STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 27, 2002
v	No. 236328 Wayne Circuit Court
ANDRE L. HENRY, Defendant-Appellant.	LC No. 00-012158

Before: Bandstra, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his conviction, following a bench trial, of third-degree fleeing and eluding, MCL 257.602a(3)(a). Defendant was sentenced to three years' probation with one year in jail. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. BASIC FACTS

The only witnesses to take the stand in the bench trial were a state trooper and defendant. The trooper testified that he had been on patrol just after midnight when he stopped at a stoplight and glanced over to see defendant's vehicle, which had extensive damage to the passenger side. Defendant's vehicle was a 1985 Ford Mustang. The make of defendant's car and the extensive damage aroused suspicion in the trooper because fifteen minutes earlier the trooper had heard a report of a hit and run accident in the area involving a Mustang.

The trooper began following defendant's vehicle, and defendant's car then accelerated, although the trooper was unsure if defendant was attempting to flee at that point, or if defendant even noticed the patrol car. As the patrol car neared defendant's vehicle, the trooper turned on his emergency lights, and defendant extinguished his lights and made a hard left turn into a vacant lot. The Mustang then returned to the street, where the trooper picked up the pursuit and activated the patrol car's siren. Defendant's Mustang attained speeds of almost seventy miles an hour in an area with a twenty mile per hour limit. Defendant did not stop and continued to flee, driving in a very reckless manner, including the failure to stop at stop signs, cutting corners, driving on sidewalks and lawns, and almost striking parked vehicles.

Eventually, the Mustang slowed and circled an area of town after blowing a couple of tires. The trooper then witnessed defendant placing his arms over his head as to surrender, but

the Mustang was still coasting, and defendant made gestures indicating that he could not stop. After defendant's vehicle slowed, but was still moving, the trooper angled his patrol car against the Mustang's front bumper and pushed it into the curb and onto the sidewalk, where the Mustang finally came to a stop. The trooper testified that defendant did not make any other gestures earlier in the chase. Defendant was arrested without incident after his vehicle was stopped.

On cross-examination, the trooper indicated that he did not initially activate his lights or siren, and that prior to nudging the Mustang to the sidewalk at the end of the pursuit, his patrol car came into physical contact with the Mustang twice during the pursuit. Additionally, defendant told the trooper after the chase that he did not have brakes on the Mustang and that the vehicle had been stuck in first gear. Finally, the trooper testified that his partner, who had also been in the patrol car during the pursuit and was an endorsed witness, was terminated two days before trial. The prosecutor noted that based on the circumstances, he could not get the trooper's partner to court to testify. The trial court indicated that it would basically instruct itself on the adverse witness instruction with regard to the missing officer.

Defendant then testified and admitted to hitting a parked car just prior to the pursuit, which resulted in damage to his Mustang. Thereafter, defendant thought he was being chased by someone, though not the police, connected to the car he had struck, and all defendant could see were bright lights coming up to the rear of his car. Eventually, defendant realized he was being pursued by what appeared to be a police vehicle with a red light on top. However, defendant believed that it was a "fake" police car because there was only a red light and not red and blue lights like on Detroit police cruisers, and because when defendant slowed down, the "police" vehicle struck his Mustang about seven times. Defendant became scared and continued driving, worrying that he was going to be robbed or shot, and he then tried to drive in the direction of the Tenth Precinct for assistance and safety, which is near where the actual pursuit ended. Defendant claimed that he had no brakes, and that he could not slow down by downshifting because he could not shift into first gear. He eventually realized that real police were pursuing him because of the siren that was activated late in the pursuit, and defendant signaled to the police that he was trying to stop but could not.

The trial court found defendant guilty of fleeing and eluding police, and it found that defendant did not believe he was being chased by "fake" police, but was simply fleeing to get away because of the earlier accident.

II. ANALYSIS

A. Ineffective Assistance of Counsel - Disqualification of Trial Judge

Defendant first argues that he was denied effective assistance of counsel where his attorney fail to move for the disqualification of the trial judge after defendant had offered to plead guilty to fleeing and eluding before the same judge. We disagree.

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Our review is limited to the record because no *Ginther*[1] hearing occurred. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

The following colloquy occurred directly before trial:

> *Defense Counsel*. [T]here's been a plea agreement reached in this case. My client's pleading guilty to fleeing and eluding, your Honor.
>
> *Trial Judge*. Well, I will accept the plea, but I'm not going to accept the agreement, because I don't know anything about this case. So, if you want to plea, you can plead unconditionally. I'm going to reserve the Court's right to give a sentence that's appropriate to the facts, and I'm not really familiar with them. So, I can't sign that, in the blind like that. You can take him back and think about it for awhile. But no, I can't go along with a promise on something I don't know anything about. If he wishes to plead, he can.

Defendant then decided to proceed with trial. We find no basis for reversal. There is nothing in the record reflecting a bias by the trial judge against defendant despite the aborted guilty plea. *People v Cocuzza*, 413 Mich 78, 83; 318 NW2d 465 (1982). The trial court's actions in quickly concluding the trial after the presentation of witnesses with no argument from the prosecutor did not reveal a bias, but simply revealed the court's belief that defendant was guilty based on the strong evidence of guilt and the highly questionable defense. Moreover, there is nothing in the record reflecting defense counsel's reasons for not moving for disqualification. Therefore, defendant has failed to overcome the strong presumption that counsel's actions were a matter of sound trial strategy. Additionally, we find no prejudice.

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[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

B. Adverse Inference - Missing Witness

Defendant argues that the trial court impermissibly negated any possible benefit to defendant by failing to properly consider the adverse inference that arose with regard to the officer who failed to testify. We disagree.

CJI2d 5.12 provides:

> [The officer] is a missing witness whose appearance was the responsibility of the prosecution. You may infer that this witness's testimony would have been unfavorable to the prosecution's case.

After the trial court found defendant guilty, defense counsel asked if the court took into consideration the adverse witness instruction. The court replied that it had taken the instruction into consideration, and when defense counsel then stated that the court was required to accept that the testimony would be favorable to defendant, the court replied:

> No, Mr. Najar [defense counsel]. What you're saying that, if you take an adverse instruction you tell the jury that if a witness were here, his testimony would be adverse to the People's case. And I'm saying, fine. And if he had come in and testified adversely to the People's case, I would not believe him. I believe what the officer, who was live here said, was the truth. That your client was doing 70 miles an hour, flattened two of his tires, and went across three vacant lots, and back onto the street at that rate of speed. He was not afraid that there was any phony cops after him, or anybody that was out to hurt him. He was trying to get away from the police. And no matter how many adverse instructions, or who came in here and said something different, that is what the Court would have found.

The trial court committed no error because CJI2d 5.12 clearly provides that the trier of fact "may" infer that the testimony would have been unfavorable, not that it must infer. The trial court, in essence, did not make an unfavorable inference considering the strong evidence against defendant and the highly questionable defense proffered by defendant. We find no error. Moreover, assuming error, it was harmless considering the evidence of guilt. MCL 769.26; *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

C. Validity of Jury Waiver

Finally, defendant argues that the waiver of his right to a jury trial was invalid because the record does not reflect that it was made knowingly and understandingly, where there was no explanation of the differences between a jury trial and a bench trial. We disagree.

The trial court's determination that a defendant validly waived the right to a jury trial is reviewed for clear error. *People v Leonard*, 224 Mich App 569, 595; 569 NW2d 663 (1997). MCR 6.402(B) provides:

> Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by

addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. . . .

At a hearing prior to trial, the trial court questioned defendant concerning his decision to waive the right to a jury trial.

Q. Mr. Henry, Mr. Najar advises the court that you wish to waive your rights to a jury trial and have the case heard by the court. Is that what you wish to do?

A. Yes.

Q. And you have a right to have a jury trial. You want to waive that right?

A. Yes.

Q. You've discussed your rights with Mr. Najar?

A. Yes.

Q. Anybody threaten you in any way or promise you anything to get you to waive your rights?

A. No, sir.

Q. Okay. This is what you wish to do?

A. Yes.

The trial court found that the waiver was knowingly and voluntarily made. Additionally, defendant signed a written waiver, in compliance with MCL 763.3, that expressly acknowledged his constitutional right to a jury trial and his decision to be tried by a judge.

There is nothing in the record to reflect that defendant did not make a knowing and voluntary waiver. Moreover, a trial court is not required to explain the differences between a jury trial and a bench trial. *Leonard*, *supra* at 596. Defendant fails to cite any law to the contrary.

Affirmed.

/s/ Richard A. Bandstra
/s/ William B. Murphy
/s/ Richard Allen Griffin