

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellant,

UNPUBLISHED  
September 29, 2011

v

KAMAAL LATEEF COGBORN,  
  
Defendant-Appellee.

No. 301926  
Wayne Circuit Court  
LC No. 07-003603-FH

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Before: SERVITTO, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

The prosecution appeals by delayed leave granted the trial court's order granting defendant's motion for a new trial. We reverse, reinstate defendant's convictions, and remand for sentencing.

Defendant was convicted following a bench trial of possession of marijuana, MCL 333.7403, carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), second offense, MCL 750.227b. Defendant was charged as a third habitual offender, MCL 769.11. Before sentencing, the trial court granted defendant's motion for a new trial. The prosecution argues that the trial court abused its discretion in granting a new trial because defendant received effective assistance of counsel; therefore, the trial court failed to state a legally recognized basis for relief. We agree. "A trial court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *Id.*

A defendant must make a testimonial record in the trial court with a motion for a new trial that will evidentially support his claim of ineffective assistance of counsel. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), quoting *People v Jelks*, 33 Mich App 425, 431; 190 NW2d 291 (1971). When there is no evidentiary hearing or motion for a new trial at the trial level, review is limited to the errors apparent on the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999). Here, defendant raised his ineffective assistance of counsel claim in his motion for a new trial, but the trial court granted defendant's motion without

holding an evidentiary hearing. Thus, review is limited to errors apparent on the existing record. The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and law. The trial court's findings of fact are reviewed for clear error, while its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish a claim for ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, there is a reasonable probability the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant must overcome a strong presumption that the action of defense counsel constituted sound trial strategy. *Id.* at 689; *LeBlanc*, 465 Mich at 578.

Defendant asserted that defense counsel should have filed a pretrial motion to disqualify the trial judge once defendant elected to have a bench trial because, after the trial judge heard the substantive evidence he ruled inadmissible, he was inherently biased and prejudiced towards defendant. Claims of ineffective assistance of counsel based on defense counsel's failure to object or make motions that could not have affected defendant's chances for acquittal are without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

To ensure a defendant's due process right to a fair trial, the presiding judge must remain impartial or "neutral and detached." *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). But "[a] party that challenges a judge for bias must overcome a heavy presumption of judicial impartiality." *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). This requires a defendant to show actual personal bias or prejudice by the trial court. *Id.*; MCR 2.003(C)(1).<sup>1</sup>

In reviewing the existing record, defendant has not proven that defense counsel's failure to file a pretrial motion to disqualify the trial judge constituted deficient performance because there is no basis for concluding that the trial judge was actually biased or prejudiced against defendant. Rather, the record reveals that the trial court was impressed with defense counsel's efforts on behalf of defendant; however, it found the properly admitted testimony from two police officers credible. Moreover, in a bench trial, the trial court is presumed to know the applicable law and the difference between admissible and inadmissible evidence. *People v Lanzo Constr Co*, 272 Mich App 470, 484-485; 726 NW2d 746 (2006). When the trial court made its findings of fact, it did not mention the evidence that it had previously ruled inadmissible, and it can be presumed that the trial court never considered the inadmissible evidence when it convicted defendant. Because defendant failed to overcome the presumption of

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<sup>1</sup> MCR 2.003(C)(1)(a) provides: "[d]isqualification of a judge is warranted for reasons that include, but are not limited to, the following: (a) [t]he judge is biased or prejudiced for or against a party or attorney."

judicial impartiality, a pretrial motion to disqualify the trial judge based on judicial bias would have been futile. Counsel is not ineffective for failing to make a futile motion. *People v Brown*, 279 Mich App 116, 142; 755 NW2d 664 (2008). Furthermore, any deficiency in counsel's performance did not prejudice defendant. Both police officers testified that they saw defendant roll a marijuana cigarette, throw it on the ground, and lean into the vehicle from the front driver's side door immediately before one officer saw the butt of a gun sticking out from underneath the front driver's side seat.

Consequently, it was an abuse of discretion for the trial court to grant defendant's motion for a new trial on the basis of ineffective assistance of counsel. MCR 6.431(B) provides, "[o]n the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." Also, MCL 770.1 provides, "[t]he judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs." Additionally, MCL 769.26 provides:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

In granting defendant's motion for a new trial, the trial court stated it would "err on the side of caution . . . to make sure that justice is effectuated," even though the court was "confident I made every effort to be as fair and correct in my rulings and my verdict as possible . . . ." The trial court adopted defense counsel's argument regarding ineffective assistance of counsel "just to avoid the appearance of any impropriety or injustice here." The court again noted it was granting relief "[j]ust to avoid the appearance of any impropriety or suggestion that there was an injustice." The trial court also stated it would recuse itself from the case.

We conclude that the trial court abused its discretion when it granted defendant's motion for a new trial because the trial court was fair with defendant and not actually biased or prejudiced. Thus, there are no grounds for appellate reversal of defendant's convictions, nor is there any reason to conclude that a miscarriage of justice occurred. MCR 6.431(B); MCL 770.1. Because no legally recognized basis for relief existed, the trial court's decision to grant defendant's motion for a new trial fell outside the range of principled outcomes and was an abuse of discretion. *Blackston*, 481 Mich at 460.

We reverse, reinstate defendant's convictions and remand for sentencing.<sup>2</sup> We do not retain jurisdiction.

/s/ Deborah A. Servitto  
/s/ Jane E. Markey  
/s/ Kirsten Frank Kelly

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<sup>2</sup> Defendant was convicted following bench trial on April 2, 2007 but failed to appear for sentencing on May 2, 2007. Defendant was arraigned on June 14, 2010, following his arrest on a bench warrant. Sentence proceedings were subsequently adjourned pending defendant's motion for new trial, proceedings in the trial court thereafter, and this appeal.