DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2007

RONNIE McGEE,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D06-1286

[February 7, 2007]

WARNER, J.

This is an appeal of the trial court's order summarily denying appellant's motion for postconviction relief. We reverse and remand for an evidentiary hearing on his claim that his attorney was ineffective for failing to request an "afterthought" instruction with respect to his conviction for robbery.

Appellant was charged with first degree premeditated murder, robbery with a weapon, and grand theft of a vehicle, all charges arising from an altercation which culminated in appellant beating and stabbing the victim to death. The state specifically charged appellant with using force or violence to "knowingly take away car keys and/or a motor vehicle . . . from the person [of the victim]" and with using a weapon in the course of the robbery. Thus, the charge was directed solely at the taking of the vehicle. According to appellant's statement to police, the victim invited appellant to his apartment, and the two watched movies. The victim paid appellant to perform some sexual acts. When appellant got upset, a struggle ensued during which fatal injuries were inflicted on the victim. After the struggle, appellant left the apartment, taking the keys to the victim's vehicle as he was leaving. The jury convicted appellant of second degree murder, robbery with a weapon, and grand theft of the vehicle.

Appellant filed a motion for postconviction relief raising several issues, only one of which merits consideration. He claims that his counsel was ineffective for failing to request an "afterthought" instruction in connection with the robbery. Under appellant's version of events, the

taking of the vehicle was an "afterthought." We have held that failure to give an instruction that the taking was an afterthought after a murder and thus could not be robbery was reversible error. *See Perkins v. State*, 814 So. 2d 1177 (Fla. 4th DCA 2002).

The state counters that since the only evidence of this defense was from appellant's "self-serving" statement, he should not be entitled to postconviction relief. It cites to *Bertolotti v. State*, 534 So. 2d 386, 387 (Fla. 1988), where the defendant claimed his counsel was ineffective for failure to raise an intoxication defense. The court refused to grant relief because the only evidence of intoxication at trial was the defendant's own statement. The court noted that the statement was not supported by any independent testimony or evidence and was specifically contradicted at trial. Therefore, without more, the trial court did not err in denying the motion.

The state also cites to *Miller v. State*, 503 So. 2d 929 (Fla. 3d DCA 1987), where the court refused to reverse a conviction for failure to give a requested jury instruction on the defense of "withdrawal" from a planned robbery where the only evidence supporting the defendant's withdrawal from the crime was the defendant's statement. In that case, too, the court noted that there was an "overwhelming preponderance of evidence" to contradict the appellant's statement. In fact, the court explained:

> [W]hen a defendant makes a self-serving statement in a police confession to prove his innocence of a crime based on withdrawal, but there is an overwhelming preponderance of evidence which contradicts that statement, an appellate court will not find reversible error in the denial of an instruction on the withdrawal defense. The actions of a defendant may speak louder than his words.

Id. at 931.

In both cases cited by the state, the defendant's self-serving statement stood in contrast to substantial evidence contradicting the statement. Thus, in light of the evidence supporting the conviction, the court in *Bertolotti* refused to grant postconviction relief, and the *Miller* court refused to reverse the conviction. Here, however, there was no evidence to support the charge of robbery other than the taking of the vehicle after the murder. That same evidence supports an "afterthought" instruction.

The dissent discusses at length the sordid history of the events leading up to the victim's death. However, efforts to get money from the victim do not translate into evidence of an intent to take the vehicle by force. We simply disagree that the other evidence presented was at all contradictory to his defense of "afterthought" to the taking of the vehicle.

Factually, this case is identical to *Perkins*, although *Perkins* was an appeal from a conviction. In *Perkins,* we noted that the standard jury instruction on robbery did not adequately explain to the jury the theory of "afterthought." Therefore, we reversed the conviction for a new trial. Similarly, in this case there does not appear to be any evidence to support the robbery charge.

Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant must show both ineffective assistance of counsel and a reasonable probability that the result would have been different had counsel not performed ineffectively. The Court wrote:

> [T]he defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687. In clarifying the meaning of "prejudice" and a "reliable" result, the Court further wrote:

> The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

Id. at 695. The appellant's claim, which is not conclusively refuted on the record, provides a reasonable probability that absent the error in not giving the "afterthought" instruction there would be a reasonable doubt respecting appellant's guilt of robbery.

As there is a sufficient showing of deficient performance on the part of counsel in failing to request such an instruction for the robbery

conviction, an evidentiary hearing is required as the ground is not conclusively refuted by the record. This does not affect the conviction for second degree murder nor the conviction for grand theft, as the lack of the "afterthought" instruction would affect only the robbery conviction, and there was substantial independent evidence supporting each of the other charges.

We therefore reverse and remand for an evidentiary hearing on the "afterthought" issue. We affirm as to the remaining issues raised.

TAYLOR, J., concurs.
GUNTHER, J., dissents with opinion.

GUNTHER, J., dissenting.

I respectfully dissent.

The majority concludes that McGee was entitled to an "afterthought" jury instruction because "there was no evidence to support the charge of robbery other than the taking of the vehicle after the murder." After considering the evidence in this case, I believe that McGee was not entitled to an afterthought jury instruction and that his trial counsel was not ineffective for failing to request such an instruction. Thus, I conclude that the denial of McGee's motion for post-conviction relief as to robbery should be affirmed and not reversed and remanded for an evidentiary hearing.

An afterthought defense is intended to negate the element of a defendant's intent to commit a robbery. In other words, "[i]f the force or violence is motivated by a reason other than to rob the victim, then the taking of the property would not constitute a robbery." *Perkins v. State*, 814 So. 2d 1177, 1178 (Fla. 4th DCA 2002). In this case, McGee, who did not testify at his trial, relies on his statement to law enforcement, which was admitted into evidence, to attempt to establish his entitlement to an afterthought jury instruction. He argues that he did not come to the victim's house and leave the victim dead in order to rob the victim of his car keys (or any other personalty). Rather, in his statement to law enforcement, McGee explained that he took the car keys in order to effectuate his getaway from the scene because he was badly bleeding and needed to immediately care for his injuries. Beyond this single, self-serving statement made to law enforcement, there is no evidence in the record supporting McGee's contention that he had no intent to rob the victim.

On the other hand, there is ample evidence in the record, contained elsewhere in McGee's statement to law enforcement, that McGee was motivated by a need for money to feed his crack cocaine addiction, and would steal, perform sexual acts, and maybe even kill for this end. When the victim first encountered McGee on the street, he asked McGee if he would be willing to hang out and watch a movie. McGee indicated that he would, but that he needed some money and a ride first. McGee used the money the victim gave him to purchase crack cocaine and did not rendezvous with the victim as expected.

However, the victim drove around until he found McGee walking down the street. The victim was upset that McGee had made off with the money. McGee feared possible violence, so he offered to repay the victim in exchange for a ride. Instead, the men stopped and bought beer and cigarettes and drove to the victim's apartment. The men settled in to watch a pornographic videotape in the victim's bedroom. The victim asked McGee for sex, but McGee declined. The victim then offered McGee fifty dollars to dance nude, and McGee agreed. The men then fooled around for a while, after which McGee threatened to leave. The victim offered McGee thirty dollars to masturbate, and McGee again agreed. A few minutes later, McGee threatened to leave again. A violent struggle ensued, the victim was killed, and McGee picked up the victim's car keys from the floor and drove off in his car.

McGee drove to a water spigot to wash off his bleeding hands. He then parked the car behind a building. The next day, after purchasing crack cocaine and having a friend drive him in another car to purchase bandages and alcohol, he pawned the victim's car and used the proceeds to buy more crack cocaine.

Generally, "[t]he failure to give a requested jury instruction on a key theory of defense, where there is evidence to support the instruction, requires a new trial." *Perkins*, 814 So. 2d at 1179-1180. However, there is an exception to this general rule where the only evidence supporting a theory of defense, such as afterthought, is the self-serving statement of the defendant. Two cases cited by the State illustrate this exception to the rule requiring the giving of a requested jury instruction on a key theory of defense when the defendant relies only on a self-serving statement.

The first case is *Bertolotti v. State*, 534 So. 2d 386 (Fla. 1988). In *Bertolotti*, the Florida Supreme Court wrote:

> At trial the only evidence of intoxication was a statement made by Bertolotti in his first confession to police that at the time of the murder he was "high" on a Quaalude he bought from a friend. The trial court correctly determined that such a "self-serving declaration" made during a confession, which was unsupported by independent testimony or evidence and was specifically contradicted at trial, was insufficient to warrant the giving of an intoxication instruction.

Id. at 387.

The second case is *Miller v. State*, 503 So. 2d 929 (Fla. 3d DCA 1987). In *Miller*, the Third District wrote:

> He made one self-serving statement in a police confession and relies on this to prove his innocence of the crime based on withdrawal. However, after the statement was allegedly made to the accomplice, the appellant's acts belied withdrawal. He supplied the accomplice with the combination to the safe; he left the store knowing the accomplice was hiding in the store in a place where he would not be found; he knew the accomplice planned to knock the porter out; and he attempted to assist the accomplice, who was covered with blood, from outside the store. Under such circumstances, the evidence did not support his request for an instruction on "withdrawal."

Id. at 930.

The majority contends that McGee's case is unlike *Bertolotti* and *Miller* because his self-serving statement to law enforcement did not stand in contrast "to substantial evidence contradicting the statement." However, *Bertolotti* stands for the proposition that a self-serving statement being both "unsupported by independent testimony or evidence and…specifically contradicted at trial," is insufficient to warrant the giving of an instruction on the defendant's theory of defense. Here, it is unquestioned that McGee's self-serving statement to law enforcement was "unsupported by independent testimony or evidence," and therefore fails to meet the first requirement of *Bertolotti* necessary for a defendant to be entitled to an afterthought instruction.

Additionally, McGee's self-serving statement was "specifically contradicted at trial." This is so because the very statement to law enforcement that McGee relies on to create his entitlement to an afterthought instruction contains, in addition to other relevant evidence, the statement that he pawned the car and used the money to purchase crack cocaine. According to the plain language of *Bertolotti*, the self-serving statement need only be specifically contradicted by evidence at trial, which it was in this case. Despite the majority's contention that the robbery charge was unsupported by any evidence other than the taking of the vehicle, contradicting evidence at trial was contained in McGee's statement to law enforcement that he took money from the victim on the street and bought crack cocaine, went to the victim's apartment where he performed sexual acts in return for money which he used to buy crack cocaine, and took the victim's car keys and car only to later pawn them for money which he used to buy crack cocaine. This pattern of behavior on McGee's part specifically contradicts his claim to have lacked the intent to rob the victim where everything he did over the course of twenty-four hours was aimed at obtaining money to fund his crack cocaine habit. Thus, I conclude that McGee's acts belie that robbery was an afterthought.

Finally, although the majority claims that this case is identical to *Perkins*, such is difficult to discern. This is so because, like the majority opinion in the present case, *Perkins* does not set forth any evidence relevant to its conclusion that the defendant was entitled to an afterthought instruction other than his self-serving statement. Without knowing what the supporting, independent testimony or evidence was in *Perkins*, and considering that there is no such evidence in this case, *Perkins* offers little support for reversal of the trial court's denial of McGee's motion for post-conviction relief.

In sum, McGee was not entitled to an afterthought jury instruction on the robbery count, and trial counsel was not ineffective for failing to request such an unwarranted instruction. Therefore, I would not reverse and remand for an evidentiary hearing on his claim that his attorney was ineffective for failing to request an afterthought instruction with respect to his conviction for robbery but would affirm this case in all respects.

* * *

Appeal of orders denying rule 3.850 motions from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Lucy Chernow

Brown, Judge; L.T. Case No. 00-3762 CFA02.

Ronnie McGee, Sanderson, pro se.

Bill McCollum, Attorney General, Tallahassee, and David M. Schultz, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.