STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 30, 2007
v	No. 268761 Livingston Circuit Court
ROBERT LEE ADAMS, Defendant-Appellant.	LC No. 04-014693-AR

Before: Murphy, P.J., and Zahra and Servitto, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order affirming defendant's district court jury conviction of operating a motor vehicle while under the influence of intoxicating liquor ("OUIL"), second offense, MCL 257.625(9). We reverse and remand.

Defendant's only argument on appeal is that defense counsel Ronald Plunkett was ineffective at trial, where Plunkett strongly urged that the best defense strategy to employ was for counsel not to participate in the trial, while still representing defendant and remaining in the courtroom. Plunkett believed that such a trial tactic would increase the likelihood of success on appeal relative to the trial court's denial of a motion to adjourn the trial and that mounting an actual defense would be problematic for reasons associated with the request to adjourn. Trial was conducted, and except for the submission of some jury instructions, Plunkett did not participate in the trial by way of examination, argument, or taking stances on district court rulings. On inquiry by the district court during the trial, defendant explained that he understood what Plunkett was doing, but he could not specifically state that he agreed with or consented to the unusual approach; he essentially deferred to counsel's expertise because he lacked the knowledge as a layperson to know any differently. Trial proceeded, and defendant was convicted.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law, which this Court reviews, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). 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." *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 deficient performance, a defendant must show that his or her attorney's performance was objectively unreasonable. *Pickens, supra* at 309.

It cannot be reasonably disputed that Plunkett's performance, which involved a strategy of nonparticipation, was deficient and objectively unreasonable, and that defendant incurred prejudice. See *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Kurylczyk*, 443 Mich 289, 296; 505 NW2d 528 (1993); *Martin v Rose*, 744 F2d 1245, 1249-1250 (CA 6, 1984).

While we do not view this case as one in which defendant was technically giving up his right to counsel, assuming such to be the case, there was no proper waiver of the right. See *People v Williams*, 470 Mich 634, 643-646; 683 NW2d 597 (2004). We view this case as one arguably giving rise to a waiver of an appellate claim of ineffective assistance of counsel on the basis of defendant's implicit consent to defense counsel's misguided trial tactics. Stated differently, it could also be viewed as a case involving a potential waiver of *effective* assistance. Assuming that a defendant can effectively waive his or her right to a claim of ineffective assistance of counsel or right to effective assistance,[1] the record does not support a finding here

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[1] We do note the following observation by our Supreme Court in *People v Mitchell*, 454 Mich 145, 151 n 6; 560 NW2d 600 (1997):

> [The] expression of satisfaction is not a waiver of a claim of ineffective assistance of counsel. Because the appropriate inquiry is not the client's evaluation of counsel's performance, but rather whether counsel is a reasonably effective advocate, "we attach no weight to either respondent's expression of satisfaction with counsel's performance at the time of his trial, or to his later expression of dissatisfaction." [Quoting *Cronic, supra* at 657 n 21.]

In *Mitchell*, the defendant had initially grieved his attorney, partly on the basis that counsel was failing to file necessary pretrial motions regarding search warrant issues. Subsequently, after the defendant and counsel conferred, concerns over seized evidence and the

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that defendant understandingly waived such a right. Moreover, the record does not even indicate that defendant expressly agreed with or consented to the trial strategy.[2]

The plaintiff maintains that if defendant's conviction is reversed on appeal, trial courts faced with what appears to be unprofessional tactics would have no option but to concede to counsel's demands. We disagree. In addition to the contempt power of the court previously discussed, *supra* at 3 n 2, "the disciplinary mechanism of the bar may be appropriately invoked" to encourage counsel's proper participation at trial. *Martin, supra* at 1252. The trial court should have warned Plunkett at the commencement of trial that if Plunkett elected to pursue what appears to be unprofessional and unethical strategy of nonparticipation, the court would refer Plunkett to the Attorney Grievance Commission (AGC).

In light of the trial court's failure to report this matter to the AGC, we direct the Clerk of the Court to provide the AGC Administrator, Robert L. Agacinski, a copy of this Court's opinion for investigation into Plunkett's conduct in this case.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Brian K. Zahra
/s/ Deborah A. Servitto

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validity of a search warrant were resolved to the defendant's satisfaction, with a stipulation between the parties being placed on the record partially limiting the admission of evidence. The Court noted that the "[d]efendant stated he was satisfied with counsel's resolution of his concerns and wanted to withdraw the grievance." *Id.* at 150-151. Here, defendant did not express either satisfaction or dissatisfaction with counsel's trial tactics.

[2] This opinion does not condone any deliberate attempt to circumvent a trial court's ruling on adjournment by nonparticipation in order to set up a claim of ineffective assistance of counsel. We cannot conceive of a situation in which nonparticipation by counsel would constitute sound trial strategy, and a court is free to use its contempt powers to preclude manipulation of the judicial system under appropriate circumstances. See *Martin, supra* at 1252. Moreover, this opinion should not be read as precluding waiver, especially if egregious circumstances exist. It is simply unnecessary in this case for us to definitively rule whether the doctrine of waiver is applicable.