary hearing on his claims of ineffective assistance of counsel. We denied the motion because defendant failed to provide affidavits or an offer of proof setting forth facts that would be established by such a hearing. See *People v Dabelstein*, unpublished order of the Court of Appeals, entered December 17, 2007 (Docket No. 278346).

A claim of ineffective assistance of counsel is a mixed question of fact and law, with the findings of fact reviewed for clear error and the questions of law reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). When a request for an evidentiary hearing is denied, our review is limited to mistakes apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

In order to prevail on a claim of ineffective assistance of counsel, a defendant must show the following: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). A defendant must also overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant first contends that his counsel's failure to call Larry Burgess as a witness deprived him of his right to effective assistance of counsel. We disagree.

Decisions regarding which witnesses to call are generally matters of trial strategy, and we will not substitute our judgment for that of counsel on matters of trial strategy. *People v Dixon*,

263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call witnesses constitutes ineffective assistance of counsel only if it deprives a defendant of a substantial defense. *Id*.

Defendant contends that Burgess's testimony should have been elicited at trial because he could have testified that defendant was not involved in the fight that prompted the officers' presence in the area. Defendant has provided nothing other than his own blanket assertion that this is what Burgess would have said on the stand. Moreover, defendant was not denied a substantial defense because defendant testified on his own behalf and provided the same testimony he claims Burgess would have given.

In addition, the officers who approached defendant had a reasonable suspicion, based on the information they received from King, that defendant may have been involved in a fight and were attempting to investigate the matter. Their commands to defendant that he stop and answer their questions were reasonable, lawful commands. The fact that another bystander might have disputed that defendant was involved with the fight did not negate defendant's duty to obey the officers' lawful commands.

Defendant asserts that, in addition to Burgess testifying that he tried to tell the officers that they had the wrong person, Burgess might also have testified that the officers never ordered defendant to remove his hands from his pockets. Again, defendant has provided nothing to support his contention that Burgess would have offered this testimony.

Defendant next contends that his counsel's failure to object to Doug Pretzer's appearance at trial while wearing jail clothing deprived him of his right to effective assistance of counsel. We disagree.

It is well settled that a criminal defendant has the right to wear civilian clothing, rather than prison garb, when in the presence of a jury. *People v Shaw*, 381 Mich 467, 474-475; 164 NW2d 7 (1969). In addition, this Court has held that the propriety of shackling or handcuffing a witness should be determined using the same analysis used for defendants. *People v Banks*, 249 Mich App 247, 256-257; 642 NW2d 351 (2002). However, this Court has never addressed the propriety of trial testimony elicited from a witness wearing prison garb.

We find no reversible error in counsel's failure to object to Pretzer's appearance in jail clothing while testifying because, even if such failure was error, defendant is still required to demonstrate that such error prejudiced the outcome of the trial. There has been no such showing in this case. The scope of Pretzer's testimony was limited at best. Despite defendant's characterization of Pretzer as the "only objective eyewitness" to the incident, Pretzer did not actually observe the interaction between defendant and the officers until after defendant had already been taken to the ground. Pretzer was unable to offer testimony as to whether the officers ordered defendant to take his hands out of his pockets. Thus, even if the jury would have been more inclined to believe Pretzer if he had been wearing different clothing, the testimony itself was insufficient to provide a substantial defense to defendant, and, as such, would be unlikely to result in a different outcome.

Affirmed.

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski