

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WADE RICHARD WATERMAN,

Defendant-Appellant.

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UNPUBLISHED

May 7, 1999

No. 164025

Kent Circuit Court

LC No. 91-056951 FH

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of five counts of participating in an illegal financial transaction by an insurance company director, contrary to MCL 500.5252; MSA 24.15252. He was sentenced to five concurrent terms of thirty to sixty months' imprisonment and ordered to pay restitution of \$3.5 million. Defendant appeals as of right. We affirm.

Defendant's sole claim on appeal is that the trial court erred in denying his motion for a new trial on the basis of ineffective assistance of counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). In order for this Court to reverse due to the ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 314. Defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant first argues that trial counsel was ineffective by not requesting an "advice of counsel" jury instruction. The decision regarding what jury instructions to request may be considered a matter of trial strategy. *People v Armstrong*, 124 Mich App 766, 769; 335 NW2d 687 (1983). A defendant's reliance on advice of counsel may be a defense to a criminal charge if it negates criminal intent. See, e.g., *People v Slayton*, 123 Mich 397; 82 NW 205 (1900); *People v Schultz*, 71 Mich 315; 38 NW

868 (1888). Here, trial counsel admitted that he did not make a conscious decision not to request an “advice of counsel” instruction. Nonetheless, we are not convinced from our review of the entire record that such an instruction was factually warranted in this case. As the prosecution's expert witness explained at the evidentiary hearing, establishing an advice of counsel defense is difficult and all of the necessary criteria for the defense must be satisfied. See, e.g., *Slayton, supra* at 316-317; *Schultz, supra* at 400. The trial court found that the evidence did not show that defendant made a specific request for advice from the company's counsel, or that counsel provided legal advice to defendant regarding the charged transactions. These findings are not clearly erroneous. Furthermore, defendant has not shown a reasonable probability that the result of the proceeding would have been different had an advice of counsel instruction been given. *Effinger, supra*. Therefore, defendant's first argument does not support his claim that he was denied the effective assistance of counsel.

Defendant next argues that trial counsel was ineffective for not requesting an instruction on accomplice testimony, see CJI2d 5.5 and 5.6, in connection with the testimony of two key prosecution witnesses. Based upon a reading of the instructions, it is apparent that the accomplice instructions are meant to apply where there is evidence that the witness assisted the defendant in the commission of the crime. That evidence was not present in this case. Furthermore, the accomplice instruction would have been inconsistent with the defense's theories. First, the defense claimed that there was no wrongdoing committed here regarding Counts IV and V when defendant was paid the money as dividend distributions, not loans. Second, defendant claimed that he did not wrongfully transfer funds out of the corporation but that Mark Johnson and Richard Lane were the ones transferring funds out of the corporation to cause its insolvency. Because the instructions on accomplice testimony were inconsistent with both the evidence and the defense theory of this case, we find that counsel's failure to request the instructions was not error. *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996); *People v Truong (After Remand)*, 218 Mich App 325, 341; 553 NW2d 692 (1996). Furthermore, defendant has not shown that his counsel's failure to request an instruction on accomplice testimony was an unsound trial strategy. In this case, given that defendant would not want to emphasize or suggest to the jury that he had help in committing a crime, a tactical decision by counsel not to request an accomplice instruction would constitute legitimate trial strategy. *People v Barker*, 161 Mich App 296, 304; 409 NW2d 813 (1987).

Defendant further argues that trial counsel was ineffective for not requesting CJI2d 5.13 (agreement for testimony) in connection with the testimony of Richard Lane or Mark Johnson. However, we conclude that CJI2d 5.13 does not apply to the facts of this case because there was no evidence that Lane or Johnson testified in exchange for an agreement not to prosecute. Furthermore, even if a modified version of CJI2d 5.13 could have been given to comport with the facts of this case, we are satisfied that defendant was not prejudiced by the absence of such an instruction because the trial court's general instructions on witness credibility were sufficient to adequately guide the jury in assessing the credibility of the witnesses' testimony.

Next, defendant argues that his counsel erred in his decision to have defendant testify. The decision whether or not to call a defendant to testify is also a matter of trial strategy. *People v Alderete*, 132 Mich App 351, 360; 347 NW2d 229 (1984). While trial counsel may not have

considered the possibility that defendant could be impeached with his tax return when deciding whether to call him as a witness, defendant did not offer any evidence that he would not have testified had he known of the possibility of impeachment with the tax return. Such evidence was necessary to finding that counsel's alleged error affected the defense. See *People v Brown*, 119 Mich App 656, 665; 326 NW2d 834 (1982). Moreover, defendant's testimony was critical to establishing his theory of the case. Finally, the tax return was also used to impeach the testimony of the accountant who prepared the return and who testified for the defense as an expert witness. Defendant does not allege that counsel was ineffective in calling the accountant as a witness. Under these circumstances, we conclude that defendant failed to establish that trial counsel was ineffective.

Defendant also argues that trial counsel was ineffective in not advancing MCL 500.901; MSA 24.1901 as a defense to the charges. In order to prevail on this argument, defendant must show that he was deprived of a substantial defense, i.e., one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). The testimony at the evidentiary hearing established that MCL 500.901; MSA 24.1901 would not have provided defendant with a substantial defense to the charges. That statute is an accounting statute. It defines the types of assets that may be used by insurance companies to satisfy statutory liability requirements for writing insurance policies. The statute did not authorize the transactions at issue in this case. Thus, counsel's failure to raise the applicability of MCL 500.901; MSA 24.1901 did not deprive defendant of a substantial defense. *Kelly, supra*.

Finally, defendant argues that he was deprived of the effective assistance of counsel because of an alleged conflict of interest. At the same time that trial counsel's law firm was representing defendant, it was also representing the Insurance Commissioner and the Insurance Bureau in other, unrelated proceedings involving two other insurance companies. The evidence established that the respective attorneys involved did not discuss their work beyond making each other aware of the potential for a conflict. Defendant was advised of the circumstance and he consented to the continued representation by counsel's firm. We agree with the trial court's determination that defendant did not show an actual conflict of interest under MRPC 1.7. *Radtke v Miller, Canfield, Paddock & Stone*, 209 Mich App 606, 620-621; 532 NW2d 547 (1995), rev'd in part on other grounds 453 Mich 413 (1996). In addition, defendant was required to show that, if there was an actual conflict of interest, that it adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant failed to show how trial counsel's performance was affected by the alleged conflict. Accordingly, we find that defendant has failed to demonstrate that he was denied the effective assistance of counsel.

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Jeffrey G. Collins