

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARENCE DOUGLAS SCOTT,

Defendant-Appellant.

UNPUBLISHED
March 29, 2007
APPROVED FOR
PUBLICATION
May 15, 2007
9:10 a.m.

No. 266280
Wayne Circuit Court
LC No. 94-004460-02

Before: Jansen, P.J., and Neff and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his guilty plea convictions of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to serve 28 to 45 years' imprisonment for his second-degree murder conviction and two years' imprisonment for his felony-firearm conviction. We affirm.

Defendant asserts that the state lost jurisdiction to retry him when it did not comply with a United States district court order conditionally granting a writ of habeas corpus. Because this issue was not raised below, our review is limited to a determination whether defendant has demonstrated plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

“A conditional grant of a writ of habeas corpus requires the petitioner’s release from custody if new proceedings are not commenced by the state within the prescribed time period.” *Fisher v Rose*, 757 F2d 789, 791 (CA 6, 1985). However, “[i]n a typical case in which a prisoner is released because a state fails to retry the prisoner by the deadline set in a conditional writ, ‘the state is not precluded from rearresting [the] petitioner and retrying him under the same indictment,’” unless there are extraordinary circumstances in which the state’s delay prejudices the petitioner’s ability to defend himself. *Satterlee v Wolfenbarger*, 453 F3d 362, 370 (CA 6, 2006), quoting *Fisher*, *supra* at 791. Here, the federal district court’s conditional habeas writ vacated defendant’s prior convictions of first-degree premeditated murder and felony firearm, and ordered that defendant be released from custody if he was not retried within 90 days. See *Scott v Bock*, 241 F Supp 2d 780 (ED Mich, 2003). It is not disputed that proceedings to retry defendant were not begun within this time. However, defendant has failed to cite any authority

demonstrating that in the absence of a federal order barring retrial, the state lost jurisdiction to retry him. Moreover, defendant does not allege, and we are unable to find, that his ability to mount a defense was affected by any delay in initiating proceedings for a new trial. *Satterlee, supra* at 370. Defendant has thus failed to demonstrate the plain error required for relief, i.e., that the state was without right or jurisdiction to retry defendant because he was not brought to trial within the period set by the conditional writ.¹ *Carines, supra*.

Defendant also argues that he was denied his right to a speedy trial. However, by entering a guilty plea, defendant has waived this issue for appeal and we decline to address it. *People v Depifanio*, 192 Mich App 257, 257-258; 480 NW2d 616 (1991).

Defendant next argues that the state violated the principle of double jeopardy by reinstating the charge of felony murder. We review this unpreserved double jeopardy challenge for plain error. *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005). To avoid forfeiture, defendant must show that there was plain error that affected his substantial rights, i.e., that the error was outcome determinative. *Carines, supra* at 763. To warrant reversal, the error must result in the conviction of an innocent defendant or must seriously affect the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 763-764.

Both the federal and state constitutions protect a defendant from being placed in jeopardy twice for the same offense. US Const, Am V; Const 1963, art 1, § 15. In the present case, defendant was originally convicted by jury of first-degree premeditated murder and first-degree felony murder. This Court, however, vacated defendant's felony murder conviction on direct appeal, *People v Collier*, unpublished opinion per curiam of the Court of Appeals, issued May 30, 1997 (Docket Nos. 184478 and 184480), and the United States district court vacated defendant's first-degree murder conviction on habeas review, *Scott, supra*. Defendant was subsequently charged with first-degree premeditated murder and first-degree felony murder. Defendant claims that his right against double jeopardy was violated because he was re-arraigned on the original first-degree felony murder offense in addition to the first-degree premeditated murder offense. However, he has failed to show how this amounted to plain error affecting his substantial rights.

As noted, defendant's convictions arise from his plea of guilty to the offenses of second-degree murder and felony firearm. Defendant has failed to assert or otherwise show how his pleas to these offenses were affected by the alleged error in arraigning him on both felony and premeditated murder charges. Thus, even assuming that double jeopardy applied to bar a subsequent prosecution on the offense of felony murder, defendant has failed to demonstrate the outcome-determinative error necessary for relief from this unpreserved claim. *Carines, supra* at

¹ To the extent defendant's argument can be read to also assert that the trial court was without jurisdiction to hear this case, we note that the circuit courts have original jurisdiction over all criminal cases involving felonies. See MCL 600.601. The trial court thus had subject matter jurisdiction to hear this case. Moreover, any challenge to the trial court's personal jurisdiction over defendant was waived by defendant's entry of a guilty plea. See *People v Eaton*, 184 Mich App 649, 658; 459 NW2d 86 (1990) ("an unconditional plea of guilty relinquishes all personal jurisdiction defects").

763. Moreover, at the plea hearing, defendant acknowledged having shot and killed the victim during the course of a robbery. Thus, even were defendant to show that the error was outcome-determinative, reversal is not warranted because the error did not result in the conviction of an actually innocent defendant and does not affect the fairness, integrity, or public reputation of the proceedings. *Id.* at 763-764.

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to contest the state's jurisdiction to retry him, assert his right to a speedy trial, or raise the issue of double jeopardy. However, defendant's guilty plea waived this issue with respect to defendant's speedy trial claim.² *People v Vonins (After Remand)*, 203 Mich App 173, 176; 511 NW2d 706 (1993) (“[w]here the alleged deficient actions of defense counsel relate to issues that are waived by a valid unconditional guilty plea, the claim of ineffective assistance of counsel relating to those actions is also waived”). Therefore, we will only review this issue as it relates to defendant's state jurisdictional and double jeopardy claims. Because an evidentiary hearing on defendant's claims of ineffective assistance has not been held, this Court's review is limited to mistakes apparent on the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Whether the facts in the record suggest that defendant was deprived of his right to the effective assistance of counsel presents a question of constitutional law that this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The United States and Michigan Constitutions guarantee a defendant the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. “To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.” *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

As noted above, defendant failed to show outcome-determinative error regarding his jurisdictional and double jeopardy claims. Consequently, he likewise cannot establish that, but for his counsel's alleged error in failing to raise these issues below, the results of the proceedings would have been different.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Joel P. Hoekstra

² See also note 1, *supra*.