

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MANUEL CARL TURCHAN II,

Defendant-Appellant.

UNPUBLISHED

July 6, 2006

No. 260946

Wayne Circuit Court

LC No. 04-008997-01

Before: Bandstra, P.J., and Saad and Owens, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(ii), and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was convicted following a joint trial before separate juries with his wife. We affirm.

Defendant first argues that the trial court erred in denying his pretrial motion to disclose the identity of a confidential informant who provided information to support issuance of the search warrant for his apartment which ultimately yielded the charges in this case. We review for an abuse of discretion a trial court's decision on a motion to disclose the identity of a confidential informant. *People v Rodriguez*, 65 Mich App 723, 728-729; 238 NW2d 385 (1975). However, we review for clear error the trial court's factual findings in connection with that determination. *People v Lucas*, 188 Mich App 554, 573; 470 NW2d 460 (1991); *People v Acosta*, 153 Mich App 504, 509; 396 NW2d 463 (1986). While the identity of an informant is privileged, that privilege is not absolute. *People v Underwood*, 447 Mich 695, 703-704; 526 NW2d 903 (1994). Where the prosecution invokes the informer's privilege in the face of a defense request for disclosure, and where the defendant is able to demonstrate a possible need for the informant's testimony, the trial court should require production of the informant and conduct an in camera hearing to determine whether the information could offer any testimony helpful to the defense. *Id.* at 706.

In this case, defense counsel asserted that the confidential informant would testify that he or she was involved in a controlled buy at defendant's apartment before the search warrant was executed. Defense counsel argued that identification of the informant would exonerate defendant regarding the felony-firearm charge through testimony that no weapon had been used or was present during the controlled buy. The prosecution offered to stipulate to that fact, but defense counsel refused. The prosecution also offered to refrain from eliciting testimony regarding the details of the controlled buy at trial. In light of the prosecution's concessions,

defendant failed to demonstrate a possible need for the informant's testimony. Moreover, the charges against defendant stemmed from evidence discovered during the execution of the search warrant which was based on information gleaned from the informant following the controlled buy, and did not stem from the controlled buy itself. Accordingly, the trial court did not err in declining to conduct an in camera hearing and did not abuse its discretion in denying defendant's motion to disclose the identity of the confidential informant.

Defendant next argues that he was denied the effective assistance of counsel based on the outrageous behavior exhibited by his attorney throughout the pendency of the lower court proceedings. Because defendant failed to move for a *Ginther*¹ hearing or a new trial on this ground, our review is limited to mistakes apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; 645 NW2d 294 (2001); *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Rodgers, supra* at 714. Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable. *Id.* Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *Id.*

The record reveals that defense counsel engaged in questionable practices throughout the proceedings, including, but not limited to: purposely engaging in dilatory tactics such as failing to file an appearance to force severance of defendant's and defendant's wife's trial after denial of a motion for severance; exhibiting unwarranted hostility during jury selection; making unfounded accusations against and exhibiting disrespect towards the prosecutor and trial court; continuing to ask questions after the trial court sustained objections; making "side comments" under the guise of talking to himself; making inquiries regarding the confidential informant, despite the resolution of that issue before trial; exhibiting argumentative behavior toward witnesses, including accusing a police officer of perjury; speaking loudly about the case in the hallway in front of the jurors; and arriving to court late without a substantiated explanation. Indeed, the trial court commented:

I have to state for the record, in my over twelve years on the bench, I have never dealt with such unprofessionalism on the part of defense counsel, as I have in this case. I have tried my best to handle the trial fairly and efficiently. And I believe that the Defendant was given a fair trial.

Defendant relies on *People v Strodder*, 394 Mich 193, 198; 229 NW2d 318 (1975) to support his claim of ineffective assistance. In that murder case, defense counsel proceeded to trial with an insanity defense. *Id.* at 197-198. However, following the close of the prosecution's proofs, defense counsel completely changed tactics and sought to establish a new theory that the victim's husband had committed the murder. *Id.* at 198. Defense counsel became "incredibly abusive to the trial judge, the prosecutor, and other public officials," and the trial court went so far as to have defense counsel undergo a psychiatric evaluation. *Id.* at 199. Chief Justice

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Contrary to defendant's assertion, his appellate counsel did not move to remand for a *Ginther* hearing in this Court.

Kavanagh was not “left with the abiding conviction that the procedure followed” afforded the defendant a fair trial, and reversed the defendant’s conviction and remanded for a new trial. *Id.* at 200. Justice Williams, in a separate opinion for reversal, found that “undoubtedly a lawyer of ordinary training and skill in the criminal law would not use the defense strategy and tactics which outraged the court in the instant case,” and that “the strain the [] circumstances imposed on the adversary process and trial procedure, combined with the failure to present a substantial defense, created a situation constituting ineffective assistance of counsel.” *Id.* at 219-220.

While much of defense counsel’s behavior in this case is similar to that of the defense counsel in *Strodger*, there is no evidence in this case that defense counsel was not of sound mind. Although defense counsel repeatedly made side comments and engaged in seemingly irrelevant rants, his arguments were coherent and understandable. Defense counsel’s conduct here appears to have been a calculated strategy more closely analogous to that exhibited in *Mickens v United States*, 53 F Supp 2d 326 (ED NY, 1999).² There, the defendant “argue[d] that counsel engaged in outrageous conduct during the course of the trial which included futile and prolonged examinations, failure to abide by the [c]ourt’s instructions and outright contempt for the [c]ourt’s rulings.” *Id.* at 331. The court agreed that defense counsel “engage[d] in improper behavior during the course of the trial,” and that defense counsel’s “performance was outlandish.” *Id.* However, the court found that defense counsel’s conduct, “although histrionic, was a tactical choice aimed at swaying the jury on the issue of [the defendant’s] innocence through radical means.” *Id.* The court concluded that “[a]lthough [defense counsel’s] strategy proved unsuccessful, it still [fell] within the realm of acceptable trial strategy.” *Id.* at 332. Because the defendant failed to prove that defense counsel’s performance was deficient, the court found that his ineffective assistance of counsel claim must fail. *Id.*

Here, when the trial court denied defendant’s motion to sever, defendant retained defense counsel and apparently decided on a trial strategy of engaging in tactics so inappropriate as to induce a mistrial. However, the fact that defense counsel’s strategy did not work does not constitute ineffective assistance of counsel. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996). And we will not reward defendant and defense counsel for their apparently purposeful dilatory and outrageous strategy: “[c]ounsel may not harbor error as an appellate parachute.” *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000).

Further, even if counsel’s performance was deficient, it is unlikely that his behavior affected the outcome of the trial. The prosecutor presented sufficient evidence to sustain the convictions against defendant: defendant admitted to purchasing and reselling large quantities of marijuana on a weekly basis, and execution of the search warrant of his apartment yielded large quantities of marijuana and other drug-selling paraphernalia, in addition to two firearms.

² Although federal authority is not binding on this Court, it may be considered persuasive. *People v Chavies*, 234 Mich App 274, 282; 593 NW2d 655 (1999), overruled on other grounds by *People v Williams*, ___ Mich App ___, ___ NW2d ___ (2006).

We affirm.

/s/ Richard A. Bandstra

/s/ Henry William Saad

/s/ Donald S. Owens