STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2011
v	No. 300413 Calhoun Circuit Court
DAVID YWAIN YOUNG, Defendant-Appellant.	LC No. 2010-001363-FH

Before: CAVANAGH, P.J., and SAWYER and METER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of two counts of resisting and obstructing an officer, MCL 750.81(d)(1). We affirm.

James Sauber was appointed as defendant's counsel in February 2010. Sauber appeared on defendant's behalf at an April 2010 preliminary examination and at a June 2010 pretrial hearing. On July 12, 2010, one day before trial, Sauber moved to withdraw as defendant's counsel due to a breakdown in the attorney-client relationship. At the motion hearing, defendant stated that Sauber failed to communicate adequately with defendant and should not represent defendant at trial. Sauber stated that his office had called defendant multiple times and had left messages with him. The trial court denied Sauber's motion to withdraw, finding that Sauber was competent to represent defendant and that defendant was responsible for the lack of communication.

Defendant argues that he was denied his right to counsel under *United States v Cronic*, 466 US 648, 659-662; 104 S Ct 2039; 80 L Ed 2d 657 (1984), because of the lack of communication between defendant and Sauber during the pretrial period. We disagree. Defendant did not preserve the issue for appeal because he did not move the trial court for a new trial on the basis of ineffective assistance of counsel, and the court did not hold a *Ginther*[1] hearing. *People v Musser*, 259 Mich App 215, 220-221; 673 NW2d 800 (2003). "A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue

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

arising from an ineffective assistance of counsel claim de novo." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008) (citation omitted). However, our review of defendant's unpreserved claim of ineffective assistance of counsel is limited to plain errors apparent in the record. *People v Snider*, 239 Mich App 393, 420, 423; 608 NW2d 502 (2000).

Both the United States and Michigan Constitutions guarantee a criminal defendant the right to the effective assistance of counsel at all critical stages of the proceedings. *People v Russell*, 471 Mich 182, 187-188; 684 NW2d 745 (2004); *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984). "Most claims of ineffective assistance of counsel are analyzed under the test developed in *Strickland*[,]" which requires the defendant to show prejudice. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). However, "in *Cronic*, the United States Supreme Court identified three rare situations in which the attorney's performance is so deficient that prejudice is presumed." *Id*. The situation relevant to this appeal is where defendant is completely denied counsel at a critical stage of the proceedings. *Cronic*, 466 US at 659. A defendant is denied counsel where counsel is totally absent, i.e., not present. *People v Murphy*, 481 Mich 919, 921 n 2; 750 NW2d 582 (2008) (MARKMAN, J., concurring); *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002). "A portion of a criminal proceeding constitutes a 'critical stage' if 'potential substantial prejudice to defendant's rights inheres in the . . . confrontation and . . . counsel [may] help avoid that prejudice.'" *Murphy*, 481 Mich at 921 (MARKMAN, J., concurring), quoting *Coleman v Alabama*, 399 US 1, 9; 90 S Ct 1999; 26 L Ed 2d 387 (1970).

In this case, defendant argues that there was a total communication breakdown between Sauber and himself throughout the pretrial proceedings, which completely denied him the assistance of counsel during this critical stage. However, we find that *Cronic* applies to situations where defense counsel was actually absent from a specific event, not where counsel simply failed to communicate with defendant. *Murphy*, 481 Mich at 921 n 2 (MARKMAN, J., concurring); *Bell*, 535 US at 695. Moreover, defendant's claim that his five-month pretrial period constituted a "critical stage" within the meaning of *Cronic* runs contrary to the overwhelming caselaw, which depicts a "critical stage" as one involving a specific adversarial confrontation. See, e.g., *Murphy*, 481 Mich at 921 n 2 (MARKMAN, J., concurring) (defense counsel did not attend interlocutory appeal); *Frazier*, 478 Mich at 244-245 (defense counsel failed to attend police interrogation with defendant); *Satterwhite v Texas*, 486 US 249, 252; 108 S Ct 1792; 100 L Ed 2d 284 (1988) (defense counsel was not present at hearing for prosecution's motion requesting a psychiatric examination of defendant). The record indicates that Sauber made multiple appearances on defendant's behalf, including the preliminary examination, where Sauber cross-examined the prosecution's lone witness and argued before the trial court that the prosecution did not meet its burden of proof, and the pretrial hearing, where Sauber obtained a plea bargain from the prosecution.[2] Thus, the record does not indicate that Sauber was totally absent during the pretrial period so as to deny defendant the presence of counsel at a critical stage. *Murphy*, 481 Mich at 921 (Markman, J, concurring); *Bell*, 535 US at 695.

[2] Defendant rejected the offered plea bargain.

We additionally note that, even if we were to find that the lack of pretrial communication between defendant and Sauber constituted complete denial of counsel during a critical stage, defendant cannot base his claim of ineffective assistance of counsel on this lack of communication when he contributed to the lack of communication. *People v Luster*, 44 Mich App 38, 41-42; 205 NW2d 78 (1972). The trial court found that defendant contributed to the lack of communication by not returning Sauber's messages, and the record does not indicate that this factual finding was a clear error. *Petri*, 279 Mich App at 410. Thus, defendant cannot cite the lack of communication as evidence that he was denied counsel during a critical stage. *Luster*, 44 Mich App at 41-42.

Sauber did not completely fail to provide defendant with effective assistance of counsel so that the judicial "process los[t] its character as a confrontation between adversaries . . . ." *Cronic*, 466 US at 656-657. Thus, defendant's claim does not present one of the "rare situations" in which *Cronic* applies and prejudice is presumed. *Frazier*, 478 Mich at 243. Rather, we apply the *Strickland* standard to defendant's claim of ineffective assistance of counsel. *Id*. Under *Strickland*, "counsel is presumed effective, and the defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *Id*.

In this case, Sauber's alleged deficiency was failing to adequately communicate with defendant during the pretrial period. However, the trial court found defendant responsible for the lack of communication, so it does not appear that Sauber's failure to communicate more with defendant was unreasonable "under the circumstances and according to prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Moreover, defendant fails to show that Sauber's alleged deficiency prejudiced defendant. At trial, the two relevant officers both testified that defendant refused to follow their repeated directives, thrashed about "violently", and was belligerent and uncooperative. This conduct falls within the ambit of resisting or obstructing a police officer. MCL 750.81(d)(1); see, e.g., *People v Nichols*, 262 Mich App 408, 412-413; 686 NW2d 502 (2004) (finding there was sufficient evidence to support the charge of resisting arrest where defendant's actions included ignoring the officers' directives and acting belligerently). The two officers also testified that they were each in full police uniform and driving fully marked police cars at the time in question, which was evidence that defendant knew or had reason to know that the individuals he resisted and obstructed were police officers performing their duties. MCL 750.81(d)(1); *Nichols*, 262 Mich App at 412-413. Defendant does not indicate how additional communication with Sauber would have changed the defense's theory or trial strategy. Thus, in light of the evidence provided at trial, defendant fails to show that "there is a reasonable probability that but for" Sauber's failure to communicate adequately with defendant during the pretrial period, the jury would have found him not guilty of resisting and obstructing. *Solmonson*, 261 Mich App at 663-664. Accordingly, defendant is not entitled to reversal under the *Strickland* standard. *Frazier*, 478 Mich at 243.

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Patrick M. Meter