YSTATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF LEELANAU

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff/Appellee,

v

File No. 02-1259-AR
HON. PHILIP E. RODGERS, JR.

WILLIAM E. KASBEN,

Defendant/Appellant.

Sara W. Brubaker (P39261)
Attorney for Plaintiff/Appellee

Defendant/Appellant in Pro Per

DECISION AND ORDER ON APPEAL

Following a 10-day jury trial, the Defendant/Appellant William Edwin Kasben ("Kasben") was convicted of 13 counts of animal cruelty in the 86th District Court for Leelanau County. On July 2, 2002, Kasben filed a Claim of Appeal to this Court. On December 6, 2002, the complete transcript of the proceedings was filed with the Court. The parties filed their respective briefs.[1] On April 28, 2003, the Court heard the oral arguments of counsel and took the matter under advisement. The Court now issues this written decision and order and, for the reasons stated herein, affirms the verdict below and the trial court's rulings.

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[1]There was some confusion over whether this appeal was combined with the appeal of a related civil forfeiture action (Leelanau County Circuit Court File No. 02-5866-AV). This Court never consolidated these matters for appellate purposes. However, Kasben filed only one brief. Upon order of the Court, that brief was accepted as timely filed in both appeals. In this decision and order, the Court will address only those issues pertaining to the criminal appeal. The Court will deal with the issues pertaining only to the civil forfeiture action in a separate opinion.

On appeal from his criminal conviction, Kasben raises the following issues:

I. Whether the trial court erred by not granting a mistrial because of prosecutorial misconduct.

II. Whether the trial court erred by failing to declare a mistrial when the prosecution conducted an improper search and seizure and attempted to introduce privileged information to the jury.

III. Whether the Appellant Kasben was denied due process of law because of prosecutorial "judge shopping."

IV. Whether the Appellant Kasben is entitled to a new trial because of the Prosecution's failure to disclose exculpatory evidence.

V. Whether the Appellant Kasben received ineffective assistance of counsel and was deprived of a fair trial.

VI. Whether the trial court erred in denying the Appellant Kasben's motion for change of venue.

VII. Whether the trial court erred in denying the Appellant Kasben's motion for judgment notwithstanding the verdict.

The Court will address each of these issues separately.

I.

Whether the trial court erred by not granting a mistrial because of prosecutorial misconduct.

On the tenth day of trial, Chief Assistant Prosecuting Attorney Dan Rose attempted to use People's Proposed Exhibit 93 to impeach Kasben and announced in the presence of the jury that "it deals with dead horses." The trial court did not admit Exhibit 93. The Court admonished counsel about making reference to exhibits that had not been admitted in evidence and denied Kasben's request for a mistrial. The following exchange then took place in the presence of the jury:

The Court: O.K., you may be seated. There was a - an issue that came up when we asked you to leave, there was information on an exhibit that was not - it's been found not to be admissible for various reasons, but - and there was some reference to horses being buried, O.K., and you're not to consider that whatsoever in your decisions, there's no

> evidence that there were any horses buried ever, and I assure you given the nature of this case, if any horses were buried, that would be coming out of this case. The reference was - was to buried horses.

Mr. Rose: (in a low voice). That's not true.

The jury was again excused and the trial court heard additional arguments relating to whether a mistrial should be declared.

Appellant Kasben contends that Chief Assistant Prosecuting Attorney Rose's comment at the end of the curative instruction indicated that the Court was being untruthful to the jury and obfuscated the Court's attempt to cure the Prosecuting Attorney's prior misconduct. Nonetheless the trial court denied Kasben's request for a mistrial.

The grant or denial of a motion for a mistrial is within the sound discretion of the trial court, and absent a showing of prejudice, reversal is not warranted. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994). The trial court's ruling must be so grossly in error as to deprive the defendant of a fair trial or amount to a miscarriage of justice. *Id.*

In this case, when the challenged comments and the curative instruction are viewed in context, it is apparent that Kasben was not deprived of a fair and impartial trial. Appellant Kasben has not shown that the prosecutor's individual comments, or the cumulative effect of those comments, warranted a mistrial.

II.

> Whether the trial court erred by failing to declare a mistrial when the prosecution conducted an improper search and seizure and attempted to introduce privileged information to the jury.

Appellant Kasben argues that the trial court erred by failing to declare a mistrial when the Prosecution attempted to introduce Exhibit 93 because Exhibit 93 was privileged and was obtained by an improper search and seizure.

Exhibit 93 consists of notes that were in Appellant's possession when he was incarcerated and which he claims were his work product as he was at the time acting as his own attorney

representing himself. The notes were discovered by a corrections officer and copies provided to the Prosecution.

Assuming *arguendo* that the search and seizure were improper, the proper remedy is suppression of the evidence obtained. *People v Dalton*, 155 Mich App 591, 597; 400 NW2d 689 (1986). In the instant case, the trial court suppressed the evidence by refusing to admit Exhibit 93 in evidence. Therefore, the trial court did not err by denying Appellant's motion for a mistrial.

III.

Whether the Appellant Kasben was denied due process of law because of prosecutorial "judge shopping."

Appellant Kasben contends that he was denied due process because the Prosecution presented three motions to three different district court judges before finally succeeding in an "un-noticed, unrecorded and ex-parte" proceeding to get the court to order his arrest and the seizure of all of the horses.

First, this Court notes that Kasben misrepresents the first order issued by Judge Gilbert and the second order issued by Judge Phillips. Second, this Court takes judicial notice of the fact that there are three judges of the 86th District Court. As with any multiple-judge court, it is customary for one judge to fill in for another judge who may be ill, on vacation or otherwise absent from the bench. Third, each of the proceedings was related. The first proceeding was a bond hearing. The second proceeding was a continuation of that bond hearing which was necessitated by Kasben's lack of cooperation with the Animal Control Officer and veterinarian when they attempted to inspect the horses. The third proceeding was on a motion to revoke Kasben's bond for violation of its terms and conditions based upon the affidavit of the Animal Control Officer. The Order signed by Judge Haley was an order for Kasben to appear and show cause why he should not have his bond revoked and an order to seize all of the horses.

The order to show cause why his bond should not be revoked provided Kasben with notice and an opportunity to be heard before his bond was revoked. The order of seizure was authorized by MCL 750.53.

This Court does not find any evidence to substantiate Kasben's assertion that the Prosecution engaged in improper "judge shopping." Each of the three complained of proceedings was appropriate and necessitated by Kasben's own conduct. For these reasons, this Court does to find that Kasben was denied due process.

IV.

Whether the Appellant Kasben is entitled to a new trial because of the Prosecution's failure to disclose exculpatory evidence.

Appellant Kasben contends that he is entitled to a new trial because the Prosecution failed to provide and disclose exculpatory evidence. More specifically, Kasben contends that the Prosecution failed to provide him with (1) certain photographs and video footage of seeming healthy horses from the herd which would have shown that many horses in the herd were provided with adequate care and were healthy and (2) evidence of an ongoing investigation by criminal control.

In response, the Prosecution asserts that the Defendant was provided with a "book" of all photographs which were taken in preparation for trial. The Prosecution further claims that there was no "exculpatory" evidence.

The United States Supreme Court in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed2d 215 (1963), held that the prosecution's suppression, in the face of defendant's request, of evidence favorable to the accused and material either to guilt or punishment violated due process irrespective of the good or bad faith of the prosecutor. See also *Moore v Illinois*, 408 US 786; 92 S Ct 2562; 33 L Ed2d 706 (1972). And in *People v Miller*, 51 Mich App 117, 119; 214 NW2d 566, 567 (1974), the Michigan Court of Appeals observed:

> In a criminal prosecution the adversary process is not total. The people are obligated affirmatively to make known all the evidence of which they have knowledge bearing upon the charged offense, whether it be favorable or unfavorable to the prosecution. This is all the more so when, as in this case, the defense affirmatively demands an evidentiary item it has reason to believe is in the possession or control of the prosecution.

From the record before this Court, it appears that Kasben demanded production of evidentiary items and those requests were honored. Appellant Kasben was provided with everything that the

Prosecution had, none of which was exculpatory. Appellant has failed to show that the Prosecution suppressed any evidence.

For these reasons, the Appellant is not entitled to a new trial.

V.

Whether the Appellant Kasben received ineffective assistance of counsel and was deprived of a fair trial.

Appellant Kasben contends that he received ineffective assistance of counsel because the trial court denied his request for removal of counsel and thus he was deprived of a fair trial. He cites his differences with counsel over defense strategy and counsel's motion to withdraw because of a breakdown in the attorney-client relationship as support for his position.

According to the trial transcript, Kasben originally represented himself. He later retained attorney Jeffrey Slocombe to represent him. Prior to trial, he requested that he be allowed to represent himself, but stated that he "needed" Mr. Slocombe to pick the jury. On the fourth day of trial, he requested that Mr. Slocombe be released, but after discussion with the Court, agreed to go forward with Mr. Slocombe because "he's great in court." Eventually, the Court allowed Kasben to represent himself and to keep Mr. Slocombe as "stand-by counsel." On the seventh day of trial, Kasben appeared with another attorney, Mr. Green. He, too, participated in the trial on Kasben's behalf.

To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). A defendant must show that, but for the error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable. *Id.* Furthermore, this Court presumes that a defendant received effective assistance of counsel, and the defendant bears a heavy burden to prove otherwise. *Id.* Decisions regarding 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, 163; 560 NW2d 600 (1997). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess

counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

In *People v Dennany*, 445 Mich 412; 519 NW2d 128 (1994) our Supreme Court provided guidance to the courts in this area by summarizing the warnings and inquiry required under *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976) and the court rules, saying:

> The underpinnings for these requirements are based not only in the protection of a defendant's fundamental constitutional rights, *Faretta* and *Anderson, supra*, but on practical considerations as well:
>
> > Whether the prospective pro per is a naïve character who sincerely believes he can represent himself better than can a lawyer, a cagey loser who is going to try to reduce the trial to a shambles in the hope that somehow reversible error will creep in, a free soul with a touch of ham, or simply someone who wants to have some fun with the judicial establishment, the trial judge must recognize that the first ground on appeal is probably going to be that the defendant was allowed to represent himself without having intelligently and voluntarily made that decision. Such are the facts of life. Therefore, pragmatically, and defensively, in addition to the legal necessity of establishing that a defendant voluntarily and intelligently reached this decision, the trial court should also protect itself--and the record. *Blunt, supra* at 649; 473 NW2d 792, quoting from *People v Lopez, supra* at 571-572; 138 Cal Rptr 36. See also *Morton, supra* at 8-9; 437 NW2d 284.

Obviously, the most effective way for a trial court to safeguard against the opening of an appellate parachute is to comply with the court rules and *Anderson*.

The applicable court rules, MCR 6.005(D) and (E), are very specific. First, the court may not permit the defendant to waive the right to be represented by a lawyer without advising the defendant of (a) the charge, (b) the maximum possible prison sentence for the offense, (c) any mandatory minimum sentence required by law, and (d) the risk involved in self-representation.

Second, a defendant who wishes to proceed pro se must be offered the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Third, even though a defendant has waived the assistance of a lawyer, the waiver must be reaffirmed at each subsequent proceeding.

> In addition, pursuant to *Anderson, supra*, the court must, upon a defendant's initial request to proceed pro se, determine three things: (1) that the request is unequivocal; (2) that the right has been asserted knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the disadvantages of self-representation; and (3) that self-representation will not disrupt, unduly inconvenience, or burden the court.
>
> Where there is error but it is not one of complete omission of the court rule and *Anderson* requirements, reversal is not necessarily required. Cf. *Guilty Plea Cases*, 395 Mich 96, 122-124; 235 NW2d 132 (1975). Whether a particular departure justifies reversal 'will depend on the nature of the noncompliance.' *Id* at 113; 235 NW2d 132.

In the instant case, the trial court granted Kasben considerable leeway to represent himself and meaningfully participate in the proceedings, while at the same time allowing counsel to remain at his disposal as stand-by counsel. The trial court's decision to deny the defense request for removal of counsel did not result in Kasben receiving ineffective assistant from counsel nor deprive Kasben of a fair trial. The trial court decision is affirmed.

VI.

Whether the trial court erred in denying Appellant Kasben's motion for change of venue.

Appellant Kasben contends that the trial court erred by denying his motion for change of venue on the basis of the prominence of the Kasben intra-family disputes and the high media coverage of this case.

We review a trial court's determination whether to grant a request for a change of venue for an abuse of discretion. *People v Passeno*, 195 Mich App 91, 98; 489 NW2d 152 (1992). The existence of pretrial publicity does not by itself require a change of venue. *People v Prast (On Rehearing)*, 114 Mich App 469, 477; 319 NW2d 627 (1982). In order to justify a change of venue, it is not enough for a defendant to merely demonstrate that pretrial publicity existed. *Id.* Rather, defendant has the burden of proving either (1) strong community feelings against him and that the publicity is so extensive that jurors could not remain impartial when exposed to it or (2) that the jury was actually prejudiced or the atmosphere surrounding the trial was such as would create a

probability of prejudice. *Id.* Further, if a juror states that she has formed an opinion from media coverage, but swears she can set that opinion aside and try the case impartially, and the trial court is satisfied, then the juror is competent to try the case. *Id.* at 98-99; 489 NW2d 152.

A change of venue is not necessary if jurors can set aside their impressions or opinions and render a verdict on the basis of the evidence presented in court. *Prast* at 477. However, a change of venue should be granted if the defendant demonstrates that there is a pattern of strong community feeling or bitter prejudice against him, and the publicity is so extensive and inflammatory that jurors could not remain impartial when exposed to it. *Id.*

Here, there was no error in the trial court's ruling. Kasben has not established that, under the totality of the circumstances, the trial court abused its discretion. He failed to show that the pretrial publicity was so extensive or biased against him that the jurors could not remain impartial. See, *People v Lee*, 212 Mich App 228, 253; 537 NW2d 233 (1995). He also failed to show that his personal reputation caused jurors to be so biased against him as to deny him a fair and impartial trial. Further support for this conclusion comes from the fact that Kasben and his counsel indicated satisfaction with the jury panel at the close of the jury selection process.

Accordingly, we find that the trial court did not abuse its discretion in denying defendant's motion.

VII.

Whether the trial court erred in denying Appellant Kasben's motion for judgment notwithstanding the verdict.

Appellant Kasben contends that, when viewed in the light most favorable to the Prosecution, the evidence does not establish beyond a reasonable doubt that he violated MCL 750.50.

After a jury renders a verdict, the issue of sufficiency of the evidence can be raised by motions for a new trial, motion for directed verdict of acquittal or motion for judgment notwithstanding the verdict (JNOV). Appellant filed a motion for judgment notwithstanding the verdict that was denied by the trial court.

This Court reviews the trial court's decision with regard to a motion for JNOV de novo. *Morinelli v Provident Life & Accident Ins Co*, 242 Mich App 255, 260; 617 NW2d 777 (2000).

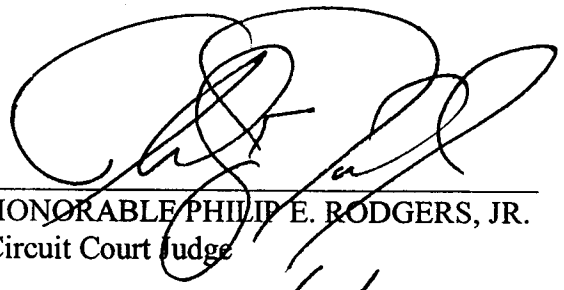
When reviewing a claim of insufficient evidence, we review the record to determine whether sufficient evidence was introduced to justify a trier of fact in reasonably concluding that the defendant is guilty beyond a reasonable doubt. *People v Hampton*, 407 Mich354, 368; 285 NW2d 284 (1979), cert den sub nom *Michigan v Hampton*, 449 US 885; 101 S Ct 239; 66 L Ed2d 110 (1980).

After thoroughly reviewing the evidence produced at the trial in the instant case, this Court finds no abuse of discretion in the lower court's denial of motion for JNOV. There was sufficient evidence introduced by the Prosecution to justify the trier of fact in reasonably concluding that Appellant Kasben was guilty beyond a reasonable doubt of violating MCL 750.50.

CONCLUSION

The Appellant William Edwin Kasben appealed his conviction in the 86th District Court on 13 counts of animal neglect, pursuant to MCL 750.50(3). The Appellant assigned seven points of error. The Court has addressed each point of error and, for the reasons stated herein, affirms the District Court's rulings and finds no denial of any of Appellant's constitutional rights to due process and effective assistance of counsel. The convictions are, therefore, affirmed. The case is remanded to the District Court for execution of sentence.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 7/18/03