

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROSEMARIE McSWAIN, also known as ROSE  
MARIE-JEANETTE McSWAIN,

Defendant-Appellee.

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FOR PUBLICATION  
December 9, 2003  
9:30 a.m.

No. 241275  
Kent Circuit Court  
LC No. 88-045197-FC

Updated Copy  
February 13, 2004

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

MURRAY, J. (*concurring*).

I concur with the majority's conclusion that the trial court's order granting defendant's motion for relief from judgment should be reversed. However, in my view the trial court's order should be reversed on the basis that, as a matter of law, good cause did not exist for failing to previously raise this issue. MCR 6.508(D)(3)(a).

As the majority discusses, but does not decide, the record reveals that defendant seeks to present issues at a new trial that are based on facts and law that existed at the time of defendant's trial. For example, defendant's trial counsel testified about various personality traits he encountered while interviewing defendant before trial. The sum and substance of that testimony was that defendant would on one occasion appear shy and reserved, while on another occasion she exhibited a brash and brazen personality. Defendant's trial counsel also testified that, during trial, defendant was essentially emotionless, thus exhibiting another different personality trait. Additionally, case law existed at the time of trial that recognized multiple personality disorder, now known as disassociative identity disorder. See, e.g., *State v Lockhart*, 208 W Va 622, 631-632; 542 SE2d 443 (2000), and the cases cited therein.

Because there were facts available to defendant's trial counsel from which he could have argued that defendant was incompetent or acted in self-defense, and because case law existed to support the legal theory behind such an argument, defendant failed to establish the requisite good cause to warrant relief from judgment. MCR 6.508(D)(3)(a); *Sellers v State*, 889 P2d 895, 897 (Okla Crim App, 1995) (holding that the defendant failed to establish "sufficient reason" to explain why he did not raise an insanity defense based on multiple personality disorder when the disorder, though relatively new at the time of trial, was reasonably discoverable); *Sellers v State*,

973 P2d 894, 895 (Okla Crim App, 1999) (denying postjudgment relief to the same defendant because the disorder could have been discovered by trial counsel at the time of trial). Indeed, when informed by defendant's current counsel of the diagnosis now given to defendant, her trial counsel testified that it "makes perfect sense in retrospect . . . ." This is a clear indication that it was only the failure to recognize the diagnosis and possible defenses, not the unavailability of them, that caused these issues to not have been previously raised.

Defendant also failed to offer a valid reason explaining why the motion was filed almost ten years after her conviction and more than seven years after her unsuccessful appeal to the Michigan Supreme Court. Such long-delayed motions are looked on by the courts with disfavor, *People v Jackson*, 465 Mich 390, 398-399; 633 NW2d 825 (2001), a fact the trial court noted. Although defendant asserted that she was presenting newly discovered evidence, as detailed above, the evidence was not newly discovered. Rather, the only difference between the time of trial and the motion for relief from judgment was that defendant found expert witnesses who opined, *based upon the facts existing at the time of trial*, that she suffered from a mental disorder that existed at the time of trial, albeit under a different name. Thus, what this case presents is an argument that the *materiality* of the evidence is newly discovered, which has long been held to be an insufficient basis for the granting of a new trial. See *People v Clark*, 363 Mich 643, 647; 110 NW2d 638 (1961); *People v Stricklin*, 162 Mich App 623, 632; 413 NW2d 457 (1987).

I would therefore reverse the trial court's order on the basis that defendant failed to establish good cause for failing to raise this ground on appeal or in the prior motion.

/s/ Christopher M. Murray