

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS WAYNE WILKOWSKI,

Defendant-Appellant.

UNPUBLISHED

November 17, 1998

No. 196083

Macomb Circuit Court

LC No. 95-001646 FC

AFTER REMAND

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan*, J.J.

MEMORANDUM.

This case returns to us after we remanded to the trial court for a *Ginther*¹ hearing. *People v Wilkowski*, unpublished opinion per curiam of the Court of Appeals, issued 3/31/98 (Docket No. 196083). The trial court held the required hearings and concluded that defendant was not denied the effective assistance of counsel. We now affirm.

We remanded this case because defense counsel failed to object to (1) the admission of hearsay testimony pertaining to a sexual assault, (2) the admission of evidence regarding defendant's drug use and arrest, and (3) the prosecutor's arguments based on this evidence. In his brief after remand, defendant has abandoned his first argument. After reviewing the trial court's opinion on remand, and the transcripts of the *Ginther* hearing, we conclude that defendant was not denied the effective assistance of counsel. At the *Ginther* hearing, defense counsel testified that he was surprised by some of the evidence because defendant had "remained adamant throughout his trial that he was drug free." Defense counsel also testified that he did not object because he did not want to draw attention to this evidence once the jury had heard it. Finally, defense counsel testified that he did not request a mistrial because "I thought the case was tried well, and it was going to be a balancing between the jury's going to believe the little girl, or the jury's going to believe Mr. Wilkowski." Thus, it appears that defense counsel considered these issues and made conscious, strategic decisions at trial. While we might sometimes disagree with an attorney's trial strategy, we simply cannot engage in the practice of second-guessing every strategic decision. Under the circumstances of this case, we cannot say that defense

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

counsel's performance was so deficient that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Joseph B. Sullivan

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).