

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 15, 2014

v

BRANDON LAMAR HILL,

Defendant-Appellant.

No. 314246
Wayne Circuit Court
LC No. 12-000909-FH

Before: BECKERING, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Following a bench trial, the circuit court convicted defendant of possession of vehicle identification number (VIN) plates and federal safety certification labels in violation of MCL 750.415(5). Defendant's conviction was based on the discovery of these items in a basement cupboard in defendant's home. The court acquitted defendant of three counts of receiving and concealing stolen motor vehicles and operating a chop shop. The court sentenced defendant to two years' probation. As a result of this felony conviction, defendant lost his employment as a nurse.

The circuit court acted within its discretion at trial in allowing the prosecutor to amend the information to add the charge of which defendant was convicted. Moreover, the record does not support defendant's contention that his pretrial counsel labored under a conflict of interest in representing one of defendant's codefendants, negatively impacting his representation during the plea negotiation process. We affirm.

I. BACKGROUND

Defendant and his stepbrother and codefendant, Tony Woods, rented a home together on Strathmoor Street in Detroit. The home belonged to Oliver Drake, defendant's and Woods's father. Drake testified that he had previously rented the home to another of his sons and that defendant and Woods had only recently taken up residence. Drake asserted that three of his other sons, including the home's prior tenant, had been arrested or convicted of crimes revolving around the operation of a chop shop. Although Drake did not admit that the Strathmoor home doubled as a chop shop, he conceded that the home's garage was full of tools and various vehicles were parked on or across the street from the property.

Suspicion was drawn to the Strathmoor residence when the victim of a car theft used a reverse Craig's List advertisement, seeking to purchase a car matching the description of his stolen vehicle. Codefendant Laurence Shaw responded and eventually invited the victim to the Strathmoor home. Police arrived instead and found Shaw working on a stolen vehicle in the driveway. The officers secured a search warrant for the house, in which they found documents linking defendant and Woods as the home's tenants. The officers found no evidence that Shaw resided there. While searching through cupboards in the basement, the officers found VIN plates and federal safety certification labels that had been illegally removed from vehicles. Based on this evidence, the prosecution charged defendant with three counts of receiving and concealing a stolen motor vehicle and operating a chop shop.

II. AMENDMENT OF INFORMATION

At some point prior to trial, the Wayne County Prosecutor's Office replaced the assistant prosecutor handling the case. On the first day of trial, the new prosecutor indicated that she would have brought different charges against defendant. Specifically, the prosecutor would have charged defendant with illegally possessing the VIN plates and federal safety certification labels found in the basement.¹ She stated her intent to request the additional charge of violating MCL 750.415(5) "if that evidence comes out."

At the close of the evidence, the prosecutor requested that the court add the subject charge to defendant's information. The prosecutor contended that this charge was supported by evidence that defendant and Woods "had possession" of the VIN plates and labels "located in their house." The court permitted the amendment based on the evidence presented at trial. The court also determined "that there's no unfair surprise or prejudice" to defendant or Woods given that the VIN plates and labels had been in evidence since the inception of the prosecution.

We review for an abuse of discretion a trial court's decision regarding a motion to amend an information. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). MCR 6.112(H) governs the amendment of a criminal information as follows: "The court before, during, or after trial may permit the prosecutor to amend the information unless the proposed amendment would unfairly surprise or prejudice the defendant." "[U]nfair surprise, inadequate notice, or insufficient opportunity to defend" preclude such amendment. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

Here, the amendment of the information did not result in unfair surprise or prejudice. As noted by the court, the VIN plates and labels were part of the evidence from the onset of the investigation. The addition of the subject charge was therefore not a surprise. Defense counsel was able to prepare a defense to the receiving and concealing stolen property and chop shop charges with this evidence in mind. The defense theory was that defendant's and Woods's brothers also had access to the property and house and that all criminal acts were committed by

¹ MCL 750.415(5) makes the possession of these items illegal: "A person shall not knowingly possess, buy, deliver, or offer to buy, sell, exchange, or give away any manufacturer's vehicle identification number plate, federal safety certification label, . . . or any facsimile thereof."

the brothers without defendant's and Woods's participation. Counsel carried this defense over to the new charge and it adequately responded to any claim that defendant knowingly possessed the VIN plates and labels. Accordingly, defendant was not denied the opportunity to defend himself. Moreover, the prosecutor timely notified the court and defense counsel of her intent to amend the information before the presentation of the evidence. Based on this record, the trial court did not abuse its discretion in granting the prosecutor's motion to amend the information.²

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Throughout the pretrial process, defendant and Woods were represented by the same counsel—Carl Jordan. They subsequently joined in retaining a single attorney for trial. Defendant contends that Jordan provided ineffective assistance because he continued the joint representation after a conflict of interest arose between defendant and Woods. This issue is fully preserved for appellate review as this Court granted defendant's motion to remand after which the lower court conducted a *Ginther*³ hearing. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). The lower court subsequently denied defendant's motion for a new trial.

“A claim of ineffective assistance of counsel presents a mixed question of law and fact. This Court reviews a trial court's findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim.” *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011) (citations omitted). We review for an abuse of discretion the trial court's denial of defendant's motion for a new trial. *People v Kevorkian*, 248 Mich App 373, 410; 639 NW2d 291 (2001).

“[T]he right to counsel is the right to the effective assistance of counsel.” *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). Generally, a defendant's claim of ineffective assistance includes two components: “First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense.” *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). The defendant must overcome the strong presumptions that his “counsel's conduct [fell] within the wide range of reasonable professional assistance,” and that counsel's actions were sound trial strategy. *Id.* at 689.

Where a criminal defendant establishes a conflict of interest, however, we employ a less stringent standard of proving ineffective assistance. *People v Smith*, 456 Mich 543, 556-557; 581 NW2d 654 (1998). Under this standard, “prejudice is presumed only if the defendant

² While challenging the amendment of the information, defendant does not claim that there existed insufficient evidence to support the new charge or the ultimate conviction. He does assert that trial counsel was ineffective in failing to object to the amendment. An attorney is not ineffective where he or she fails to raise a meritless objection, however. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

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

demonstrates that counsel actively represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 557 (quotation marks and citations omitted). "Such a conflict is never presumed or implied;" the defendant must establish its existence. *People v Lafay*, 182 Mich App 528, 530; 452 NW2d 852 (1990). "[M]ultiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest," and this is the defendant's burden to establish. *Cuyler v Sullivan*, 446 US 335, 348; 100 S Ct 1708; 64 L Ed 2d 333 (1980).

Defendant's challenge arises from pretrial plea negotiations. The Sixth Amendment's right to counsel extends to the plea-bargaining process and a claim of ineffective assistance of counsel may be based on counsel's failure to properly advise the defendant regarding a plea offer. *People v Douglas*, 296 Mich App 186, 205; 817 NW2d 640 (2012), applying *Lafler v Cooper*, ___ US __; 132 S Ct 1376; 182 L Ed 2d 398 (2012). In the context of a plea agreement, a defendant must show that the outcome of the plea process would have been different had he received competent advice. *Douglas*, 296 Mich App at 205-207.

Before trial, the prosecution offered to dismiss all criminal charges if defendant, Woods, and Shaw made full restitution of \$25,000 to the only named victim of the car theft operation. Each codefendant was required to pay \$4,000 within 45 days. The offer was a package deal; if even one did not meet his financial burden, the offer would be rescinded. Defendant claims an actual conflict because he was able to pay while Woods was not. A reasonable conflict of interest argument could be made that had counsel not represented both parties, he would have advocated more vigorously for dividing the plea agreement to protect those who could pay. (Counsel did in fact make this plea before trial, but the prosecutor required full payment.) This is not the argument defendant raises, however. Rather, defendant argues that counsel performed ineffectively by failing to advise defendant that he could have provided Woods's portion of the restitution.

Jordan admitted at the evidentiary hearing that he "did not ever advise [defendant] that he could sign a promissory note or anything of that nature, but I did discuss with him coming up with this money" and suggested that defendant ask his other brothers for contribution. Jordan also testified that the prosecutor stated in the presence of both defendant and Woods that "it didn't matter where the money came from as long as" the victim "was made whole." Defendant admitted that he heard the prosecutor's statement in this regard and that "[i]t was clear to [him] it didn't matter where the money came from." Yet, in his supplemental brief following the evidentiary hearing, defendant raises a prejudicial conflict because counsel failed to advise him that he could pay Woods's portion of the restitution. Defendant's appellate claims ring hollow in light of his testimony before the lower court. It naturally follows that if the prosecutor was unconcerned about the source of the funds, she would be unconcerned if defendant paid a double share.

Moreover, defendant was not prejudiced by any failure to adequately advise him that he could have paid Woods's portion of the restitution. At the evidentiary hearing, defendant testified that he paid neither his portion nor Woods's portion even after hearing the prosecutor's comments because he claimed Jordan told him and Woods that they "didn't need to pay it." Jordan refuted that claim and we may not second guess the trial court's resolution of that factual issue. See *People v Kanaan*, 278 Mich 594, 619; 751 NW2d 57 (2008). Defendant also testified

that he did not want to accept the plea offer and wanted to go to trial. Defendant admitted that he made this decision despite knowing that his nursing license could be suspended. That defendant would now prefer to reverse the clock, accept the plea bargain, and pay Woods's share of the \$25,000 restitution does not create a conflict of interest or render defense counsel's performance defective.

We affirm.

/s/ Jane M. Beckering
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher