STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2007
v	No. 270327 Calhoun Circuit Court
MAURICE ANTHONY POINTER, Defendant-Appellant.	LC No. 2003-003091-FH

Before: Bandstra, P.J., and Zahra and Owens, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of one count of third-degree fleeing and eluding, MCL 750.479a(3), and one count of operating a motor vehicle while intoxicated, third offense, MCL 257.625(1). He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent sentences of 4 to 20 years' imprisonment for each conviction, with credit for 176 days' time served. Defendant now appeals as of right. We affirm.

Charles Pelfrey, an officer with the Battle Creek Police Department, arrested defendant after a high-speed, late-night chase through downtown Battle Creek. Defendant had recently left a local bar and was intoxicated. The chase ended when defendant crashed his truck into a concrete divider.

Defendant was appointed counsel, but the trial court permitted defendant's counsel to withdraw after three months, apparently after defendant assaulted him. The trial court then appointed attorney Ronald Pichlik to represent defendant. Approximately one month later, Pichlik moved to withdraw as counsel, claiming that defendant's verbal threats to him and refusal to talk with him regarding the case impeded his ability to adequately represent defendant. The trial court denied Pichlik's motion, and Pichlik represented defendant at trial.

Defendant argues that the trial court abused its discretion when it denied Pichlik's motion to withdraw. We disagree. We review for an abuse of discretion both a trial court's denial of a motion for withdrawal of counsel and of a motion for substitute counsel. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001).

"'An indigent defendant is guaranteed the right to counsel.'" *Id.*, quoting *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). However, "'he is not entitled to have the attorney of his choice appointed simply by requesting that the attorney originally appointed be replaced.'"

Traylor, *supra* at 462, quoting *Mack*, *supra* at 14. Both the *Mack* and *Traylor* Courts noted that the defendant bears the burden of showing that there is good cause for a substitute beyond simply wanting new counsel:

> "Appointment of a substitute counsel is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." [*Traylor*, *supra*, at 462, quoting *Mack*, *supra* at 14.]

Defendant claims that the trial court should have appointed substitute counsel because "he and counsel did not get along." However, a defendant's mere allegation that he lacks confidence in his trial counsel does not constitute good cause to substitute counsel. *People v Tucker*, 181 Mich App 246, 255; 448 NW2d 811 (1989). Accordingly, defendant's assertion alone is insufficient to establish that he should have been appointed substitute counsel.

Instead, the record indicates that the breakdown in the attorney-client relationship was largely the result of defendant's disruptive behavior. "A defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel." *People v Myers (On Remand)*, 124 Mich App 148, 166-167; 335 NW2d 189 (1983). Pichlik stated in his motion that defendant had told him that he was "fired" and, at a hearing in a separate case, refused to speak to him until ordered to do so by the court officer. Pichlik also alleged that defendant had verbally threatened him and noted that defendant had physically assaulted his first appointed attorney. These facts indicate that defendant, not his attorney, impeded the attorney-client relationship. This is not a sufficient reason to request substitution of counsel.

Accordingly, defendant failed to demonstrate good cause for substitution of counsel. Defendant had already been given one replacement counsel, and at the hearing on the motion to withdraw he gave no good reason for needing new counsel, other than his dislike of Pichlik and his self-serving allegations that Pichlik had not come to see him. Because defendant failed to establish that good cause existed to substitute defense counsel, we need not address whether substitution of defense counsel would have unreasonably disrupted the judicial process.

Defendant also alleges that his counsel was ineffective. We disagree. Because defendant did not move for a new trial or an evidentiary hearing regarding Pichlik's performance, our review of this allegation is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The determination whether defendant has been deprived of effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court must first determine the facts and then decide whether these facts constitute a violation of the defendant's right to effective assistance of counsel. *Id.* We review factual findings for clear error and review constitutional determinations de novo. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

To establish a claim of ineffective assistance of counsel, a defendant must show both that his counsel's performance was deficient and that his counsel's deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To demonstrate that his counsel's performance was deficient, a defendant must establish that his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. The defendant must also overcome a strong presumption that his counsel's performance constituted sound trial strategy. *Strickland*, *supra* at 690-691; *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To establish that his counsel's deficient performance prejudiced the defense, the defendant must show that his attorney's representation "was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). This means that the defendant "must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). Finally, defendant must show that as a result of his counsel's deficient performance, the proceedings "were fundamentally unfair or unreliable." *Rodgers*, *supra* at 714.

First, defendant claims that Pichlik was ineffective because he did not consult with defendant before trial. If Pichlik had consulted with him before trial, defendant claims, Pichlik would have learned of the existence of Teri Walker, a bouncer at the bar defendant was at that night, and of Pelfrey's possible bias against defendant.[1] Defendant claims that because Pichlik rarely came to see him, he did not confide in Pichlik.

However, defendant fails to support his self-serving allegations that Pichlik's representation was deficient. Instead, the record indicates that defendant's actions hindered Pichlik's attempts to represent him. Defendant verbally threatened Pichlik on several occasions when they met, making it difficult for Pichlik to talk to him about the case. Defendant does not dispute that Pichlik sent him letters informing him of the proposed trial date and asking him to identify potential witnesses. Defendant apparently chose to ignore these letters, and he did not attempt to inform Pichlik of Walker's existence or of Pelfrey's alleged bias against him until the end of the first day of trial. "A defendant may not purposely break down the attorney-client relationship by refusing to cooperate with his assigned attorney and then argue that there is good cause for a substitution of counsel." *Myers*, *supra* at 166-167. Pichlik made reasonable efforts to find and examine witnesses, to communicate with defendant, and to otherwise provide adequate representation both before and during trial. Accordingly, his representation of defendant was not deficient.

Defendant also fails to establish that his counsel's alleged deficiencies prejudiced his defense. Defendant claims that Pichlik's failure to call Walker to the stand was prejudicial because Walker could have verified defendant's claims that another bar patron was driving the truck and defendant was merely a passenger during the high-speed chase. Yet again, defendant did not notify Pichlik about Walker until the end of the first day of trial. Therefore, Pichlik's

[1] Purportedly, Pelfrey and defendant had been schoolmates. Defendant claimed that Pelfrey did not like him, but did not provide any further explanation.

failure to call Walker to testify did not prejudice defendant. Although defendant alleges that Walker saw him on the night of the accident and told another patron to drive the truck, he does not establish that this evidence would have been substantial enough to alter the outcome of the case, particularly in light of Pelfrey's testimony that defendant was the only individual in the truck. Because Walker was not in the truck, she could not verify whether defendant was driving of the truck at the time of the accident. Regardless, defendant was given the opportunity to locate Walker after the first day of trial, yet failed to do so. Accordingly, Pichlik's failure to locate Walker and call her to testify did not deny defendant a fair trial.

Further, Pichlik's failure to re-call Pelfrey to the stand, or to question him more vigorously during cross-examination regarding his relationship with defendant, did not deny defendant a fair trial. Defendant fails to describe the nature of or the reason for any significant problem between Pelfrey and himself. Defendant testified, "I never had no physical encounter or done anything to him, but it was just—it was just like a personal buff between us. I wasn't trying to be his friend, he wasn't trying to be my friend." However, nothing in the record indicates what this "personal buff" was or how it would have affected Pelfrey's credibility as a witness.

Further, there is no evidence in the record to support defendant's claim that not calling Pelfrey back to the stand prejudiced his case. Pichlik's decision not to call Pelfrey back to the stand was a tactical one, and we will not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). The record indicates that Pichlik did not call Pelfrey back to the stand because then he could use the fact that defendant's testimony regarding a prior negative relationship between him and Pelfrey had not been refuted in his closing statement. This gave Pichlik a way to cast doubt on the probability that the malfunction to the recording device in Pelfrey's patrol car, which prevented a video recording of the crash and of defendant's arrest from being made, was pure chance.

Defendant also argues that Pichlik was ineffective because he failed to give him a copy of the police report before trial started. Pichlik claimed that defendant's previous counsel had provided a police report to defendant. The trial court file indicates that defendant's previous counsel had requested a police report, making it reasonable that Pichlik would believe that defendant already had the report. Defendant's alleged failure to receive a police report until the first day of trial did not prejudice him, however, because the report was made available to him before voir dire began.

Affirmed.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Donald S. Owens