

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALLAN GENE-REEDER MARTIN, JR.,

Defendant-Appellant.

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UNPUBLISHED

September 29, 2000

No. 218813

Berrien Circuit Court

LC No. 96-504416-FC

Before: Griffin, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of first-degree felony murder, MCL 750.316; MSA 28.548, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life in prison without parole for the felony murder, and a consecutive two years on the felony-firearm conviction. We affirm.

This case arises from a murder that took place in Berrien County at John Piedt & Sons Gun Shop. The shop was owned and operated by Darrell Piedt, the victim, and his son, Brad.

I

Defendant first argues the trial court abused its discretion by refusing to grant defendant's motion for new trial on the basis that he received ineffective assistance of counsel. We disagree.

Under MCR 6.431(B), a court may order a new trial on "any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." This Court reviews a trial court's decision whether to grant a new trial for an abuse of discretion. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997). "The standard for reviewing a decision for an abuse of discretion is narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *Id.*

In order to establish a claim of ineffective assistance of counsel, a defendant must show counsel's performance fell below an objective standard of reasonableness compared to professional

norms, and the ineffective representation so prejudiced him that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). To demonstrate the requisite prejudice, a defendant must prove that, but for errors of counsel, there was a reasonable probability of a different outcome. *Pickens*, *supra* at 314. To prevail, defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843, 852 (1999); *Henry*, *supra* at 146. In reviewing matters of trial strategy, such as whether to call a witness, introduce evidence and present a particular defense, a reviewing court will not substitute its judgment for that of defense counsel. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

At the hearing on defendant's motion for a new trial, the trial court heard testimony from both defendant and his trial counsel. The trial court found trial counsel's testimony to be credible and, conversely, defendant's testimony to be incredible. The court ultimately ruled defendant had not established ineffective assistance of counsel and therefore had not established his right to a new trial.

On appeal, defendant advances numerous alleged instances of ineffective assistance of counsel which purportedly demonstrate error requiring reversal. According to defendant, his trial attorney was ineffective because he failed to make the identity of the killer an issue in the case, he admitted that defendant shot the victim and stipulated to the admission of the murder weapon, and he failed to assert sufficient reasons in support of his request that the trial court order the prosecutor to grant immunity to the codefendant. However, a thorough review of the record does not substantiate these claims and leads us to conclude that defendant's motion for a new trial was properly denied by the trial court.

At the hearing on defendant's motion for a new trial, defendant's trial counsel testified that the prosecution's case against defendant was strong and left him little room to devise a feasible defense. Defendant had been seen at the gun shop shortly before the murder. The day after the murder, defendant explained in detail to his girlfriend Crystal Fisher how he went to the gun shop with his codefendant, shot the victim in the head, and stole several guns. Fisher saw defendant, his codefendant, and others filing the serial numbers off of some guns. Defendant's fingerprint was located on the trigger of one of the guns missing from the shop, which was later found at the house where defendant had been seen by Fisher filing the serial numbers from the guns. After his arrest, defendant gave the police a detailed confession in which he described going with his codefendant to the gun shop, shooting the victim in the head, taking guns and hiding them, and throwing the gun used in the shooting into the river. Although defendant subsequently told one of the detectives he did not shoot Mr. Piedt, that same day he showed the police where he had thrown the gun into the river. A dive team found the gun used to shoot the victim in the location described by defendant.

Trial counsel further testified at the hearing that defendant failed a private polygraph test scheduled by defense counsel. After he failed the test, defendant confessed with great emotion to counsel that he had killed Piedt and asked counsel not to tell his parents. Thereafter, defendant did not offer any alternative explanation of his participation (or lack thereof) in the murder. On the basis of these facts, the trial strategy evolved which, according to the testimony of trial counsel, was jointly formulated and pursued by himself and defendant. The planned defense was that defendant did in fact

kill Piedt, but the homicide was not first-degree murder, but a lesser offense. This defense required defendant to testify that he had killed the victim before any theft of the guns was planned, without intending to kill him, and only after reacting when the victim moved toward the phone to telephone authorities. Defense counsel testified at the motion hearing that this trial strategy was based on the totality of the case, including defendant's confession to him, the need to defend statements defendant gave to the police, and the physical evidence. Trial counsel testified that defendant was fully involved in the preparation of the case and knew what would transpire at trial. Consequently, there was no reason for defense counsel to make the identity of the killer an issue at trial.

The trial court found trial counsel's testimony that he and defendant discussed and planned the defense strategy employed at trial more credible than defendant's testimony that they did not. A trial court frequently has to evaluate credibility in deciding a motion for a new trial. See *People Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994). In this case, the court had to evaluate the credibility of defense counsel and defendant and make factual findings regarding who was telling the truth and what the preparation of the defense actually involved. A trial court's findings of fact are reviewed on appeal for clear error. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). The trial court is in a superior position to assess the evidence. *People v Zahn*, 234 Mich App 438, 445; 594 NW2d 120 (1999). Therefore, this Court defers to the trial court's resolution of factual issues, especially when it involves the credibility of witnesses. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). A finding is clearly erroneous if, after considering all of the evidence, the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

We find no clear error in the trial court's conclusion that defendant failed to overcome the presumption that, under the circumstances of the case, counsel's choice of a defense was sound trial strategy. Counsel's strategy was in fact circumscribed by what his client told him and by the prosecutor's evidence. In view of the overwhelming evidence that defendant did kill Mr. Piedt, it was reasonable, from a tactical standpoint, to attempt to convince the jury to convict him of a lesser offense which would not result in his imprisonment for life without the possibility of parole. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994).

Contrary to defendant's assertion, trying to convince a jury that someone other than defendant killed Mr. Piedt would have been difficult and problematic. As previously noted, the substantial evidence adduced at trial proved defendant's involvement in the crime, and trial counsel reasonably refused to elicit at trial what he knew, based on defendant's confession to him, to be false testimony that someone else committed the murder. See *People v LaVearn*, 448 Mich 207, 216-217; 528 NW2d 721 (1995); *People v Hubbard*, 156 Mich App 712, 715-716; 402 NW2d 79 (1986). Moreover, even though defendant's father told trial counsel on the second day of trial that someone had forged defendant's endorsement on a stolen check and cashed it using the driver's license stolen from defendant before the murder, trial counsel reasonably concluded that such information was immaterial not only to his client's chosen defense, but also to a determination of who killed the victim. Likewise, the fact that anonymous threatening letters and a package were received by defendant's relatives after the trial ended was not information available to trial counsel during trial and was immaterial to the defense. Despite defendant's theory that whoever stole the license killed Piedt, the trial court aptly found the evidence to be "totally irrelevant to anything that has anything to do with whether Mr. Martin

was at Mr. Piedt's on—Piedt's shop on the date of this—on the date of this—the incident,” particularly in light of the “mountain of evidence” that the prosecutor had against defendant. The trial court likewise found, correctly we believe, that the anonymous threatening letters and package mailed to defendant's relatives after the trial were ambiguous, constituted inadmissible hearsay evidence, had “little probative value on the issue of who was in Mr. Piedt's shop,” and that a different outcome would not have been obtained if the mail had been admitted.

Further, given defendant's confession to his trial counsel, as well as the absence of any evidence to support the conclusion that the victim could not have been killed by a left-handed person, evidence that defendant was strictly left-handed would also not have been helpful on the issue of identity. An attorney is not ineffective for failing to present a defense for which there is no evidentiary support. *Emerson, supra* at 349.

We also conclude trial counsel was not ineffective for admitting, as part of the defense strategy, that defendant shot the victim and stipulating to the admission of the murder weapon. As previously noted, decisions regarding what defense to present and how to present it, including the introduction of evidence, are matters of trial strategy not to be second-guessed by a reviewing court with the benefit of hindsight. *Barnett, supra* at 338. According to the testimony of trial counsel, found to be credible by the trial court, defendant agreed to the defense strategy; the record indicates defendant never demonstrated any dissatisfaction with counsel's opening remarks or his representation during trial.

Defendant lastly argues defense counsel failed to assert sufficient reasons to support a motion to the court requiring the prosecution to grant immunity to his codefendant so that he could testify favorably to defendant's case. However, defendant's argument that the codefendant's testimony would have exonerated defendant is purely speculative. Moreover, because the agreed-upon strategy at trial was to admit that defendant killed the victim, but argue that the crime was something less than murder, it would have been illogical for defense counsel to argue the motion based on defendant's tenuous theory. In any event, the trial court could not force the prosecution to grant immunity to codefendant; such a decision is discretionary and rests with the prosecutor's office. *People v Catanzarite*, 211 Mich App 573, 580; 536 NW2d 570 (1990). Trial counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000); *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant's remaining arguments alleging ineffective assistance of counsel are without merit. Defendant has not demonstrated that his trial counsel's performance fell below an objective standard of reasonableness and that the ineffective representation so prejudiced him that he was deprived of a fair trial. *Pickens, supra*. We therefore conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial on the basis of ineffective assistance of counsel. *Torres, supra*.

## II

Next, defendant argues the trial court had the authority to force the prosecution to grant codefendant immunity for his testimony and abused its discretion by failing to do so. We disagree.

A defendant is entitled to the benefit of immunity for witnesses only where prosecutorial misconduct results in the suppression of testimony favorable to a defendant. In *People v Julian*, 171 Mich App 153, 159-160, n 12; 429 NW2d 615 (1988), cited by defendant in support of his position, this Court relied on *People v Iaconelli*, 112 Mich App 725; 317 NW2d 540 (1982), vacated in part on other grounds on rehearing, 116 Mich App 176; 321 NW2d 684 (1982), for the proposition that a defendant's due process rights could be violated if the refusal to grant immunity results in the suppression of testimony favorable to a defendant or where the immunity is necessary to obtain exculpatory testimony. Subsequently, however, in *People v Schmidt*, 183 Mich App 817, 832; 455 NW2d 430 (1990), this Court expressly rejected the rule in *Iaconelli* which recognized inherent judicial authority to grant use immunity where a defendant claims the prosecutor's failure to immunize a witness, in the absence of prosecutorial misconduct, deprives him of exculpatory evidence essential to his defense. Furthermore, in *Catanzarite*, *supra* at 580, this Court held that a "prosecutor has no duty to grant a witness immunity so that the witness can testify for a defendant, and a defendant cannot compel a grant of immunity."

In light of the authority of the *Schmidt* and *Catanzarite* decisions, and in the absence of any discernible evidence on the record of prosecutorial misconduct, defendant's argument in this regard fails for lack of merit.

## III

Finally, defendant argues the trial court abused its discretion by denying defendant's motion for new trial on the basis of newly discovered evidence, specifically, the fact that defendant's stolen driver's license was used to forge stolen checks while he was in jail, and the receipt of anonymous threatening letters and a package by defendant's relatives after he was convicted.

Under MCR 2.611(A)(1)(f), a new trial may be granted when the substantial rights of a party were materially affected and when there was "material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at trial." To justify a new trial on the basis of newly discovered evidence, the moving party must show that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not with reasonable diligence have discovered and produced the evidence at trial. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995). We review a trial court's decision regarding a motion for a new trial on the basis of newly discovered evidence for an abuse of discretion. *Id.*

At the hearing on defendant's motion for new trial, the court found that the evidence in question was not newly discovered and was "totally irrelevant to anything that has anything to do with whether Mr. Martin was at Mr. Piedt's . . . shop" on the date of the murder. We find no abuse of discretion in this conclusion. The stolen driver's license and forged check were not material to defendant's case,

since, as previously noted, the killer's identity was not an issue at trial. The evidence overwhelmingly implicated defendant. It would take a leap of logic to conclude, pursuant to defendant's theory, that the person who stole defendant's license actually killed the victim. Similarly, we are in agreement with the trial court that the anonymous letters and package received by defendant's relatives after the trial are ambiguous, constitute inadmissible hearsay evidence, are not material to the issues in the case and fail to meet the criteria for the admission of newly discovered evidence. *Miller, supra*.

Affirmed.

/s/ Richard Allen Griffin

/s/ Peter D. O'Connell

/s/ Kurtis T. Wilder