

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CECIL LASHON MATHEWS,

Defendant-Appellant.

UNPUBLISHED

October 6, 1998

No. 202845

Ingham Probate Court

LC No. 0022110

Before: MacKenzie, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Following a bench trial, defendant, a minor, was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). After he was placed in the temporary custody of his aunt, defendant moved for a new trial on the grounds of ineffective assistance of counsel. The trial court denied his motion for a new trial as well as his request for a hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). We reverse and remand for further proceedings.

Defendant first argues that a *Ginther* hearing was not necessary because the ineffectiveness of his counsel was apparent from the record and consequently, he maintains, he is entitled to a new trial. Alternatively, defendant argues that the trial court abused its discretion by not granting a *Ginther* hearing, a hearing which he maintains would have provided the factual basis for his claim of ineffective assistance. We hold that the trial court erred when it denied defendant's motion for a *Ginther* hearing. Without an evidentiary hearing this Court cannot determine if defendant's counsel was ineffective, nor can it determine if the trial court abused its discretion in denying defendant's motion for a new trial.

There is a presumption that counsel's assistance was effective, a burden that the defendant must overcome. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). The facts supporting a claim of ineffective assistance must either exist in the trial record or be established in an evidentiary hearing on the issue. *Ginther, supra* at 443. This Court will not "second-guess" matters of trial strategy, nor assess the competency of counsel through the use of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). In matters involving trial

strategy, the testimony of the allegedly ineffective counsel is essential. *People v Bass (On Rehearing)*, 223 Mich App 241, 255; 565 NW2d 897 (1997), vacated in part on other grounds 457 Mich 865 (1998).

Here, defendant filed a written motion for a new trial and sought an evidentiary hearing, proffering witnesses to testify as to facts underlying the ineffective assistance claim. The trial court denied defendant's motions, opining that defendant had not established a prima facie case of ineffective assistance that would justify an evidentiary hearing, apparently relying on cases cited by the prosecutor, *People v Ford*, 417 Mich 66, 112-113; 331 NW2d 878 (1982), and *People v Williams*, 391 Mich 832 (1974). These precedents do not support the trial court's ruling. *Ford* lays out the standard that an appellate court will apply in determining whether *it* will grant a *Ginther* hearing where no motion was made in the trial court; it does not say that a prima facie showing of ineffective assistance must be made in the trial court before a *Ginther* hearing should be ordered. To the contrary, in *Williams*, the Court noted that a hearing is warranted where there are disputed material facts regarding the claim. *Williams, supra*. Defendant did present such facts here, most notably regarding defendant's uncle's alleged violent acts against defendant and whether defendant's resulting intimidation prevented him from testifying.

Further, many of defendant's arguments concern issues of trial strategy, for example, regarding decisions about calling witnesses, requesting sequestration of witnesses and making objections to testimony. The absence of testimony from defendant's trial attorney requires remand. *Bass, supra* at 255. Defendant asserts a sufficient basis, if not adequately explained by trial counsel, for finding ineffective assistance. However, the ineffectiveness of counsel is not apparent from the record.

We reverse and remand with the instruction that the trial court shall hold an evidentiary hearing regarding defendant's claims of ineffective assistance of counsel. We do not retain jurisdiction.

/s/ Barbara B. MacKenzie

/s/ Richard A. Bandstra

/s/ Stephen J. Markman