

ISSUE PRESERVATION: WAIVED AND FORFEITED CLAIMS OF ERROR

By Guy L. Sweet
Assistant Prosecuting Attorney
Ingham County
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I. Key definitions.

- a. Appeal: A proceeding in which the appellant seeks to challenge and correct an error that allegedly occurred in a lower court proceeding.¹
- b. Appellant: A party who raises a claim of error during an appeal.
- c. Error: A deviation from a rule of law.²
- d. Forfeiture: The failure to make a timely assertion of a right.³
- e. Waiver: The intentional relinquishment or abandonment of a known right.⁴

II. Key case: *People v Carter*, 462 Mich 206 (2000).

III. The Rule: An appellant may not seek review of a claim of error that has been waived, but may seek review of a claim of error that has y been forfeited.⁵

- a. Rationale: Waiver extinguishes the error.⁶
- b. Exception: An appellant may argue that his trial counsel rendered ineffective assistance by creating the waiver.⁷

¹ *People v Jones*, 476 Mich 301, 304-305 (2006).

² *People v Shafier*, 483 Mich 205, 219 (2009), *People v Carter*, 462 Mich 206, 214 (2000), *People v Grant*, 445 Mich 535, 548 (1994).

³ *Carter*, p 215, *People v Carines*, 460 Mich 750, 762, n 7 (1999).

⁴ *Id.*

⁵ *Carter*, p 215.

⁶ *Id.*

i. But the appellant must overcome the “strong presumption” that his attorney’s actions constituted sound trial strategy.⁸

c. A forfeited claim of error is reviewed under the “plain error” test. To prevail, the appellant must demonstrate that an error: (1) occurred, (2) was clear and obvious, (3) was probably outcome-determinative, and (4) resulted in the conviction of an innocent person or seriously affected the fairness, integrity and public reputation of judicial proceedings.⁹

IV. Agency theory: A waiver can occur through the actions of trial counsel If the waiver pertains to a trial management issue.¹⁰

V. Examples of waiver by defense counsel.

- a. Introducing inadmissible evidence.¹¹
- b. Requesting a specific jury instruction.¹²
- c. Stating that he or she **has no objections** to the jury instructions as read.¹³
- d. Expressing satisfaction with supplemental jury instructions.¹⁴
- e. Stating that the prosecutor’s version of a jury instruction “would be fine.”¹⁵
- f. Stating that “I have no additions, corrections or deletions to the [pre-sentence] report.”¹⁶

⁷ See, e.g., *People v Kleine*, 2009 WL 839837 (Unpublished opinion).

⁸ *People v Toma*, 462 Mich 281, 302 (2000), *People v Mesik*, 285 Mich App 535, 543 (2009).

⁹ *Schafier*, p 219, *Carines*, p 763.

¹⁰ *Carter*, pp 218-219.

¹¹ *People v Riley*, 465 Mich 442, 448 (2001).

¹² *People v Herron*, 464 Mich 593, 607, n 8 (2001).

¹³ *People v Mutuzsak*, 263 Mich App 42, 57 (2004), *People v Lowery*, 258 Mich App 167, 173 (2003).

¹⁴ *Carter*, p 219.

¹⁵ *People v Unger*, 278 Mich App 210, 292 (2008).

¹⁶ *People v Harper*, 479 Mich 599, 642, n 72 (2007).

g. Stating that the sentencing guidelines were scored correctly.¹⁷

h. The prosecutor states during a plea hearing that his office “will take no position” on a defense request to deviate downward from a “mandatory” minimum sentence.¹⁸

VI. The primary example of a forfeiture is a failure by counsel to articulate an objection.¹⁹

¹⁷ *People v Omev*, 2009 WL 2426326 (unpublished opinion).

¹⁸ *People v Arriaga*, 199 Mich App 166, 168-169 (1993) (The Court of Appeals treated the “waiver” as a breach of the plea agreement.)

¹⁹ *People v Pipes*, 475 Mich 267, 278 (2006), *People v Riley*, 465 Mich 442, 450 (2001) (dissenting opinion by Kelly, J).