STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY ALLEN CSERNAI,

Defendant-Appellant.

UNPUBLISHED
July 14, 2000

No. 205832
Macomb Circuit Court
LC No. 96-001307-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY ALLEN CSERNAI,

Defendant-Appellant.

No. 205833
Macomb Circuit Court
LC No. 96-001296-FH

Before: Gribbs, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for one count of concealing or misrepresenting the identity of a motor vehicle with intent to mislead, MCL 750.415(2); MSA 28.647(2), as to a Ford Mustang assembled from parts manufactured in the 1980s, and one count of concealing or misrepresenting the identity of a motor vehicle without intent to mislead, MCL 750.415(1); MSA 28.647(1), as to a 1967 Ford Mustang. Defendant was sentenced to twelve months' probation and a $500 fine. We affirm.

Defendant first argues that the trial court erred in failing to suppress evidence that was seized during an administrative search of his business – a vehicle repair shop. Defendant claims that the search, conducted without a warrant, violated the search and seizure provisions of the Michigan and Federal

Constitutions. We disagree. We will not disturb a trial court's decision following a suppression hearing unless it is clearly erroneous. *People v Houstina*, 216 Mich App 70, 73; 549 NW2d 11 (1996). Further, we review constitutional questions and statutory construction de novo. *Id.*; *People v Lyon*, 227 Mich App 599, 604; 577 NW2d 124 (1998).

The Motor Vehicle Service and Repair Act authorizes administrative searches of businesses such as defendant's. MCL 257.1317(1); MSA 9.1720(17)(1). Under the statute, inspections of registered facilities or facilities required to be registered under the act may be conducted by law enforcement officers without a search warrant during reasonable business hours. *Id.* See *Gora v Ferndale*, 456 Mich 704, 721; 576 NW2d 141 (1998) ("It is well established that administrative searches conducted without warrants are permissible in closely regulated industries because a licensee in such an industry is held to have impliedly consented to periodic inspections by applying for and obtaining a license.").

Defendant does not take issue with the constitutionality of the statute; rather, he contends that the officers exceeded the scope of the statute by conducting the search while defendant was closed for business, and thereby conducted a search without a warrant in violation of both state and federal constitutional law. However, we agree with the trial court's analysis that, standing alone, the fact that defendant's business was closed to customers does not necessarily mean that business was not being conducted on the premises. The officer leading the inspection testified that he had no reason to believe that defendant's business was closed when they conducted the inspection at approximately 10:00 a.m. on a Thursday morning. Because the officers entered the business through the back door, they never saw the sign on the front door which indicated that the shop was closed on Thursdays. In addition, defendant failed to mention to the officers that his business was closed. Further, the officer testified that, from his standpoint, there was no indication that the business was closed judging from the activity taking place therein. Defendant was present and was working on a vehicle and at least one other individual was present. Based on this evidence, the trial court concluded that the officers acted reasonably in assuming that defendant's shop was open for business, and therefore refused to suppress the evidence seized during the inspection. On this record, we conclude that the trial court did not clearly err in failing to suppress the evidence in question.[1]

Defendant also claims that the search was pretextual because officers were looking for evidence as it related to a specific allegation of wrongdoing, and thus what took place was not a routine statutory "inspection," but rather a warrantless search for evidence of a crime. Defendant's argument is unpersuasive where a representative from the Secretary of State was present during the inspection and

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[1] The record further reveals evidence that defendant may have consented to the search after consulting with his attorney over the telephone. On this basis alone, the trial court could have found suppression of the evidence unwarranted. See *People v Borchard-Ruhland*, 460 Mich 278, 294; 597 NW2d 1 (1999) ("One established exception to the general warrant and probable cause requirements is a search conducted pursuant to consent. [Citation omitted.] Whether consent to search is freely and voluntarily given is a question of fact based on an assessment of the totality of the circumstances.")

defendant was issued violations as a result of the inspection. Further, the purpose behind the statutes that authorize inspections of automobile salvage yards and repair shops is to curb the use of stolen parts in vehicles. See *People v Barnes*, 146 Mich App 37, 42, 47; 379 NW2d 464 (1985). Even if the officers were looking for a specific item, the purpose of the statute would still be served. Thus, defendant's argument is without merit.

Defendant next argues that he was denied the effective assistance of counsel at trial where his attorney had a conflict of interest as a result of representing an endorsed witness[2] for the prosecution, where counsel failed to call that crucial witness, and where counsel failed to object to a jury instruction which omitted the elements of a lesser included offense. We disagree.

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). "To establish a denial of effective assistance of counsel under the state and federal constitutions, a defendant must demonstrate that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel made an error so serious that counsel was not functioning as an attorney as guaranteed by the Sixth Amendment." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). The deficiency must have prejudiced the defendant. *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994); *Daniel, supra*. A defendant must demonstrate that, but for counsel's errors, there is a reasonable probability that the result of the trial would have been different and that the result was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). In addition, the defendant has the burden of overcoming the presumption that the challenged conduct was sound trial strategy. *People v Avant*, 235 Mich App 499, 507-508; 597 NW2d 864 (1999); *Daniel, supra*.

The *Ginther*[3] hearing did little to support defendant's claim for ineffective assistance of counsel. Although defendant focused his ineffective assistance of counsel argument on a conflict of interest because defense counsel allegedly represented a potential witness, the testimony at the *Ginther* hearing dispelled that theory. Both defense counsel and the potential witness acknowledged knowing one another and even admitted that defense counsel had given the potential witness legal advice in the past. However, both denied that there was an ongoing attorney/client relationship. They refuted any idea that defense counsel gave the potential witness legal advice with regard to the present case or that defense counsel had a particular knowledge of the facts based on his relationship with the potential witness. The record does not support defendant's argument that a conflict of interest existed, and thus defendant's argument fails. See *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (where an ineffective assistance of counsel claim is based on defense counsel's conflict of interest, defendant must first demonstrate that counsel had a conflict of interest, i.e., that counsel "actively represented conflicting interests").

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[2] The record reveals that the prosecution listed the potential witness as a known witness, but did not include him on its trial witness list.

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

Defendant argues that even in the absence of a conflict of interest, defense counsel's failure to call that potential witness resulted in ineffective assistance of counsel because the potential witness's testimony would have helped defendant's case. At the *Ginther* hearing, defense counsel explained that it was to defendant's benefit to keep that potential witness off the stand so there could be no correlation drawn between defendant and that potential witness. Defense counsel feared that the potential witness would reveal that two of defendant's renters were the individuals who disassembled the potential witness' car. Defense counsel's failure to call witnesses is presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). "This Court will not substitute its judgment for that of trial counsel in matters of trial strategy." *Avant, supra* at 508. Upon review of the record, we conclude that defendant has failed to overcome the presumption that defense counsel's decision was sound trial strategy. See *id.* at 507-508; *Daniel, supra*.

Finally, defendant argues that defense counsel was ineffective for failing to object to the trial court's instructions. However, there does not appear to be any error in the instructions that would have warranted an objection. Thus, defense counsel was not required to make a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Affirmed.

/s/ Roman S. Gribbs
/s/ Joel P. Hoekstra
/s/ Jane E. Markey