

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TROY LEON DOWNING,

Defendant-Appellant.

UNPUBLISHED

October 19, 2026

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No. 374746

Missaukee Circuit Court

LC No. 24-003507-FH

Before: SWARTZLE, P.J., and ACKERMAN and TREBILCOCK, JJ.

PER CURIAM.

Defendant appeals his conviction of methamphetamine possession, arguing that his defense counsel was deficient by advising defendant not to testify at trial. Because there was no ineffective assistance of counsel, we affirm defendant’s conviction.

Police officers discovered methamphetamine and related paraphernalia during a search of defendant’s residence. Defendant admitted to the officers that he had “used rigs,” which is common slang for syringes used to inject drugs, but he also told the officers that he was clean from drug use. In the bedroom where defendant was staying, defendant retrieved, opened, and showed the officers a black box containing syringes and clear plastic baggies with white residue. According to the officers, defendant answered affirmatively when asked if the items were his, but defendant claimed that he only had the syringes in order to dispose of them properly. Tests revealed that the white residue in the bags was methamphetamine.

Defendant was charged with possession of methamphetamine, MCL 333.7403(2)(b)(i). At trial, defense counsel, during cross-examination and arguments, focused on the visibility of the substance; defendant’s exact statements, including that his admission only related to the syringes; and defendant’s willing participation with the search, which indicated a lack of knowledge of the substance. Defendant, however, chose not to testify on his own behalf. The trial court confirmed with defendant his understanding of his right to testify, including that the decision on whether to testify was his choice to make and that he was freely choosing not to exercise that right in light of advice or input from his attorney. The jury convicted defendant of the charge, and the trial court sentenced defendant to serve 2 to 20 years’ imprisonment.

Defendant now appeals.

On appeal, defendant argues that his defense counsel was ineffective for advising him not to testify. Defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. This right includes the right to the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). "Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v Solloway*, 316 Mich App 174, 187; 891 NW2d 255 (2016). Defendant moved earlier to remand this matter for an evidentiary hearing alleging, among other things, that trial counsel was ineffective. This Court denied the motion, so we review defendant's ineffective assistance of counsel claim for errors apparent on the record, though we retain the authority to remand for an evidentiary hearing if one is needed. See *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008); *People v Downing*, unpublished order of the Court of Appeals, entered October 20, 2025 (Docket No. 374746).

To establish a claim of ineffective assistance of counsel, defendant must show that: (1) defense counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). Defense counsel's performance is deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Defendant bears a heavy burden to show that counsel made errors so serious that counsel was not performing as guaranteed by the Sixth Amendment, and defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001) (citing *Strickland v Washington*, 466 US 668, 104 S Ct 2052, 80 L Ed 2d 674 (1984)). The performance will be deemed to have prejudiced the defense if it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. *Jordan*, 275 Mich App at 667.

Counsel must advise a defendant of the right to testify, but "the ultimate decision whether to testify at trial remains with the defendant." *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). A defendant waives that right to testify when he "decides not to testify or acquiesces in his attorney's decision that he not testify." *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). Where defense counsel advises a defendant not to testify on his own behalf, there is a presumption that advice is sound trial strategy. See *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Further, if the "Court can conceive of a legitimate strategic reason for trial counsel's act or omission," the act or omission did not fall below an objective standard of reasonableness. *People v Haynes*, 338 Mich App 392, 429-430; 980 NW2d 66 (2021).

Given the record before the Court, defense counsel had a legitimate strategic reason to advise defendant of the risks of testifying. Most critically, defendant would have been subjected to the prosecutor's cross-examination if he had testified on his own behalf. This cross-examination reasonably could have elicited more prejudicial evidence against defendant, such as his past methamphetamine use. In light of defense counsel's other arguments (the discernibility of the residue and defendant's cooperation with the search indicating a lack of knowledge of the methamphetamine), defense counsel was able to advance a defense for defendant without his testimony.

Defendant was also not prejudiced by defense counsel's advice. Given the evidence against defendant, defendant cannot establish a reasonable probability of a better outcome had defense counsel not advised him to refrain from testifying. Moreover, it was defendant's decision on whether he testified or not, as shown by the trial court's extensive conversation with defendant about the possibility of testifying.

Thus, defendant is not entitled to reversal and retrial, nor a remand for an evidentiary hearing.

Affirmed.

/s/ Brock A. Swartzle
/s/ Matthew S. Ackerman
/s/ Christopher M. Trebilcock