

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY ALFRED YOCIC,

Defendant-Appellant.

UNPUBLISHED

November 15, 2005

No. 254699

Tuscola Circuit Court

LC No. 03-008855-FH

Before: Murphy, P.J., and Sawyer and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of possession of marijuana, MCL 333.7403(2)(d). He was sentenced to serve one year in jail with credit for 211 days served. After imposing sentence, the trial court held a *Ginther* hearing¹ on defendant's claim of ineffective assistance of counsel, which defendant raised in a motion for new trial. The court denied defendant's motion. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's sole argument on appeal is that trial counsel was ineffective. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment."

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Strickland, *supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

With respect to counsel's performance and whether it was deficient, the performance is measured against an objective standard of reasonableness with consideration of the circumstances and prevailing professional norms. *Pickens*, *supra* at 303, 327. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant argues that trial counsel was constitutionally ineffective because she failed to argue the defense of "innocent possession" of a controlled substance and failed to request a jury instruction on the defense. Trial counsel has a duty to "prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "Where there is a claim that counsel was ineffective for failing to raise a defense, the defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and that the defense of which he was deprived was substantial." *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). A substantial defense is one that might have made a difference in the outcome of the proceedings. *Id.*

Defendant has failed to overcome the strong presumption that counsel's performance constituted sound trial strategy. A defense of "innocent possession" relative to a drug possession charge would be a fairly novel approach, and, moreover, it would have been extremely difficult to convince the jury that the defense was credible and worthy of any consideration following the testimony of Sergeant Scott Jones, which reflected an ever-changing story by defendant with respect to his possession of the marijuana. The sergeant's testimony regarding defendant's statements about the marijuana would leave a reasonable juror doubting the validity of defendant's claim that he was innocently possessing the marijuana. Indeed, defendant's account as conveyed to the sergeant is almost laughable. While we agree with defendant that it would not have been necessary to put him on the stand to pursue the "innocent possession" defense, reliance in great part on the sergeant's testimony in support of the defense would have been a highly questionable defense tactic; the testimony was damaging and not exculpatory. During the *Ginther* hearing, defense counsel explained that she chose not to pursue the "innocent possession" defense because she believed that defendant would have to testify in order to fully explain how he came to innocently possess the marijuana plant such that the sergeant's testimony could be overcome, and defendant did not want to testify. Counsel did not think his explanation that he was bringing the marijuana plant to the police sounded believable, and she was also concerned that defendant could be impeached with prior bad acts evidence. Furthermore, counsel indicated that the theory of defense was that there was no evidence of manufacturing

marijuana, for which defendant was charged and ultimately acquitted. We defer to counsel's stated strategy.

Defendant argues that trial counsel was absolutely required to present the defense on defendant's demand. Assuming, without accepting this to be true,² counsel testified that defendant wanted to argue either misdemeanor possession *or* innocent possession. Moreover, even if counsel's performance was deficient for failing to present an "innocent possession" defense, defendant has failed to establish that the results of the proceeding would have been different. The defense was not substantial, and reversal is unwarranted.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Patrick M. Meter

² "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, with respect to a plea to be entered, whether to waive jury trial, and whether the client will testify. In representing a client, a lawyer may, where permissible, exercise professional judgment to waive or fail to assert a right or position of the client." MRPC 1.2(a).