

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEWEY LEE CLERY,

Defendant-Appellant.

UNPUBLISHED

December 23, 1997

No. 191862

Recorder's Court

LC No. 95-004315 FC

Before: MacKenzie, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

In a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279, and simple assault, MCL 750.81; MSA 28.276. He was then adjudicated a third offender, and received an enhanced sentence of thirty-five to sixty years on the murder charge, six to ten years for the felony assault charge, and time served on the misdemeanor assault, all sentences to be served consecutively to a previous sentence for which defendant was on parole at the time of these offenses. This appeal as of right is being decided without oral argument pursuant to MCR 7.214(E).

The issues raised by defendant concern assertions that he was deprived of the effective assistance of counsel at trial. This Court granted a remand pursuant to MCR 7.211(B) and *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Defendant now contends that the trial court infringed his Sixth Amendment right to counsel by failing to conduct a hearing prior to trial to determine whether defendant's trial counsel should have been replaced, when defendant complained that counsel had acted uncivilly toward him, referring to defendant in insulting terms. Defendant further argues that trial counsel was ineffective for advising defendant not to testify in his own defense.

The trial court found that the information provided in defendant's letter to the judge failed to rise to the level necessary to warrant a hearing to determine whether there had been a breakdown in the attorney-client relationship; defendant's testimony at the *Ginther* hearing indicated there had been no such breakdown. Accordingly, defendant never made the threshold showing required to warrant such a hearing, let alone to require the discharge of his original appointed counsel and replacement with new

counsel. *People v Ginther, supra*, at 440-441. To the contrary, even with the benefit of hindsight, defendant could point to nothing which occurred before trial to justify such a replacement. At the *Ginther* hearing, the trial court found that defendant's testimony was not credible, while it did find credible the testimony of defendant's trial attorney, who specifically testified that there had been no breakdown in the attorney-client relationship. Counsel also denied that the claimed use of disparaging terms to describe defendant had ever occurred. *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997).

When the defense rested at trial without proffering any witnesses or evidence, the trial judge inquired of defendant whether he was aware of his constitutional right to testify in his own defense, and whether, in effect, he concurred with counsel's decision not to present his testimony. Defendant replied in the affirmative. Nonetheless, defendant now contends that counsel was ineffective in advising him not to testify. As defendant had two prior convictions for offenses involving an element of theft or dishonesty, had he testified he would have been subjected to impeachment on this basis. *People v Allen*, 429 Mich 558; 420 NW2d 499 (1988). Defendant has failed to overcome the presumption that the decision not to present his testimony was sound trial strategy. *People v Harrison*, 163 Mich App 409, 415-416; 413 NW2d 813 (1987); *People v Mitchell, supra*. Defendant has failed to overcome the presumption that counsel's strategic decisions were sound and that counsel's performance was adequate. *People v LaVearn*, 448 Mich 207; 528 NW2d 721 (1995).

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Harold Hood

/s/ Joel P. Hoekstra