

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY FARLEY,

Defendant-Appellant.

UNPUBLISHED
September 6, 2007

No. 272782
Wayne Circuit Court
LC No. 06-003781-01

Before: Cavanagh, P.J., and Donofrio and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of discharge of a firearm intentionally aimed without malice, MCL 750.234, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, second offense, MCL 750.227b, entered after a bench trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted as a result of an altercation wherein his stepson was wounded in the leg. Defendant's wife testified that defendant and her son engaged in a physical fight, and that defendant shot her son.

The spousal privilege provides that a spouse may not be examined in a criminal prosecution brought against the other spouse without the consent of the testifying spouse, unless certain conditions exist. MCL 600.2162(2).¹

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must

¹ A prior version of MCL 600.2162(2) placed waiver of the privilege in the hands of the spouse against whom criminal proceedings had been brought, instead of in the hands of the testifying spouse. 182 PA 2000 amended the statute, and placed the decision with the testifying spouse.

show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600.

Defendant argues that he was denied the effective assistance of counsel because counsel failed to assert the privilege to prevent his wife from testifying against him. Defendant emphasizes that his wife provided the only direct testimony that he possessed a gun² and contends that if his wife had not been permitted to testify, it is reasonably probable that the result of the proceedings would have been different.

Defendant's argument is based on MCL 600.2162(2) as it read prior to being amended. However, the decision to testify is held by the testifying spouse. Defendant has pointed to nothing in the record that demonstrates that his wife would have refused to waive the privilege if given the opportunity to do so. Counsel is not required to raise a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000). Defense counsel did not render ineffective assistance. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio
/s/ Deborah A. Servitto

² This statement is not accurate. The victim testified that defendant possessed a gun, and shot him with it.