

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TYREE KAYUN HAMILTON,

Defendant-Appellant.

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UNPUBLISHED

May17, 2007

No. 266946

Muskegon Circuit Court

LC No. 05-051810-FH

Before: Hoekstra, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

After a jury trial, defendant Tyree Kayun Hamilton was convicted of one count of third-degree fleeing and eluding a police officer, MCL 750.479a(3), one count of resisting and obstructing a police officer, MCL 750.81d(1), and one count of driving with a suspended license, MCL 257.904(1). He was sentenced as a habitual offender, fourth offense, to 4 to 20 years' imprisonment for the fleeing and eluding conviction, 2 to 15 years' imprisonment for the resisting and obstructing conviction, and 90 days' incarceration for driving with a suspended license.<sup>1</sup> He now appeals as of right. We affirm.

I. Facts

About 9:45 a.m. on May 19, 2005, Clay Orrison, a uniformed officer with the City of Muskegon Police Department, received a dispatch indicating that an individual matching defendant's description had engaged in a domestic dispute and was driving a potentially stolen vehicle.<sup>2</sup> The dispatcher gave Orrison a description of the vehicle and a partial license plate number. Soon thereafter, Orrison observed an individual matching defendant's description driving a Buick Rivera matching the description of the allegedly stolen vehicle. The vehicle

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<sup>1</sup> Defendant was on parole at the time of his arrest. His sentences for the fleeing and eluding conviction and the resisting and obstructing conviction are concurrent, but are consecutive to his remaining sentence for his prior convictions. The trial court counted the 157 days that defendant served in the Muskegon County Jail after his arrest toward his sentence for driving with a suspended license.

<sup>2</sup> Testimony presented at trial indicated that defendant had borrowed the vehicle from an acquaintance and it had not been stolen.

passed Orrison's police cruiser traveling in the opposite direction. Orrison immediately turned around, at which point the vehicle began to accelerate. Orrison activated the overhead lights of his cruiser and pursued the vehicle. After a vehicular chase, defendant stopped the car in an alley and departed on foot. Orrison stopped his cruiser behind the vehicle and pursued defendant on foot.

Defendant ran to the enclosed back porch of a house on Fourth Street belonging to the elderly mother of Corliss Foster. He entered the porch through an unlocked screen door and knocked on the back door of the house. Foster was at the home assisting her mother at this time. Through the peephole of the back door, she saw defendant crouched on the porch floor. When Foster opened the door, defendant begged her to let him in the house, claiming that he knew her husband. Foster, who did not recognize defendant, immediately closed the door and contacted the police. Defendant pounded on the door for a short period after she shut it and then left.

Orrison had lost sight of defendant during the foot chase and was not aware that he was hiding on the porch of the Fourth Street house. However, a dispatch over his police radio informed him of the presence of an intruder at the Fourth Street house, and Orrison went to that location. As he approached the Fourth Street house, he saw defendant run away from the house and attempt to scale a fence. Orrison continued to chase defendant. He and other officers arriving on the scene apprehended defendant as he attempted to break into a locked garage nearby.

After apprehending defendant, the officers placed him in a patrol vehicle. They returned to the Fourth Street home, where they talked with Foster. Foster was shown defendant and told the police that defendant was the individual she had earlier seen on her mother's back porch. Foster also identified defendant as that individual at trial.

## II. Ineffective Assistance of Counsel

Defendant argues that he was denied the effective assistance of counsel at trial because his attorney failed to move to suppress Foster's on-the-scene identification and failed to challenge Foster's in-court identification of defendant. We disagree. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant "failed to move for a new trial or an evidentiary hearing with regard to his claim, review is limited to mistakes apparent on the record." *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). To establish a claim of ineffective assistance of counsel, defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To establish prejudice, "defendant must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . .'" *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). Defendant must also overcome the presumption that the challenged action constitutes sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). "Effective assistance

of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

Defendant notes that the police transported defendant to Foster’s mother’s house in a police cruiser and showed defendant to Foster while defendant was in police custody and without the presence of his attorney. Defendant argues that Foster’s on-the-scene identification of defendant as the individual she saw on her mother’s porch was inadmissible because, by asking Foster to identify defendant under the aforementioned circumstances, the officers impermissibly suggested that he was the culprit and, in so doing, violated his due process rights. We disagree.

A prompt on-the-scene identification allows the police to identify the correct person to arrest, assures the quicker release of innocent suspects, and allows victims to make identifications when their memories are fresh. See *People v Libbett*, 251 Mich App 353, 361-363; 650 NW2d 407 (2002). Regardless, an identification procedure “violates a defendant’s right to due process of law when it is so impermissibly suggestive that it gives rise to a substantial likelihood of misidentification.” *People v Gray*, 457 Mich 107, 111; 577 NW2d 92 (1998). The fairness or suggestiveness of an identification procedure “is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification.” *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). The following factors are relevant to determine the likelihood of misidentification: (1) the opportunity for the witness to view the suspect at the time the crime occurred; (2) the witness’s degree of attention; (3) the accuracy of any prior descriptions by the witness; (4) the witness’s level of certainty during the identification; and (5) the length of time between the crime and the confrontation. *People v Colon*, 233 Mich App 295, 304-305; 591 NW2d 692 (1998). If an on-the-scene identification procedure is determined to be impermissibly suggestive, in-court identification by the same witness is inadmissible unless the prosecutor can demonstrate, by clear and convincing evidence, an independent basis for the identification. *Gray, supra* at 114-115.

Under the totality of the circumstances, Foster’s on-the-scene identification was not so impermissibly suggestive that it led to a substantial likelihood of misidentification. Foster was within a few feet of defendant when she opened the back door and saw him on the porch of her mother’s house. Defendant made no attempt to cover his face, giving Foster the opportunity to observe and interact with him from a few feet away. Foster saw defendant on the front porch at about 10:00 a.m., and she did not indicate at trial that the lighting on the back porch was insufficient for her to clearly see defendant. Foster immediately contacted the police after defendant attempted to enter her mother’s home, and she accurately described his apparel to the dispatcher. Further, Foster expressed no doubt during the on-the-scene identification that defendant was the person who attempted to enter her mother’s house. Although the exact amount of time that transpired between Foster’s initial observation of defendant and her later identification of defendant is not discernable from the record, the police returned to Foster’s mother’s house with defendant immediately after his apprehension. Accordingly, the time between Foster’s initial observation of defendant and her identification of defendant to police was relatively short. Under these circumstances, Foster’s on-the-scene identification of defendant as the individual who had attempted to enter her mother’s home was not so impermissibly suggestive that it led to a substantial likelihood of misidentification. The trial court’s admission of this identification was not erroneous.

Consequently, a due process challenge by defense counsel to the admission of Foster's on-the-scene identification of defendant would have been futile. "Defense counsel is not required to make a meritless motion or a futile objection." *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Accordingly, defendant's claim that his counsel was ineffective for failing to challenge the admission of Foster's on-the-scene identification of defendant on due process grounds is without merit. Defendant claims that Foster's in-court identification of defendant was tainted because of the likelihood that the identification at trial "was the result of the tainted on-the-scene identification procedure." Because the on-the-scene identification was not impermissibly suggestive, defendant's claim that the in-court identification should have also been suppressed lacks merit.

### III. *Blakely* Violation

Defendant also argues that the trial court violated his Sixth and Fourteenth Amendment rights, as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), when it considered facts not established by a jury beyond a reasonable doubt when determining his minimum sentence. We disagree. In *People v Drohan*, 475 Mich 140, 143; 715 NW2d 778 (2006), our Supreme Court concluded that the United States Supreme Court's holding in *Blakely* does not apply to Michigan's indeterminate sentencing scheme.<sup>3</sup> Accordingly, defendant's Sixth and Fourteenth Amendment rights were not violated.<sup>4</sup>

Affirmed.

/s/ Joel P. Hoekstra  
/s/ E. Thomas Fitzgerald  
/s/ Donald S. Owens

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<sup>3</sup> The United States Supreme Court denied defendant's petition for certiorari in *Drohan v Michigan*, \_\_\_ US \_\_; 127 S Ct 592; 166 L Ed 2d 440 (2006).

<sup>4</sup> Defendant also includes in his statement of issues presented on appeal a contention that his Fifth Amendment rights were violated. Defendant, however, failed to present any argument in support of this issue in his brief on appeal. The failure to argue the merits of an assertion of error in the body of the brief constitutes abandonment of the issue, and we decline to address it further. See *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).