STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 17, 2009
v ARTHUR RONALD HAILEY, III, Defendant-Appellant.	No. 276423 Wayne Circuit Court LC No. 06-008941-01

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ARTHUR RONALD HAILEY, III, Defendant-Appellant.	No. 276904 Wayne Circuit Court LC No. 06-008939-01

Before: Hoekstra, P.J., and Murray and M.J. Kelly, JJ.

PER CURIAM.

In Docket No. 276423, defendant appeals as of right his jury trial convictions of carjacking, MCL 750.529a, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to 10 to 25 years' imprisonment for the carjacking and armed robbery convictions, and two years' imprisonment for the felony-firearm conviction. We affirm.

In Docket No. 276904, defendant appeals as of right his jury trial convictions of receiving and concealing a stolen firearm, MCL 750.525b, two counts of receiving and concealing a stolen motor vehicle, MCL 750.535(7), and carrying a concealed weapon, MCL 750.227. Defendant was sentenced to nine months to ten years' imprisonment for the receiving and concealing a stolen firearm conviction, and nine months to five years' imprisonment for each of the two receiving and concealing a stolen vehicle convictions and the carrying a concealed weapon conviction. We affirm.

In Docket No. 276423, defendant argues that he was denied the effective assistance of counsel when his trial counsel failed to interview or question two witnesses, Devaughn Brown and Jerome Hailey (defendant's brother). We disagree.

The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court "must first find the facts, and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.* A trial court's factual findings are clearly erroneous if this Court is left with a definite and firm conviction that a mistake has been made. *People v Mullen*, 282 Mich App 14, 22; 762 NW2d 170 (2008).

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant must overcome a strong presumption that counsel's assistance was sound trial strategy. *People v Horn*, 279 Mich App 31, 37-38 n 2; 755 NW2d 212 (2008). Generally, to establish an ineffective assistance of counsel claim, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008). However, such performance must be measured without the benefit of hindsight. *Bell*, *supra* at 698; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant's argument fails for two reasons. First, trial counsel's actions did not fall below an objective standard of reasonableness under prevailing professional norms. Counsel is permitted to make – and must make – reasoned decisions about when further investigation into certain areas would be a waste of valuable time. *Rompill v Beard*, 545 US 374, 383; 125 S Ct 2456; 162 L Ed 2d 360 (2005). In *Bigelow v Williams*, 367 F3d 562, 570 (CA 6, 2004), the Sixth Circuit set forth the standards to apply in a case like the present one:

> Judicial review of the lawyer's performance must be "highly deferential," and "indulge a strong presumption" that a lawyer's conduct in discharging his duties "falls within the wide range of reasonable professional assistance," since reasonable lawyers may disagree on the appropriate strategy for defending a client. [*Strickland*, 466 US at 689]. While "strategic choices made after thorough investigation of law and facts . . . are virtually unchallengeable[,][ ] strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id*. at 690-91; see also *O'Hara v Wigginton*, 24 F 3d 823, 828 (CA 6, 1994) ("[A] failure to investigate, especially as to key evidence, must be supported by a reasoned and deliberate determination that investigation was not warranted."); cf. ABA Standards for Criminal Justice 4-4.1(a) (3d ed 1993) ("Defense counsel should conduct a prompt investigation of the

circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.").

Trial counsel admitted at the evidentiary hearing that she did not talk to Devaughn and Jerome because, in her professional opinion, they never would have confessed at defendant's trial. In fact, trial counsel testified that she had been practicing criminal law for eight years and never heard of such a thing happening. Trial counsel explained that she made this determination after (1) having knowledge that Devaughn and Jerome were *facing* other carjacking and robbery charges,[1] (2) talking and listening to defendant, and (3) talking and listening to defendant's (and consequently Jerome's) mother and father. No one at any time mentioned that Devaughn or Jerome were willing to testify, and of course by the time trial commenced, trial counsel was aware that neither witness came forward to exonerate defendant. Additionally, regarding prevailing professional norms, Jerome's defense counsel at the time testified at the evidentiary hearing that in his 18 years of experience, he never had heard of anyone, while facing similar charges themselves, confessing in open court at someone else's trial.[2] Therefore, defendant has failed to overcome his heavy burden of showing how his trial counsel's actions fell below an objective standard of reasonableness under prevailing professional norms.

The disagreement between our opinion and that of our dissenting colleague comes down to whether it is a reasoned professional judgment for an attorney to conclude that a prospective witness will not testify at trial that he committed the crime for which defendant is being prosecuted, and to therefore not contact that witness. Our dissenting colleague opines that trial counsel did not exercise reasonable professional judgment in deciding not to contact the two witnesses, particularly because those witnesses were defendant's brother and cousin. Although we certainly understand the reasoning of our dissenting colleague, we believe that the dissenting opinion does not give sufficient weight to the extremely high deference given to decisions like this one and ignores the circumstances existing at the time the decision was made.

In reaching our conclusion, we have kept in the forefront the principle that "[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective *at the time*." *Strickland*, 466 US at 689 (emphasis added). Moreover, as the *Strickland* Court repeatedly emphasized, review of ineffective assistance of counsel claims must avoid "intensive scrutiny of counsel," and to do so we must apply "a heavy measure of deference to counsel's judgments." *Id*. at 690-691.

With these principles in mind, we cannot help but conclude that counsel's decision to not contact the two witnesses because of the highly unlikely scenario that they would confess to the

[1] The fact that both Devaughn and Jerome had pending carjacking cases against them, a fact that counsel knew, sets this case apart from the otherwise nonbinding decision relied upon by defendant, *People v Patterson*, unpublished opinion per curiam of the Court of Appeals, issued April 1, 2008 (Docket No. 273937).

[2] After the evidentiary hearing, the trial court found that it was doubtful that either witness would have testified at defendant's trial.

crime in open court, did not fall "outside the wide range of professional competent assistance." *Id.* at 690. Indeed, and although in unpublished opinions, while addressing an ineffective assistance of counsel claim both the Sixth Circuit and a federal district court have recognized that it is highly doubtful that an individual will incriminate himself just to provide a defense to the defendant. For instance, in *Goldsby v United States*, 152 Fed Appx 431 (CA 6, 2005), the Sixth Circuit held:

> It is highly unlikely that the testimony of Ms. Batchler would have aided Goldsby. *In order to provide helpful testimony, Ms. Batchler would have had to incriminate herself, an improbable scenario.* It is far more likely that Ms. Batchler would have supported the Government's contention, that the drugs were Goldsby's. Thus, calling Ms. Batchler as a witness would have in all likelihood have been positively harmful to Goldsby's case. In addition, the circumstances of the encounter with the police made it unlikely she could have planted the drugs, as she was under surveillance while the police dealt with Goldsby. *Given these facts, and the reasonable deference given to counsel's judgment, it was a reasonable decision to forego an investigation of Ms. Batchler, and spend the time on more promising avenues of investigation.* [Emphasis added; citation omitted.]

See, also, *Culbreath v Bennett*, unpublished opinion of the United States District Court for the Western District of New York, issued August 11, 2004 (Docket No. 01-CV-6337) (the court found defendant's argument that a witness would have had no fear of self-incrimination if called to testify to be "highly doubtful").

It bears repeating that at the time of trial, counsel relied on defendant's information as well as that from his parents in formulating a defense. See *Strickland*, 466 US at 691 (recognizing that defense counsel properly relies on, and makes informed strategic decisions based upon, the defendant's information). Trial counsel therefore relied on her experience as well as the information supplied by defendant to conclude that the defense of "I didn't do it, but my brother and cousin may have" could be presented, but that it was not worth the time and effort to contact potential witnesses who in all likelihood would not come forward and exculpate defendant by incriminating themselves.

Furthermore, the trial court's rejection of Devaughn and Jerome's after-the-fact testimony that they would have testified if asked was not clearly erroneous. Any objective view of the evidence supports the trial court's conclusion. Devaughn and Jerome had virtually nothing to lose in taking responsibility for the carjacking at the time of the evidentiary hearing since they were already serving lengthy prison sentences. Jerome also denied that a hand-written letter that was attributed to him, which confessed to the carjacking, was actually his.

Second, defendant cannot establish that there is a reasonable probability that there would have been a different outcome at trial had counsel contacted Devaughn or Jerome. *Davenport*, 280 Mich App at 468. For one, the failure to call these witnesses did not deprive defendant of a substantial defense, *People v Dixon*, 263 Mich App 393, 398 (opinion by Cooper, J.); 688 NW2d 308 (2004), which significantly weighs against a finding of ineffective assistance, *People v Dendel*, 481 Mich 114, 125, 125 n 10; 748 NW2d 859 (2008). Accord *Strickland*, 466 US 693 ("Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the

defendant must show that they actually had an adverse effect on the defense."). Here, defendant testified on his own behalf at trial and put forth the defense that it was Devaughn and Jerome who carjacked the Jeep. Defendant testified that Devaughn and Jerome showed up at defendant's house near midnight one night, presumably the night of the carjacking, with a blue Jeep and tried to unload musical equipment. Since the defense of Devaughn and Jerome being the actual carjackers was actually raised at trial, defendant was not deprived of a substantial defense. See *Dixon*, 263 Mich App at 398 (the defendant's defense of consent in a CSC case was actually raised at trial, so the fact that a witness was not called that could have contributed to this defense was insufficient to prevail). And, at trial defendant was identified by both victims as the perpetrator, and when defendant was arrested, one of the stolen vehicles was present at the scene. The trial court's decision that defendant was not denied the effective assistance of counsel was correct.

In Docket No. 276904, defendant argues that his trial counsel was constitutionally deficient because she did not move to suppress evidence of two guns and stolen car parts found on defendant's vehicle. We disagree.

As noted before, effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Defendant has failed to overcome this burden. Defendant argues that the search was an invalid inventory search. However, there is nothing on the record to show what standard procedures and policies were in place at the Detroit Police Department for an inventory search. Therefore, it is impossible to conclude that any policies were not adhered to.

Moreover, another well-established exception to requiring a warrant for a search such as this is the "automobile" exception. *People v Kazmierczak*, 461 Mich 411, 418; 605 NW2d 667 (2000). As long as the police have probable cause of finding evidence, a warrantless search of a readily mobile automobile is permitted. *Id*. at 418-419. So, even if an inventory search policy was not followed, probable cause supported the search of defendant's vehicle for the fruits of the carjackings where defendant was involved in the carjackings and his own vehicle was parked in the police impound lot. Furthermore, after July 3, 2006, when defendant's vehicle was impounded, the carjackers were not seen using the MAC-11 gun anymore. Therefore, the police could have suspected that the gun was located in defendant's vehicle. Since counsel's failure to make a meritless objection does not constitute ineffective assistance of counsel, *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995), defendant's counsel was not ineffective for failing to object to the admission of the items found pursuant to the search.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray