

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NATHAN JOINER,

Defendant-Appellant.

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UNPUBLISHED  
November 9, 2010

No. 293704  
Wayne Circuit Court  
LC No. 08-006944-FH

Before: BECKERING, P.J., and JANSEN and TALBOT, JJ.

PER CURIAM.

Nathan Joiner asserts the ineffective assistance of counsel in challenging his bench trial convictions of possession of a firearm by a felon<sup>1</sup>, carrying a concealed weapon<sup>2</sup> and possession of a firearm during the commission of a felony.<sup>3</sup> Joiner was sentenced to two years' imprisonment for the felony-firearm conviction and 30 days in jail for his convictions of carrying a concealed weapon and possession of a firearm by a felon. We affirm.

Joiner seeks either reversal of his convictions or, alternatively, a remand for further hearings to establish ineffectiveness of his trial counsel for failing to fully investigate<sup>4</sup> and to seek to suppress his confession to police.<sup>5</sup> Because Joiner failed to follow proper procedure<sup>6</sup> we deny his request for remand to the trial court for additional hearings and directly address his claims of ineffective assistance of counsel.

Joiner contends that he was denied the effective assistance of counsel because defense counsel failed to request a copy of any police car video of his encounter with police or seek to suppress his statement to police. "Whether a person has been denied effective assistance of

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<sup>1</sup> MCL 750.224f.

<sup>2</sup> MCL 750.227.

<sup>3</sup> MCL 750.227b.

<sup>4</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>5</sup> *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

<sup>6</sup> MCR 7.211(C)(1).

counsel is a mixed question of fact and constitutional law.”<sup>7</sup> “Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo.”<sup>8</sup> Because we have denied Joiner’s request for a remand, our review of his claim of ineffective assistance of counsel is limited to the facts contained in the lower court record.<sup>9</sup>

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.”<sup>10</sup> A “defendant must show that his attorney’s conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived of a fair trial.”<sup>11</sup> To demonstrate the latter, it is incumbent on a defendant to show that the outcome of the proceeding would have been different had it not been for defense counsel’s error.<sup>12</sup> Any assessment of counsel’s performance is not to be conducted with the benefit of hindsight.<sup>13</sup> Although “the Sixth Amendment guarantees a range of reasonably competent advice and a reliable result . . . . [i]t does not guarantee infallible counsel.”<sup>14</sup> “Counsel is not ineffective for failing ‘to advocate a meritless position.’”<sup>15</sup>

Joiner first asserts that counsel was ineffective for failing to procure a copy of the police car video for use at trial because it would have demonstrated that Joiner did not possess a gun when the police first encountered him by his vehicle. At the outset, we presume that trial counsel’s decision regarding what evidence to present is a matter of trial strategy, “which we will not second-guess with the benefit of hindsight.”<sup>16</sup> This is confirmed by the lower court record, which shows that the absence of the video was used by Joiner’s attorney to question the credibility of the officers involved in the arrest and their investigation techniques. If the video had been produced and confirmed the officer’s version of events, trial counsel’s hands would have been tied and his ability to defend his client seriously compromised. This is a reasonable assumption given the failure to call any witnesses at trial to confirm Joiner’s assertion that he did not have or handle the firearm, despite his assertion of the presence of other individuals when the events leading to his arrest unfolded.

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<sup>7</sup> *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

<sup>8</sup> *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

<sup>9</sup> *Id.*

<sup>10</sup> *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

<sup>11</sup> *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003).

<sup>12</sup> *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004).

<sup>13</sup> *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

<sup>14</sup> *People v Mitchell*, 454 Mich 145, 170-171; 560 NW2d 600 (1997); see, also *LeBlanc*, 465 Mich at 578.

<sup>15</sup> *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) (citation omitted); *Matuszak*, 263 Mich App at 58.

<sup>16</sup> *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

Joiner has also failed to demonstrate that counsel's failure to secure or present this evidence deprived him of a substantial defense.<sup>17</sup> A substantial defense is defined as one that could have made a difference in the outcome of the trial.<sup>18</sup> This case was essentially a credibility contest between the arresting officer and Joiner. The absence of the video served to enhance counsel's ability to pursue the available defense strategy by challenging the veracity of the police officer. Counsel's decision not to procure the video constituted a legitimate trial strategy. Merely because that strategy ultimately proved to be unsuccessful, does not inevitably lead us to conclude that counsel was ineffective.<sup>19</sup>

We reach the same conclusion regarding Joiner's contention that his trial counsel was ineffective for failing to seek to suppress his statement to police. Specifically, Joiner asserts his statement to police was not voluntary because, at the time, he was on medication and was suffering from a gunshot wound that occurred approximately two weeks earlier. Contrary to his assertions, the record does not support Joiner's contention that his statement was involuntary. At trial, Joiner acknowledged having been read and signing an advice of rights form and that he understood his rights. Joiner refused to sign the statement at the conclusion of the police interview and, at trial, merely asserted a lack of memory regarding the content of the interview and his responses. He did not contend that he was the victim of coercion by police; merely that he was in pain and tired after having been awakened.

Although Joiner asserted he did not possess his G.E.D. as indicated by police, the fact that police read his rights to him and Joiner acknowledged at the time of the interview and later at trial that he comprehended these rights is immaterial with regard to the voluntariness of his statement. "While advanced intoxication from the use of drugs may preclude the effective waiver of *Miranda*<sup>20</sup> rights, the fact that a person is under the influence of drugs is not dispositive of the issue of voluntariness."<sup>21</sup> Testimony by the interviewing police officer contradicts Joiner's assertion that he was so under the influence of pain and medication that he was not aware or cognizant of his situation. The timing of the police interview also renders Joiner's assertion suspect as he was arrested on May 11, 2008 at approximately 7:30 p.m. but not interviewed until May 12, 2008 at 12:20 p.m. Given the elapse of 17 hours from the arrest to the time of interview, the impact of any medication ingested before Joiner's arrest should have been minimal. Because there is no evidence to support Joiner's contention that his statement was involuntary, the failure of counsel to try to suppress the statement does not demonstrate that he was ineffective as counsel has no duty to pursue meritless objections.<sup>22</sup>

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<sup>17</sup> *Id.* at 398.

<sup>18</sup> *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

<sup>19</sup> *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

<sup>20</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

<sup>21</sup> *People v Feldmann*, 181 Mich App 523, 530-531; 449 NW2d 692 (1989).

<sup>22</sup> *Mack*, 265 Mich App at 130.

Affirmed.

/s/ Jane M. Beckering

/s/ Kathleen Jansen

/s/ Michael J. Talbot