

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant

v

AMERICAN EARL WALTON,

Defendant-Appellee.

UNPUBLISHED
February 11, 1997

No. 190605
Recorder's Court
LC No. 94-011279

Before: Cavanagh, P.J., and Reilly, and C.D. Corwin,* JJ.

PER CURIAM.

Defendant was convicted following a jury trial of obstruction of justice, MCL 750.505; MSA 28.733, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). He was sentenced to a prison term of two years, six months to five years for the obstruction of justice conviction, to be served consecutive to a two-year term for the felony-firearm conviction. Defendant subsequently filed a motion for a new trial or a directed verdict of acquittal, arguing that the verdict was against the great weight of the evidence and that the conviction was invalid because he did not effectively waive his right to a preliminary examination. Defendant's motion was denied for want of a copy of the transcript from the preliminary examination proceeding. Defendant filed a motion for reconsideration, seeking a new trial or an evidentiary hearing, and alleged ineffective assistance of counsel, as well the error relating to the preliminary examination. An evidentiary hearing was held, following which the trial court granted defendant's motion for a new trial. The prosecution now appeals by leave granted. We reverse.

The prosecution contends that the trial court abused its discretion in granting defendant a new trial. We agree. A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. *People v LeGrone*, 205 Mich App 77, 79; 517 NW2d 270 (1994). In this case, the trial court granted defendant's motion for a new trial on two grounds: (1) the trial court lacked jurisdiction to bind defendant over on the instant charges because he did not effectively waive his right to a preliminary examination and, (2) defendant was denied his right to the effective assistance of counsel by trial

* Circuit judge, sitting on the Court of Appeals by assignment.

counsel's failure to request a remand for a preliminary examination or, at the very least, to investigate defendant's allegations of impropriety arising out of the pretrial proceeding.

First, we consider the trial court's decision to grant defendant a new trial on the ground that the court lacked jurisdiction because defendant did not effectively waive his right to a preliminary examination. We need not decide whether defendant's express waiver of his right to a preliminary examination was effective or whether it was withdrawn. Defendant failed to object before or at the time he entered a plea of not guilty to the information. Such failure has been deemed the equivalent of a waiver of the right to a preliminary examination, see *People v Tate*, 315 Mich 76, 80; 23 NW2d 211 (1946); *People v Jones*, 24 Mich 215 (1872), as well as a waiver of any error in the proceedings. *People v Jones*, 75 Mich App 261, 268; 254 NW2d 863 (1972). Accordingly, even if defendant's express waiver of the preliminary examination was not effective, the failure to hold a preliminary examination was not a valid basis for the court to order a new trial.

Secondly, we conclude that defendant received the effective assistance of counsel. To establish a claim of ineffective assistance of counsel, the defendant must show: (1) that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment, and (2) that counsel's deficient performance so seriously prejudiced the defense as to deprive the defendant of a fair trial. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995). Further, defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Upon review of the record from defendant's *Ginther* hearing, we conclude that defendant has neither sustained his burden of proving that counsel made a serious error that affected the result of the trial nor has defendant overcome the presumption that counsel's actions were strategic. Accordingly, we hold that the trial court's decision to grant defendant a new trial on this basis was also an abuse of discretion.

Reversed.

/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly
/s/ Charles D. Corwin