STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY DONNELL WARD,

Defendant-Appellant.

UNPUBLISHED
September 6, 2007

No. 271641
Wayne Circuit Court
LC No. 04-005072-01

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

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to murder, MCL 750.83, armed robbery, MCL 750.529, possession with intent to deliver marijuana, MCL 333.7401(2)(d)(*iii*), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to serve two years' imprisonment for felony-firearm, consecutive to concurrent terms of imprisonment of ten and one-half to 16 years for the assault conviction, three and one-half to seven years for the robbery conviction, and one to four years for the marijuana conviction. Defendant appeals as of right, arguing that he was convicted without the benefit of effective assistance of counsel, and that the trial court erred in denying trial counsel's motion for a continuance or to withdraw. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

I. Basic Facts

The prosecutor presented evidence that on March 11, 2004, defendant's accomplice robbed and nonfatally shot defendant's prospective marijuana customer, and that as the customer fled, defendant and others continued shooting at him.

At the start of trial, defense counsel asked the trial court for a continuance, or to allow him to withdraw from the case, on the grounds that a lack of communication with defendant left him unprepared for trial. Defendant protested that counsel had been in touch only for the purpose of demanding money. The trial court advised defendant, "today is the day set for trial. We're going to have the trial. [Defense counsel] has already indicated his objection to going forward . . . . You can continue with [defense counsel] or if you want to represent yourself you can do that, but we're going to go to trial." Defendant elected a bench trial, and defense counsel represented defendant.

Before sentencing, defendant engaged substitute counsel who successfully sought an evidentiary hearing on the question of effective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). This proceeding, which took place before a different judge from the one who heard the trial, resulted in a decision concluding that defendant's attorney's performance in fact met or exceeded normal professional standards.

II. Standards of Review

We review a trial court's decisions on a motion to withdraw and a motion for a continuance for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005); *People v Williams*, 386 Mich 565, 575; 194 NW2d 337 (1972). Review of a trial court's decision following a *Ginther* hearing presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The factual aspect is reviewed for clear error, and the legal aspect is reviewed de novo. See *id.*

III. Assistance of Counsel

The United States and Michigan constitutions guarantee a criminal defendant the right to the effective assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20; *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). 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. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A defendant seeking a new trial for this reason must further show that there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

A. Motion to Withdraw or for Continuance

Defendant emphasizes that, when moving to withdraw or for a continuance, defense counsel reported that he been only superficially in touch with defendant since the final conference three months earlier, and stated, "I have had no communication with him. I have no defense. I have no idea what I'm doing whatsoever." These remarks, considered in isolation and taken at face value, seem to suggest that proceeding to trial meant wholly depriving defendant of the benefit of assistance of counsel, a structural constitutional deficiency demanding reversal. See *Cronic*, *supra* at 658-659. But, viewed in context, it is apparent that defense counsel came to court with an operable grasp of the case, and only resorted to such emphatic language to emphasize his frustration over defendant's having failed to make himself available for its preparation.

Defense counsel complained that in 15 or 20 attempts he was unable to reach defendant by telephone until just days before trial, at which time defendant refused to appear at counsel's office. Counsel further reported that defendant's "attitude toward me is totally negative," and that defendant "does not and will not cooperate." We point out that defense counsel was retained, not appointed, and that defendant never indicated he wished to fire him, or otherwise arrange for substitute counsel, up to and continuing through trial. Counsel had appeared on

defendant's behalf at the arraignment, preliminary examination, and the final conference, and apparently had succeeded in having defendant await trial at large on bail.

In denying the motion to withdraw, the trial court stated, "apparently he's satisfied with whatever representation you can give him with the understanding that you have not talked with him. It appears to me that [defendant] understands the process and he's . . . trying to avoid coming to trial but that is not going to happen." The trial court was within its rights in refusing to allow defendant to gain the benefit of his own intransigence. We are loathe to grant appellate relief over an irregularity for which the appellant was initially responsible. See *People v Baines*, 68 Mich App 385, 388-389; 242 NW2d 784 (1976).

Defendant's protestation that counsel contacted him only to pressure him for more money seems a dubious attempt to avoid responsibility for the lack of communication. It strains at credulity to suggest that, even on the eve of trial, counsel would demand that defendant bring money to his office while making clear that nothing else in furtherance of the representation was in the offing. For these reasons, we conclude that the trial court did not abuse its discretion in holding defendant responsible for the lack of communication between himself and counsel, and for insisting that defendant proceed to trial, either with counsel or as his own attorney.

B. Counsel's Performance

Defendant characterizes defense counsel's displays of impatience with him, and his occasional revelations in connection with what few communications he and defendant had, as driven by counsel's desire to appear blameless for his lack of preparation, and asserts that counsel's incentive in this regard created a conflict of interest with defendant. We reject this argument. Counsel's desire to make the court understand his frustration could hardly have compelled counsel to betray his office entirely and sabotage his representation of defendant. See MRPC 1.7(b). Nor does our review of counsel's performance cause us to doubt that defense counsel did his best in the event.

Defendant protests that he had waived his right to a jury trial without advice from defense counsel in the matter. But defendant did not take advantage of the trial court's offer to allow him and counsel a private conference, or otherwise express any need for legal advice beyond what the trial court spelled out in accepting his waiver.

Defendant complains that defense counsel demonstrated his personal impatience with defendant even while defendant was on the stand, citing the following exchanges:

Q: When you say "these people," what people are you talking about?

A: The people that did that whatever they did to him that was from Flint, because I wasn't there. I pulled off after he got in that car.

Q: See, I asked you a simple question.

A: Okay.

Q: You got to just answer my question, okay?

* * *

Q: What happens at that location?

A: When I got to the location he got out his car and he got in the Suburban. Before he got in the Suburban he told me "I'm good."

Q: Okay, now—

A: I was on my way to the bar so he said he'll get with me tomorrow and whatever I was, whatever he was gon [sic] give me he'll give it to me tomorrow and I pulled off and I left."

Q: You'll allow me to ask you a question, won't you?

A: Yes, sir.

Q: Just for the heck of it?

* * *

Q: Mr. Ward, you're never going to believe this, but in a court there's a question and there's an answer.

A: Okay.

Q: And you respond slowly.

A: All right.

Q: Okay?

A: Okay.

We find nothing adverse about the representation in these examples. In striving to hold defendant to directly responsive answers to his questions, defense counsel was promoting efficiency in the matter of getting defendant's version of the events before the factfinder, which was less likely to put defendant in a poor light than to please the trial court in this bench trial.

Defendant asserts that counsel failed to subject the prosecution's case to meaningful adversarial testing. See *Cronic*, *supra* at 656-657. But defendant specifies no situation where defense counsel overlooked some advantage that might have been gained through more rigorous cross-examination. Defendant's cursory assertion merits no further consideration. See *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Defendant complains about his lack of contact with defense counsel in the months preceding trial, and cites authority for the proposition that denial of the opportunity to work with counsel in the preparation of a defense constitutes denial of effective assistance of counsel.

Defendant then acknowledges that the trial court held defendant, not counsel, responsible for that lack of communication, but argues that "even if [defendant] were to blame for the breakdown in communication, [defendant's] non-communication cannot explain and should not justify his attorney's inability of fulfill his duties to his client." But defendant cites no authority for the proposition that a criminal defendant can willfully make himself unavailable to counsel, and then cite that lack of communication in support of a claim of ineffective assistance. The caselaw in fact holds otherwise. See *People v Luster*, 44 Mich App 38, 41-42; 205 NW2d 78 (1972).

Defendant also complains that counsel did not investigate his case well enough. See *People v Kimble*, 109 Mich App 659, 663; 311 NW2d 446 (1981). But defendant does not specify what counsel might have discovered in the way of witnesses, evidence, or theories of defense, from more aggressive investigation that would have benefited the defense. We decline to speculate on how further investigation might have improved defendant's position. See *Mackle, supra*; *Jones, supra.*

At the *Ginther* hearing, trial counsel boasted of his 38 years' experience as an attorney. When asked if he had conducted any investigation in this case, counsel answered in the affirmative, elaborating, "[t]alked to my client once or twice. Probably more so by phone because he refused to come to the office. Held a preliminary exam. Got the discovery. As best I could, prepared to [sic] trial without a client." Counsel denied refusing to meet with defendant unless the defendant paid him. Counsel recounted talking with defendant before the preliminary examination, and reviewing the transcript of that examination, along with the victim's medical records, before trial. Counsel reported that defendant had personally chosen to testify on his own behalf, overriding counsel's advice in the matter. The court below, in its written opinion, concluded as follows:

> The court does not find that the Defendant in this case was afforded ineffective[] assistance of counsel. The defendant was afforded extremely capable counsel and received effective assistance of counsel at the time the charges were tried that had been brought against him. The conduct and performance of [trial counsel] did in fact meet or exceed the objective standard of reasonableness under prevailing professional norms . . . . There has been no factual presentation or argument basically premised upon any fact that has come out during the course of this *Ginther* Hearing that would lead to a reasonable probability that the conduct of [trial counsel] would have resulted in a different outcome . . . . [Italics supplied.]

The court additionally noted, "Often . . . defense attorneys are confronted with recalcitrant, obstinate, noncommunicative clients," but that such a situation "does not therefore mean that the defense attorney is rendering ineffective assistance of counsel at the time of trial."

We agree with the circuit judge that, in light of defendant's uncooperative posture,

defense counsel performed admirably. This record and defendant's arguments bring to light no error in those findings or conclusions.

Affirmed.

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