STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2000
v	No. 193891 Genesee Circuit Court
COREY RAMONE FRAZIER, Defendant-Appellant.	LC No. 95-052613-FC AFTER REMAND

Before: Corrigan, P.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

This case returns after remand to the trial court for a *Ginther*[1] hearing on the issue whether defendant was denied the effective assistance of counsel by trial counsel's advice that he make statements to the police about his role in the crime. On remand, the trial court denied defendant's motion for new trial on grounds of ineffective assistance. We affirm.

I. *Ginther* Hearing

At the *Ginther* hearing, defendant's mother testified that she learned that the police were investigating defendant's involvement in two murders when officers executed a search warrant at her home three days after the victims' deaths. She immediately contacted defendant, who was vacationing in Illinois, and urged him to return home. She then attempted to retain an attorney for defendant, but found it difficult because it was a Saturday. She eventually consulted with an attorney that afternoon who urged her to contact UAW-GM legal services. Defendant returned home on Sunday night. On Monday morning, five days after the murders, legal services referred defendant's mother to trial counsel. Counsel met with defendant and his mother later that morning.

Defendant's mother testified that counsel and defendant did not discuss the circumstances surrounding the murders in depth. Instead, counsel contacted the police and arranged for defendant to surrender. Defendant's mother maintained that counsel assured her and defendant from the beginning

* Supreme Court Justice, sitting on the Court of Appeals by assignment.

that he would secure a plea agreement in the case. Counsel then drove defendant to the police station. Later, defendant's mother went to the police station to authorize the officers to speak with her then seventeen-year-old son. She stated that counsel instructed her to go home rather than observe the interview. Counsel purportedly assured her that he would secure an agreement under which defendant would plead guilty to armed robbery and serve seven years in a nearby prison.

Defendant supported his mother's testimony. He stated that, on first meeting counsel, counsel merely asked him whether he "did it." He replied "no." Counsel then began arranging for defendant's surrender. Defendant maintained that counsel, not he, actually raised the prospect of a plea bargain. Counsel told him that talking to the police was necessary to secure a plea agreement. According to defendant, counsel urged him to tell the police about the murders after they arrived at the police station. After the arraignment, counsel again advised defendant that it would be in his interest to talk to the police.

Trial counsel's testimony conflicted with that of defendant and his mother. Counsel stated that defendant maintained his innocence during their first meeting. According to counsel, defendant stated that he was not involved in the murders and that he did not know of codefendant's intent to rob the victims. Counsel maintained that both defendant and his mother stressed that they desired a plea bargain in the case. Counsel then contacted the police department. He learned from the investigating officer that the police believed that codefendant was the lead offender in the crime, but that they were not sure of the extent of defendant's involvement. Counsel stated that the officer indicated that a possibility existed of resolving the case by plea bargain.

Counsel testified that, before driving defendant to the police station to surrender to police, he discussed with defendant whether defendant should speak with the officers. Counsel stated that defendant "wanted to talk;" that he "wanted to tell his story about his non-involvement, about his knowledge that he had nothing to do with the murders." Counsel gave defendant "both sides as to what he could say." After arraignment, counsel again discussed with defendant whether he should speak with the officers. Counsel testified: "I recall that he was maintaining his innocence. He wanted to talk. He wanted to get his story out. And I told him, that in pursuit of a plea bargain, that as long as he was honest and truthful, that we could go there." Counsel stated that he advised defendant about the risks of speaking with the officers. He explained to defendant that "what he was telling [counsel] had to be the truth if he was going to be talking, in order to pursue a plea bargain."[2]

Counsel acknowledged that an assistant prosecutor informed him on the date of arraignment that he had no authority to enter into a plea agreement. Further, after defendant made the inculpatory statements, counsel learned that the prosecutor did not intend to offer a plea bargain. Counsel explained, however, that, in his experience, the prosecutor's refusal to enter into a plea bargain before the preliminary examination does not foreclose the possibility of a plea agreement. Counsel stated that further developments in the case at the circuit court level could result in a plea bargain.

The trial court credited trial counsel's version of events, finding as follows:

In the case at bar, defendant Frazier was persistent in pursuit of a plea offer.

* * *

> Under the facts of this case, it cannot be said that the pursuit of a plea bargain, where defendant wanted one, and, where the prosecution was not then interested, constitutes ineffective representation.
>
> Even though a plea bargain was not offered, defense counsel was able to argue that defendant cooperated with the police. He also contended that the police offered to help and, when they did not help he sent a letter to the family of murder victim McClogan [sic]. In that letter, that was read to the court, defendant asserted that he did not participate in the crime. Defendant testified that he talked to the police because he wanted a plea bargain. It was his belief that if he cooperated with the police, something would be worked out. At trial Sgt. Collardey, on examination by defense counsel, explained that defendant was cooperative with the police. Defense counsel also elicited from Sgt. Collardey that, even though defendant's statement was exculpatory, defendant's statement nevertheless aided the police in solving the matter by implicating codefendant Idell Cleveland. Attorney Meiers also obtained testimony from Sgt. Collardey and Det. Elford that defendant had not told them that he had killed either Aaron McColgan or James Goff.
>
> Defendant has failed to establish on this record that Mr. Meiers' representation was ineffective. Under the facts and circumstances of this case, Mr. Meiers' assistance followed a course having a reasonable basis to effectuate defendant's interests.

The trial court further determined that, regardless of counsel's performance, the trial produced a reliable result because substantial evidence existed to support the convictions.

II. Evidentiary Ruling

Defendant initially argues that the trial court erred in excluding the testimony of an expert witness regarding the standard of care in representing criminal defendants and whether trial counsel rendered effective assistance in this case. We disagree. We review the trial court's decision to admit or exclude expert testimony for an abuse of discretion. *People v Christel*, 449 Mich 578, 587; 537 NW2d 194 (1995); *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999).

MRE 702 governs the admissibility of testimony by expert witnesses. It provides:

> If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

The testimony must be relevant and assist the trier of fact to understand the evidence or to determine a fact in issue. *People v Peterson*, 450 Mich 349, 363; 537 NW2d 857, amended 450 Mich 1212; 548 NW2d 625 (1995). The admissibility of expert testimony thus varies according to the subject matter and the particular facts of the case. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986).

In the context of ineffective assistance of counsel claims, the trial court does not need expert testimony to understand the evidence because the court is as capable of evaluating counsel's conduct as any other attorney. See *Clemmons v Missouri*, 785 SW2d 524, 531 (Mo, 1990); *New Jersey v Moore*, 273 NJ Super 118, 127-128; 641 A2d 268 (1994). Therefore, the trial court may exclude the testimony on the ground that it will not assist it in determining whether counsel provided effective assistance. *Id.* Cf. *Freund v Butterworth*, 165 F3d 839, 863, n 34 (CA 11, 1999); *Nebraska v Thomas*, 236 Neb 553, 558; 462 NW2d 862 (1990); *Pennsylvania v Neal*, 421 Pa Super 478, 481, n 4; 618 A2d 438 (1992).

In this case, the expert witness would have merely offered his opinion regarding the propriety of counsel's advice. The experienced trial judge was, however, fully capable of making that determination without the assistance of an expert witness. We therefore conclude that the trial court did not abuse its discretion in determining that the evidence would not assist it in resolving the effective assistance issue. *Murray, supra* at 52.

III. Ineffective Assistance

Defendant argues that he was denied the effective assistance of counsel because trial counsel advised him to make incriminating statements to the police in the hope of receiving a favorable plea bargain, even though the prosecutor never offered a plea agreement. We disagree.

To establish ineffective assistance of counsel, defendant must prove that counsel's performance fell below an objective standard of reasonableness and that the representation prejudiced him so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that counsel's decision constituted sound strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Regarding the second requirement, defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *People v Johnson*, 451 Mich 115, 122; 545 NW2d 637 (1996).

Counsel's action in advising defendant to make a statement in this case was a strategic decision. *Smith v Rogerson*, 171 F3d 569, 573 (CA 8, 1999). Advising a client to cooperate with law enforcement does not, as a matter of law, constitute ineffective assistance of counsel. *Tennessee v Black*, 815 SW2d 166, 184 (Tenn, 1991). That counsel's strategy proved unsuccessful is not dispositive. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Rather, we examine the evidence in the record to ascertain whether counsel's action was reasonable. See *Pickens, supra*. A defendant's statements to counsel and other information supplied by him are

important factors in making this determination. See *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

In this case, we conclude that counsel did not act unreasonably in advising defendant to cooperate with the police. Rather, counsel employed a strategy designed to maximize the possibility of achieving defendant's stated objective--a plea agreement. The trial court credited trial counsel's testimony in this regard. It found that defendant was "persistent in pursuit of a plea offer." Because this finding rests on an evaluation of witness credibility, we defer to the trial court's resolution of the conflicting evidence. Cf. *People v Farrow*, 461 Mich 202, 209; 600 NW2d 634 (1999).

Trial counsel also permissibly relied on defendant's truthfulness regarding his innocence in advising him to cooperate with the police. *Barnes v Thompson*, 58 F3d 971, 979 (CA 4, 1995); *Ex parte Wilson*, 571 So 2d 1251, 1257 (Ala, 1990); *North Carolina v Sneed*, 284 NC 606, 614; 201 SE2d 867 (1974). That defendant's statements to the police revealed extensive involvement in the crime is of no moment because we evaluate counsel's action from his perspective at the time he made the decision. *Strickland*, *supra* at 689. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Id.* In this case, the record contains no evidence that suggests that counsel should have doubted defendant's veracity during their initial meeting.

Under these circumstances, we cannot conclude that counsel's strategy to cooperate in the hope of leniency and a future plea agreement was unreasonable. See *Rachlin v United States*, 723 F2d 1373, 1379 (CA 8, 1983). If defendant's statements to the police had comported with his statements to counsel, he would not have inculpated himself in the crime. Rather, he would have admitted that he was merely present while codefendant robbed and murdered the victims.[3] He would have assisted the police in their investigation by providing details of the crime. Further, although the assistant prosecutor had declined to offer a plea bargain before defendant spoke with the officers, counsel testified that, in his experience, the prosecutor may ultimately offer a plea bargain in a case even when declining to do so at the initial stages of the proceedings. Here, counsel, acting in reliance on defendant's assertions of innocence, reasonably advised defendant to cooperate with the police in an effort to obtain a plea agreement. Accordingly, we conclude that defendant was not denied the effective assistance of counsel. *Pickens*, *supra* at 338.

Affirmed.

/s/ Maura D. Corrigan
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra

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

[2]. Counsel noted that defendant's inculpatory statements demonstrated that defendant "had been lying to [him]." In his statements to the police, defendant admitted that he supplied codefendant with the murder weapon and knew of codefendant's intent to rob the victims.

[3]. The officers already knew that defendant was present during the commission of the crime. Kenneth Haywood had informed the police that he drove defendant and codefendant to McColgan's home. He heard gunshots after one of the victims allowed defendant and codefendant to enter the home.