STATE OF MICHIGAN
IN THE BERRIEN COUNTY TRIAL COURT- CRIMINAL DIVISION
811 Port Street, St. Joseph, MI 49085 (269) 983-7111

THE PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v.

RICKY ARISTER WILLIAMS,
Defendant.

Case No.: 2019001072-FH

HON. ANGELA M. PASULA

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At a session of the Berrien County Trial Court, held
On the 7th day of April, 2021, in the City of
St. Joseph, Berrien County, Michigan,

ORDER GRANTING DEFENDANT'S MOTION FOR NEW TRIAL

Defendant was convicted by jury on July 2, 2019 of Carrying a Concealed Weapon in an Automobile, Felon in Possession of a Firearm and Felony Firearm. He was sentenced August 26, 2019 to the MDOC to 24 months to five years in the first two counts and a two year consecutive sentence for the felony firearm charge. Thereafter Defendant filed a Motion for New Trial and Motion to Remand to Trial Court for *Ginther* Hearing. The Michigan Court of Appeals remanded this case to the trial court for an evidentiary *Ginther* hearing, which was held February 11, 2021. Defendant's request for additional time to file a Supplemental Brief after Evidentiary Hearing in Support of Motion for New Trial was granted. This brief was filed March 22, 2021.

FACTUAL BACKGROUND

Defendant was driving a car rented by his girlfriend on March 24, 2019, when officers pulled behind him after Defendant parked the vehicle outside of the May Street Market. (T p 179, 226) Officer Deenik observed Defendant exit from the driver's door of the vehicle and enter the store. (T p 181) Upon reaching the driver's door, Officer Deenik noted a front seat passenger,

PROOF OF SERVICE
The undersigned certifies that a copy of the foregoing document was served upon the attorneys and/or parties of record to the above cause by mailing the same to them at their respective addresses as disclosed by the file, with postage fully prepaid on 4/7/21
MFranklin
Deputy Clerk

who was visibly intoxicated. The driver's window was rolled down and Officer Deenik saw a semi-automatic handgun sitting on the driver's seat. Upon informing other officers in the immediate area of the weapon, Officer Deenik retrieved the gun as Defendant was leaving the store and ordered Defendant to the ground. (T p 182-184.)

Originally, Defendant was represented by court appointed counsel, Jolene Weiner at the pre-exam conference on April 3, 2019. At this appearance Defendant and his counsel expressed Defendant's intent to hire independent counsel prior to his preliminary examination. (P/E Conf 4-5) Attorney Christopher Renna covered for Attorney Weiner at the time of Defendant's preliminary examination, heard, April 9, 2019. Noting Defendant had paid a private attorney to represent him, Attorney Renna went on to indicate that while newly retained counsel had visited Defendant in jail, he had not entered an appearance in the case and no substitution of counsel had been entered. Although Attorney Renna had "reached out to him several times this morning, was not able to get a response." Defendant declined to request an adjournment of the preliminary examination. (PE 5) Thereafter, the status conference was held on June 24, 2019. Defendant did not express any concern, objection or disapproval with Attorney Danian at that time. Defendant's jury trial commenced July 02, 2019, at which time he was represented by Attorney John Danian. At the time of trial, Defendant had four prior felony convictions in the Berrien County Trial Court and was supplemented as a habitual offender with three prior felony convictions.

With the jury panel gathered and waiting in the courthouse, on the morning of trial, Defendant expressed to the court his displeasure with Attorney Danian, indicating he "got Peter J. Johnson on standby right now." (T p 5) After conferring with his family, Defendant agreed to continue the trial with Attorney Danian representing him. (T p 38)

During the course of the trial, the prosecution moved to admit People's Exhibit 3, a certified copy of Defendant's conviction for Delivery of Cocaine, which was admitted into evidence without objection. (T p 200) Further, during cross-examination of Officer Deenik, Attorney Danian inquired regarding the reason for Defendant's stop, with Officer Deenik eventually responding Defendant had two warrants for his arrest, which were confirmed through LEIN. (T p 211-211)

As the trial continued, the prosecution introduced evidence of Defendant's, 2012 conviction for delivery of cocaine, by way of exhibit 3, (for the purpose of proving the element

of a prior felony conviction under count 2), without objection, after handing it to Attorney Danian for inspection. (T p 200)

NEW TRIAL

On Defendant's motion, a court may order a new trial on any ground that would support reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice, and a court must state its reasons for granting or denying a new trial orally on the record or in a written ruling. MCR 6.431(B). A new trial may be granted if the verdict is against the great weight of the evidence. *People v Lemmon*, 456 Mich 625, 635 (1998).

The decision of whether to grant or deny a motion for a new trial is within the court's discretion. *People v Miller*, 482 Mich 540, 549; 759 NW2d 850 (2008). "An abuse of discretion occurs only when the trial court chooses an outcome falling outside the principled range of outcomes. *Id.* (internal quotation omitted).

The Michigan Supreme Court in *Lemmon* rejected the approach that the trial court in deciding Defendant's motion for a new trial sit as the thirteenth juror. "Discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction," *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1983), or "preponderates sufficiently heavily against the verdict that a serious miscarriage of justice may have occurred…." 137 *State v. Kringstad*, 353 N.W.2d 302, 306 (N.D., 1984). As the United States Supreme Court has emphasized; "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v Schiedt*, 293 US 474, 486 (1935).

INEFFECTIVE ASSISTANCE OF COUNSEL

A defendant alleging ineffective assistance of counsel bears a heavy burden of overcoming the presumption that counsel was effective. *People v Rockey*, 237 Mich App 74, 76 (1999), *People v Carbin*, 463 Mich 590 (2001). To establish ineffective assistance of counsel, a defendant must first establish that counsel's performance fell below an objective standard of reasonableness and must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687 (1994). Second, a defendant must show that there is a reasonable probability that the result of the proceedings would have been different. *Id.* at 687-688. A court shall not substitute its judgment for that of trial counsel in matters of trial strategy.

People v Avant, 235 Mich App 499, 508 (1999). In reviewing a claim for ineffective assistance of counsel, a reviewing court must make every effort to eliminate the distorting effects of hindsight. *People v LaVearn*, 448 Mich 207, 216 (1995) quoting *Strickland v Washington*, 466 US 668, 689 (1984). Decisions on what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 164 (1997).

Failure to adequately investigate may be a claim for ineffective assistance of counsel when it undermines the confidence in the trial's outcome. *People v Grant*, 470 Mich 477, 492 (2004). A defendant is entitled to have his or her attorney prepare, investigate, and present all substantial defenses. *In re Ayers*, 239 Mich App 8, 22 (1999). When a party claims ineffective assistance of counsel for failing to raise a defense, a defendant must show he or she made a good faith effort to avail himself or herself of the right to present a particular defense and that the defense which was deprived was substantial. *Id.*

Effective assistance of counsel is presumed. *People v. Noble*, 238 Mich App 647, 661 (1999). Regarding ineffective assistance of counsel claims, the *Strickland* Court provided a two-prong test to determine whether trial counsel was indeed ineffective: First, "the defendant must show that counsel's representation fell below an objective standard of reasonableness," and second "the defendant must show . . . a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 688, 694 (1984). Further, courts recognize that "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 US at 690. Finally, reviewing courts are required "to affirmatively entertain the range of possible reasons that [trial] counsel may have had for proceeding the way they did." *Cullen v Pinholster*, 563 US 170, 196 (2011).

ANALYSIS

Initially, Defendant claims trial counsel was ineffective not only because he failed to exclude evidence that Defendant had two outstanding felony warrants at the time of his arrest, but also because he solicited that information from Officer Deenik during cross-examination.

Defendant's Outstanding Felony Warrants

Q: Officer Deenik you prepared a report in this matter. Correct?

A: Yes.

Q: A police report. And you talk about the reason why you're there. Do you recall what you said in your report about why you were there at the scene initially?

A: Initially it's because the Deputy Chief called me over there to stop a vehicle.

Q: Okay. What -- what you do you recall about what was said to you about stopping the vehicle?

A: That it needed to be stopped. I'm not --

Q: All right. How come your report doesn't mention any of that about that -- why you were there?

A: (no response)

Q: Your report picks up with the fact that you're observing Mr. Williams get out of the vehicle. Correct?

A: Which is a relevant question if I can answer it.

Q: Yes.

A: Would you like me to answer why I stopped him when I pursued him the way I did into the store?

Q: Yes.

A: Because he had two felony warrants.

Q: Okay. That's where your report picks up. You don't mention anything about being called out there about a be on the lookout for a blue Tucson, about meeting up with these officers, you indicate that you saw Mr. Williams exit the vehicle and you knew him to have warrants. Correct?

A: Correct.

Q: All right. What proof do you have that he did have any warrants?

A: He was lodged on two valid warrants.

Q: Okay.

A: They were confirmed through LEIN.

Q: Okay. Do you have any written documentation to show that he had LEIN's at the time of this incident --?

A: If you --

Q: -- for warrants.

A: -- look in the report packet there should be what's called a PR1 and a CAN on there -- or a PR1.

Q: Okay. Would that be attached to your police report? (T p 210-212)

Trial counsel's explanation detailing his solicitation from Officer Deenik of information regarding Defendant's two outstanding felony warrants falls short of sound trial strategy. While claiming he "needed to know whether or not the warrants actually existed" (GH p 46 & 50) he acknowledged his awareness that Officer Deenik testified at the preliminary examination about Defendant's outstanding warrants and further the video footage (of Defendant's arrest) contained discussion regarding these arrest warrants. (GH p 48) Trial counsel continued that he knew the prosecutor redacted that information from the video, introducing a shortened version at trial, but continued he did not know why the prosecution had chosen to do so. (GH p 48-49) Trial counsel went on to explain that he "wanted to get a clear answer from Officer Deenik about these so-called outstanding warrants to make sure that they were still valid…at the time of the incident." (GH p 47) To further clarify his strategy, trial counsel testified,

> "I was gauging the way that he was answering my questions and trying to ascertain whether or not he was being truthful. And so, I wanted specific details to see if he was being honest about what he was testifying to. Because if he had no valid reason to stop and arrest on sight, then that whole requirement wouldn't have been met…. [w]itnesses routinely testify differently at the preliminary examination than they do at trial. And if I could use that somehow to impeach him or to show that he was not being credible, absolutely I wanted to know that answer."(GH p 51-52)

While this information could have been gained by discovery request or basic pretrial inquiry, no logical explanation exists for performing this line of inquiry during the course of the trial in front of the jury. During his testimony at the *Ginther* Hearing, trial counsel was unable to provide a reasonable and strategic reason for not seeking this information prior to trial, testifying, "[I] didn't see any—any need to prior to trial. It came up—it came up during the trial testimony", continuing "I don't think—it was prejudicial at all to Mr. Williams…" to hear testimony of Defendant's outstanding felony warrants. (GH p 53-54)

"Old Chief"

Claiming trial counsel was ineffective for not seeking an "Old Chief" stipulation regarding the fact that Defendant had a prior felony conviction, to satisfy the required element under his felon in possession of a firearm charge, he further points to trial counsel's failure to realize the

certified copy of conviction, entered without objection at trial, (People's Exhibit 3), contained the name of one of Defendant's prior convictions, delivery of cocaine.

Initially, trial counsel testified although he did not seek a pre-trial stipulation to exclude such evidence, he thought and his understanding was, that the record of conviction entered at trial had been redacted. (GH p 14) Admitting he "glanced" at People's Exhibit 3 and failed to "take any additional time or object to it" (GH p 17), trial counsel then went on to testify that he did not have a strategic reason for failing to seek an exclusionary stipulation regarding the details of his client's prior conviction. Rather, he simply thought the information "was not coming in and ...didn't know...the prosecutor was introducing a document that still had that in there"....but counsel "thought that we had already talked about that and that the document that was prepared had been blacked out or that the specific offense was not gonna be shown to the jury." (GH p 15-16) Unable to explain why he failed to move for a mistrial counsel testified,

A: ...It was my understanding that it had already been taken out and my intention was never to disclose to the jury what the prior conviction was. I was simply -- because the -- to have him, I guess, you know, charged with the other crime of the felon in possession and then the prior conviction it was never my intention to have that go to the jury.

Q: Well, at some point you became aware of -- of the nature of the felony during the trial; right?

A: Yes.

Q: And -- and at that point you knew that that was part of the evidence. I mean, (indiscernible) you -- you consider moving for mistrial at that point.

A: I did not consider moving for mistrial; I was gauging from the jury the significance of having that come in. And at some point you -- you don't want to draw more attention to -- to something that the jury wasn't really even, I don't think, taking into -- you know, serious consideration or was paying much attention to. So, you know, there -- there's also the question of whether or not the jury, you know, it was gonna look at that and question why you're not disclosing what that information is. So, at that point, I -- I did not want to pursue it any further or drawn any additional attention to it to make it worse for Mr. Williams.

Q: Well you -- you could have asked that your objections be heard outside the presence of the jury either for a mistrial or for a instruction on -- on not mentioning anything about this felony or the details of it going forward once you realized that it came into evidence; right?

A: I would agree, yes. (GH p 18-19)

In response to appellate counsel's question inquiring as to the strategic reason for failing to make a motion before the court for mistrial, trial counsel answered,

> "Because my understanding that, you know, strategically if -- if a jury is left questioning what that underlying felony is sometimes that -- that can be just as damaging. And I think that having heard it -- you know, Mi- -- Mr. Williams didn't have any prior weapons charges and I took that into consideration, because, you know, I -- I would rather have the jury know what that offense was at that point and not drawn more attention to it than guess and maybe use that against him thinking that he might have had other prior felonies that were similar to what he was being charged with." (GH p 20)

Trial counsel failed throughout his testimony to expound upon his decision that to change his strategy during the course of trial, due to his failure to review and object to People's Exhibit 3, would be more beneficial to Defendant than moving for a mistrial outside of the jury's presence.

Failure to Prepare Defendant for Trial Testimony

During cross-examination of Defendant, the prosecutor asked Defendant if he disputed his prior conviction for the offense of delivery of narcotics. Eventually Defendant responded by testifying, "it was soap it wasn't dope," and that he "took the plea they told me I could go home…like they did with all the other pleas" and that he had not sold drugs. (T p 254) While Defendant claimed trial counsel never discussed with him the options of testifying or in the alternative, remaining silent at trial, he further asserted he was unaware that there existed a mechanism to prevent the jury from hearing evidence about the name of his prior conviction under the felony firearm charge. (GH p 93-98) Conversely, trial counsel indicated he discussed the case multiple times with Defendant.

CONCLUSION

Review of the trial and *Ginther* Hearing transcripts provide a factual basis to conclude trial counsel's representation of Defendant fell below an objective standard of reasonableness and further that a reasonable probability exists that but for trial counsel's unprofessional errors

the result of the trial would have been different. Clearly, trial counsel's decision to question Office Deenik regarding Defendant's two outstanding felony warrants at the time of Defendant's arrest, during the course of trial and in front of the jury, as opposed to performing pre-trial discovery to confirm the validity of those warrants cannot be found to be sound trial strategy. Further, trial counsel's testimony during the *Ginther* Hearing is inconsistent. Evidence shows his explanation of failing to confirm with the prosecution and place on the record prior to trial a redaction of the identity of Defendant's prior conviction on the felon in possession of a firearm charge, his failure to adequately review People's Exhibit # 3 before allowing its admission without objection and assertion that his initial trial strategy was to keep such information from the jury but changing his declared strategy mid-trial upon his failure to examine a document, cannot be reconciled. Finally, Defendant's admission to previously lying under oath in front of the jury regarding his delivery of cocaine conviction may never have been elicited but for the introduction of the named prior felony conviction during the trial.

For the reasons stated above, Defendant has established trial counsel was ineffective and Defendant's Motion for New Trial is **GRANTED**.

IT IS SO ORDERED.

DATE: 4-7-21

HON. ANGELA M. PASULA (P32275)
Berrien County Trial Court