

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARTHON MOORER,

Defendant-Appellant.

UNPUBLISHED

October 21, 2008

No. 281029

Wayne Circuit Court

LC No. 06-008117-01

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of possession with intent to deliver 50 or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(iii), possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), possession of marijuana, MCL 333.7403(2)(d), and possession of a firearm during the commission of a felony, MCL 750.227b. Because defendant was not denied effective assistance of counsel, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

This case arises from the discovery of defendant in a house in Detroit along with quantities of various controlled substances and firearms, on November 22, 2005. The prosecutor's theory of the case was that the police went to the premises to execute a search warrant, forced entry, noted what appeared to be quantities of cocaine, heroin, and marijuana, and found defendant attempting to exit the premises. No one else was found in the house. Upon arresting and searching defendant, the police found keys to the residence on his person. The police additionally seized a handgun and a shotgun. One of the police officers testified that defendant admitted to selling drugs from that location for four months.

The defense maintained that defendant was at the premises in connection with his business of purchasing and renovating abandoned houses for resale.

Following his conviction and sentencing, defendant moved the trial court for an evidentiary hearing to decide whether he had been denied the effective assistance of counsel. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). The court held the hearing, and then concluded that counsel was not ineffective, and that no new trial was warranted.

II. Assistance of Counsel

Defendant argues that defense counsel was ineffective for failing to call either him or his romantic partner as witnesses.

A. Standards of Review

To prove ineffective assistance of counsel, 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 result in deprivation of a fair trial. *Strickland v Washington*, 466 US 668, 687-688, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must also show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Counsel's decisions concerning the choice of witnesses or theories to present are presumed to be exercises of sound trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). To overcome that presumption, a defendant must show that counsel's failure to prepare for trial resulted in counsel's remaining ignorant of substantially beneficial evidence that accordingly did not get presented. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990).

We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). A trial court's findings of fact may not be set aside unless clearly erroneous. MCR 2.613(C).

B. Decision Not to Testify

At the close of the prosecutor's proofs, defense counsel informed the trial court that, after discussing the matter with counsel, defendant had elected not to testify in his own defense. Defendant himself confirmed that he understood his rights in the matter, that he chose not to testify, and that the decision was his own and not that of counsel.

At the *Ginther* hearing, the trial court concluded that defendant elected not to testify in order to avoid cross-examination. On appeal, defendant does not take issue with that conclusion, and specifies that he had stood vulnerable to impeachment with an earlier conviction. Defendant asserts that counsel ill-advised him not to testify, arguing that he could have fronted the earlier conviction and thus neutralized its adverse force. Defendant also argues that, had he testified, he could have offered his complete and innocent explanation for why he was at the house as the police found him.

However, defendant's arguments call for precisely the kind of hindsight and second-guessing in which we are loathe to engage. *Barnett, supra*. The decision whether to testify is a criminal defendant's own to make personally. See *Rock v Arkansas*, 483 US 44, 52; 107 S Ct 2704; 97 L Ed 2d 37 (1987).¹ That decision often constitutes a crucial aspect of trial strategy. Because it was defendant's decision personally to make, and because a sound strategic reason for the decision made is readily apparent, we cannot deem defense counsel's role in the matter as constituting ineffective assistance. We therefore rebuff defendant's attempt to pursue an alternate strategy through the device of disparaging defense counsel's performance in the matter.

C. Defendant's Companion

Defendant suggests that his partner in romance could have testified to defendant's innocent reasons for being at the house, and asserts that she had dropped him off at the house on the day in question, and returned to the house later that day. Defendant further reports that defense counsel had declined to call his companion as a witness because counsel was satisfied that she was out of town that day, and would have given perjured testimony. However, defendant points out that his companion provided the court with receipts in hopes of showing that she was indeed in town on the day in question.

At the *Ginther* hearing, defense counsel testified that he had heard nothing of defendant's companion's having dropped defendant off at the house, or returning to it later, until that moment. Defense counsel further testified that defendant's companion had informed him that she was in fact in Las Vegas on that day.

At the close of proofs at the *Ginther* hearing, the trial court stated as follows:

The Court . . . finds that . . . it was revealed to [defense counsel] that [defendant's companion] was not in the metropolitan Detroit area at the time that the raid had taken place. But it is contended by the Defendant during the course of this *Ginther* hearing that quite the contrary was true. That [defendant's companion] had indicated that she was in the area and had dropped off the Defendant at the . . . residence[] before, and then had come back to that residence later on that same day, subsequent to the raid having taken place.

* * *

. . . [T]he Court finds that the testimony of [defendant's companion] is totally improbable, and the credibility of her testimony is severely called into question based upon the testimony of [defense counsel], various . . . receipts purportedly establishing or supporting [defendant's companion's] contention that

¹ But see *People v Toma*, 462 Mich 281, 308; 613 NW2d 694 (2000) (where a defendant insisted on testifying, counsel's failure to ensure that the jury fully understood the defendant's account of events did not constitute ineffective assistance, because that account was "so unbelievable that defendant was arguably better off letting the jury speculate about what he was really trying to say[.]").

she was in the vicinity on or about November 22nd, 2005, the Court finds are very general in nature

“A finding is clearly erroneous if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made.” *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). In this case, defendant attempts to rebut the trial court’s findings with regard to his companion only by offering his own bald assertions to the contrary. Such mere argument does not lead us to the definite and firm conviction that the court erroneously interpreted the evidence of defendant’s companion’s whereabouts on the day in question, or erred in discounting her credibility on the stand.

Because defendant fails to show that defense counsel inexcusably failed to take advantage of the beneficial testimony available from defendant’s companion, we cannot credit a claim of ineffective assistance predicated on counsel’s disinclination to call that witness.

D. Different Outcome

We further observe, as did the trial court, that defendant never offered any explanation for why he was alone in a house with substantial quantities of valuable narcotics, plus firearms. Also of significance is the evidence that defendant had initially admitted to one of the police officers that he had been selling drugs from that house for four months. In light of this evidence, defendant fails to show that the result would have been different had defense counsel called him, or his companion, to testify. See *Messenger, supra*.

III. Conclusion

Because defendant fails to show any deficiencies on the part of defense counsel’s performance, or that any different strategy or tactics would have brought about a different result, we must affirm the trial court’s conclusion that defendant did not suffer from ineffective assistance of counsel.

Affirmed.

/s/ Deborah A. Servitto

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood