STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 25, 1998
v	No. 179609 Recorder's Court
DAVID A. SCHLENKERT, Defendant-Appellant.	LC No. 93-001106 AFTER REMAND

Before: White, P.J., and MacKenzie and E. R. Post*, JJ.

PER CURIAM.

Defendant was convicted following a bench trial of armed robbery, MCL 750.529; MSA 28.797, and unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645. He was sentenced to six to fifteen years' imprisonment. This Court granted defendant's delayed application for leave to appeal and, by order dated March 23, 1995, remanded the cause to the trial court for appointment of appellate counsel.[1] Current appellate counsel filed an appellate brief and motion to remand on March 22, 1996. By order dated June 12, 1997, this Court affirmed in part defendant's convictions and remanded for a *Ginther*[2] hearing on defendant's ineffective assistance of counsel claims, with the exception of the claim regarding trial counsel's failure to file a pretrial motion for a *Wade-Gilbert*[3] hearing, as to which this Court concluded that defendant had not shown prejudice. A *Ginther* hearing was held on November 7, 1997, and the circuit court denied defendant's motion finding that defendant failed to establish that counsel was ineffective. We have reviewed defendant's claims of ineffective assistance of counsel and affirm.

To establish ineffective assistance of counsel, a defendant must show 1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, 2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and 3) that the result of the proceeding was fundamentally unfair or unreliable. *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway, supra* at 687. This Court will not

* Circuit judge, sitting on the Court of Appeals by assignment.

substitute its judgment for that of counsel regarding matters of trial strategy. *People v Barnett,* 163 Mich App 331, 338; 414 NW2d 378 (1987).

I

Defendant first argues that his trial counsel rendered ineffective assistance by failing to cross-examine the complainant on various statements he gave regarding the alleged location of the robbery, statements defendant alleges were conflicting.

A

The complainant, Douglas Gray, testified that a bartender at the Gas Station Lounge introduced him to defendant one afternoon of the previous summer, outside the bar. He testified that the Gas Station Lounge was at Seven Mile Road and Woodward in Detroit. Gray testified that between the time he met defendant for the first time and the time his car was robbed he saw defendant more than twenty times on the side street next to the Gas Station Lounge, mostly at night. Gray testified that, other than saying hello when he and defendant were introduced, he never conversed with defendant.

Gray testified that he was robbed on the morning of January 2, 1993, after he left the Gas Station Lounge around 2:15 a.m. He testified that he had had two or three drinks and was not intoxicated. Gray testified that he got in his car, a 1988 red Thunderbird, drove off, and that defendant came up to his car when he was stopped at a stop sign. Defendant asked Gray for a ride home to Ferndale, and Gray agreed, since it was on his way home to Royal Oak. Defendant sat in the front passenger seat and introduced himself as David. Gray testified that he made a right turn onto Woodward to drive to Ferndale and that defendant said to him "give me five dollars." Gray said "no," and defendant again said "give me five dollars." Gray responded "no way," and defendant then told Gray to take him back to the Gas Station Lounge. Gray testified that he said "Fine. No problem," and turned the car around, heading south on Woodward. Gray testified regarding the location of the robbery:

> I passed Seven Mile right by the car wash there. Turned around, and I made a right on Seven Mile and a left on the first street so I could just circle and drive right out on to Woodward.
>
> * * *
>
> Q. So you made a right on Seven Mile, a left on the first street?
>
> A. And then another left on the –
>
> Q. Do you know the name of the street?
>
> A. Larchwood, something like that.
>
> Q. And where did you go after you made a left on Larchwood?

A. About half way down the street to the Gas Station, he said, you can let me off right here.

Q. Where did he say you can let me off right here?

A. Behind the building, the back of the building. I guess that would be facing Seven Mile.

Q. Okay. Were you still on the street when he said for you to stop?

A. Yes.

Q. And did you stop on the street?

A. Yes. Actually it was in the middle of the street.

Q. You had not reached Woodward yet?

A. No.

Q. Had you reached the alley behind the building on Woodward yet?

A. No.

Gray testified that after he stopped the car, defendant put the car in park and turned the car off. Defendant opened the passenger door and a white male got in the back seat of Gray's car. Gray testified that he got a quick glimpse of the male and thought he recognized him. The male that got in the back seat then put a choke hold on Gray, as a result of which Gray was facing the passenger seat and could see defendant. Defendant said to Gray, "He has a knife. Do what we say." Gray testified that when he tried to look down he saw something silver shining between the bucket seats of his car, and that the male in the back seat was holding the silver thing. Defendant told him to not do anything stupid, to do as they said, and that he would not get hurt. Gray testified that defendant then took $12.00 Gray had in his shirt pocket and that they took his wallet from his back pocket. Gray testified that after the male in the back seat found out Gray had no other money, he started pushing Gray in the face, and defendant told him to stop, which he did. Gray testified that defendant removed Gray's watch from his wrist, and that defendant pulled Gray's coat off him and threw it in the back seat, and that they then told Gray to get out of the car. Gray testified that he got out of the car and ran to the bar to call the police. He testified that they drove away but that he was unable to see who was driving.

Gray testified that he was robbed at approximately 2:30 a.m., and that the police arrived within a half hour and interviewed him at the bar. Gray gave the police the name David but testified that he did not remember what kind of physical description he gave the police. Gray testified that he described defendant's hair to the police as reddish-brown. Gray testified that the people at the bar supplied the name of the man who had gotten in the back seat.

On cross-examination, Gray testified that he went to the Gas Station Lounge, alone, a couple of times a week, and left alone unless someone asked him for a ride. Regarding the location of the robbery, Gray testified:

Q. Now do you pull up to the same area where you picked him up?

A. I made the turn around on Woodward and made a right on Seven Mile, a left on the first side street and a left on the next side street, and that would have taken me right back on to Woodward. That's why I took that route so he wouldn't have to- -

Q. I guess my question is do you stop in the same place that you picked him up at?

A. No.

Q. How far different?

A. About a half block.

Q. A half block. And he has nothing to say about where you dropped him off at?

A. No. He told me you can drop me off right here.

Q. So as you are driving along, he just says you can drop me here?

A. Correct.

* * *

Q. And you're on the opposite side of the street from where you were when you took off?

A. No. We are on the same side street.

Q. But you are going in the opposite direction. Right?

A. No. We're going—

Q. You come around the same way again?

A. Right.

At the preliminary examination, Gray had testified under questioning by codefendant's counsel that after he refused to give defendant five dollars, defendant asked Gray to take him back to where he was picked up:

Q. Did Mr. Schlenkert get in your car?

A. Yes, he did.

Q. And that was just the two of you then?

A. Yes.

Q. Where did you drive to?

A. I drove up Woodward to Ferndale [from Seven Mile Road].

Q. And did anything out of the ordinary happen?

A. Yes, he didn't ask, he more or less demanded five dollars, give me five dollars.

Q. Are you talking about Mr. David Schlenkert?

A. Yes.

Q. And what did you tell him?

A. I told him no and he told me to take him back where I picked him up.

Q. Did you do that?

A. Yes.

Q. So you are now back to Woodward near the Gas Station Lounge?

A. Correct.

Q. What occurred there?

A. He told me just pull over, let him out and I did and that's when he put the car in park, turned the car off.

B

Defendant's defense as presented in opening statement was that he was not involved in the robbery of Gray and was at another location at the time. We thus agree with the trial court's opinion following the *Ginther* hearing, which stated in pertinent part:

> Trial counsel's failure to examine complaining witness' conflicting statements in this Court's opinion had no bearing on defendant-appellant's defense because their strategy was that defendant was not present when the robbery took place.

Further, based on the testimony summarized above, we conclude that the record does not support defendant's argument that Gray's trial testimony included several different versions of the location of the

robbery. We also reject defendant's argument that Gray testified differently at the preliminary examination than he did at trial regarding the location of the robbery. Gray's testimony at the preliminary examination was in response to cursory questioning that did not delve into the specific street location of the robbery, and cannot be said to contradict his trial testimony.

Defendant also argues that Gray made a statement to the police that contradicted his preliminary examination and trial testimony. Defendant argues that Gray's statement was: "When we got to the bar he told me to drop him off down the street a little, I got to the spot, I stopped the car." The statement is not before us. However, assuming that Gray made such a statement, we do not agree that this statement contradicts or varies significantly from Gray's trial or preliminary examination testimony, summarized above.

We conclude that in light of defendant's defense, the location of the robbery was not of such significance that trial counsel's failure to cross-examine Gray on that issue can be considered ineffective assistance of counsel. Moreover, Gray's testimony at trial and at the preliminary examination regarding the location of the robbery did not vary in any significant sense. We conclude that defendant has failed to establish that he was prejudiced by trial counsel's failure to cross-examine Gray on this issue.

II

Defendant next argues that he is entitled to an evidentiary hearing or reversal of his convictions because trial counsel was ineffective by failing to investigate and obtain evidence that Peter Comstock was the perpetrator of the crimes for which defendant was convicted. Under the circumstances presented here, we disagree.

Testimony at the *Ginther* hearing established that defendant told trial counsel several times before trial that "red-headed Pete" committed the crime. However, defendant did not know Pete's last name. Trial counsel testified that she never had Pete's last name, that defendant never asked her to investigate Pete, and that defendant told her that he had no idea where Pete was, had heard that Pete had left town, and that his whereabouts were unknown. Trial counsel further testified when asked why she cut defendant off during direct examination when he mentioned Pete:

> A. You are asking me to speculate again, but I will say this. Mr. Schlenkert testifying at trial was a very sticky situation. He had made certain admissions to me and I was being very careful to avoid those areas that I thought might get him into trouble, making too many references to his knowledge of the event. I was afraid of where it might lead on Cross Examination by the Prosecutor, which would, I assume, he would have to make certain admissions as to his own criminal involvement in this matter.
>
> Q. He made admissions to you as to his involvement in this matter?
>
> A. Absolutely.
>
> Q. What were those admissions?

A. In one of those admissions, one claiming that red-headed Pete and Darcy admitted they committed the robbery. That they had arrived at the place he was at after the robbery, that he had become aware they had taken the car in the robbery, that Darcy had told him that there were things in the car to be sold and that the three of them sold the items and used the proceeds to buy crack cocaine, that one, either Darcy or red-haired Pete obtained the wallet that had been taken in the robbery and told him he could dispose of it in any way he chose to and Mr. Schlenkert had taken custody of the credit cards and quote, unquote, "worked them."

Q. So he would have been guilty of Receiving and Concealing Stolen Property?

A. That would be one.

Q. But not Armed Robbery?

A. I am not alleging that he made any admissions concerning the robbery.

Q. Darcy Durand was represented at the Preliminary Exam?

A. Yes.

Q. And his case was dismissed?

A. Yes.

Q. Did you interview Darcy Durand to see if Durand had any information regarding red-headed Pete.

A. No.

In any event, on cross-examination at trial defendant testified that Darcy and Pete came over to his house driving a reddish T-Bird on the evening of December 31, 1992. Defendant testified at the *Ginther* hearing that he specifically asked trial counsel to hunt red-headed Pete down and bring him in, and told trial counsel that Pete had been arrested in the neighborhood, that Pete was a prostitute and that he thought Pete lived near Ferndale and had been seen in the neighborhood. He testified that trial counsel told him they did not need to investigate who Pete was. Defendant testified that while he was out on bond he and his father went to the Eleventh Precinct after being told there was "a guy with the same M.O.," and they were shown a photograph. Defendant testified from seeing the photograph that he knew it was red-headed Pete but that the police would not give him a last name. Defendant testified that he learned Pete's last name after trial.

Defendant's father testified at the *Ginther* hearing that he told trial counsel on the day trial began that he had located red-headed Pete at the Eleventh Precinct after having heard through the grape-vine that he had been arrested. Defendant's father testified that he went to the Eleventh Precinct and saw a photo of red-headed Pete and learned that his last name was Comstock, but that the police

would not release the photo to him. However, when asked whether he gave trial counsel Pete's last name, defendant's father testified that he probably forgot it.

We note that the trial lasted only one day. Under these circumstances, we agree with the trial court's determination as expressed in its opinion following the *Ginther* hearing:

> . . . . At the Ginther hearing the parents of the defendant-appellant both testified that they informed trial counsel they had located "red-headed Pete" when they were in the corridors of the courthouse on the very day the trial was to begin.
>
> Further testimony by the parents of the defendant-appellant was that they had gone to the eleventh precinct and received a name for "red-headed Pete," and that they were shown a picture of him. However, the information was not made available to trial counsel until after the date of trial.
>
> In view of the fact that some information regarding the name of the mysterious "red-headed Pete" was received on the day of trial, it was literally impossible for trial counsel to secure him under the circumstances.
>
> Each witness who appeared on defendant-appellant's behalf testified that whatever information they received was on the very day of trial or after, for the above-cited reasons, this Court denies defendant-appellant's Motion for a New Trial.

Thus, the circuit court's conclusion that defendant failed to establish ineffective assistance is amply supported by the record.

Affirmed.

/s/ Helene N. White
/s/ Barbara B. MacKenzie
/s/ Edward R. Post

[1] The Recorder's Court appointed the State Appellate Defender to represent defendant, but that counsel moved to withdraw due to a conflict of interest. The Recorder's Court entered an order appointing substitute counsel on or about February 8, 1996.

[2] *People v Ginther*, 390 Mich 346; 212 NW2d 922 (1973).

[3] *United States v Wade*, 388 US 218; 87 S Ct 1926; 18 L Ed 2d 1149 (1967); *Gilbert v California*, 388 US 263; 87 S Ct 1951; 18 L Ed 2d 1178 (1967).