

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUANE RUFF,

Defendant-Appellant.

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UNPUBLISHED

January 12, 2010

No. 283612

Wayne Circuit Court

LC No. 07-014582-FH

Before: Davis, P.J., and Fort Hood and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm defendant's conviction, but remand to the trial court for correction of the judgment of sentence.

Defendant first argues that the trial court erred in ordering him to pay court-appointed attorney fees without inquiring about his ability to pay in accordance with *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004). However, the *Dunbar* decision was overruled by *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009). An ability to pay challenge to the imposition of fees is not subject to review by the trial court until enforcement begins. *Id.* at 292. Therefore, the trial court did not err in failing to assess defendant's ability to pay the attorney fees.

Defendant next argues and the prosecutor agrees that the trial court erred in ordering that his sentences for CCW and felony-firearm be served consecutively. Indeed, case law provides that the "Legislature intended that a felony-firearm sentence be consecutive only to the sentence for a specific underlying felony." *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000). "No language in the statute permits consecutive sentencing with convictions other than the predicate offense." *Id.* at 464. In light of this concession of error, we remand for correction of the judgment of sentence.

Defendant also argues in his standard 4 brief that he was denied the effective assistance of trial counsel. He alleges four instances of ineffective assistance of counsel. Defendant failed to move for an evidentiary hearing or new trial in the lower court, and therefore, our review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002); *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). If there is insufficient record evidence to support the claim, appellate review is waived. *Davis, supra.*

“[T]o find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). In order to show prejudice, a “defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 314, quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant first claims that he was denied the effective assistance of trial counsel because his attorney failed to move to quash the information or seek to have the charges dismissed where there was insufficient evidence to support the finding of probable cause at his preliminary examination. However, defendant does not challenge the individual elements of the offenses, but rather, asserts that the police officers were not credible. “[A]n evidentiary deficiency at the preliminary examination is not ground for vacating a subsequent conviction where the defendant received a fair trial and was not otherwise prejudiced by the error.” *People v Hall*, 435 Mich 599, 600-601; 460 NW2d 520 (1990). Furthermore, issues of witness credibility are to be resolved by the trier of fact, and this Court does not resolve those issues anew. *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). Accordingly, defendant’s challenge is without merit.

Defendant next argues that his defense counsel was ineffective for failing to seek suppression of the handgun because he was arrested and searched without probable cause. We disagree. A traffic violation or civil infraction provides sufficient cause to justify the stop of a vehicle. *People v Kazmierczak*, 461 Mich 411, 420 n 8; 605 NW2d 667 (2000). After witnessing a civil infraction, a police officer may stop and temporarily detain the person for the purpose of issuing a written citation. *People v Chapo*, 283 Mich App 360, 366; 770 NW2d 68 (2009). After the traffic stop, defendant did not produce a valid driver’s license. To the extent that defendant challenges the stop based on the credibility of the witnesses, the trial court found that the officers’ testimony was credible. Therefore, defense counsel was not ineffective for failing to file a meritless motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Defendant’s remaining challenges addressing severance of trial and the failure to call a *res gestae* witness present questions of trial strategy. “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight.” *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Alton T. Davis  
/s/ Karen M. Fort Hood  
/s/ Deborah A. Servitto