STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 2, 2001
v	No. 218924 Wayne Circuit Court Criminal Division
JERMAINE MICHAEL WILLIAMS, Defendant-Appellant.	LC No. 98-003739

Before: Bandstra, C.J., and Whitbeck and Owens, JJ.

WHITBECK, J. *(dissenting).*

I respectfully dissent from my colleagues' implicit determination that the available record is adequate to decide the troubling ineffective assistance of counsel claim in this case.[1] I also respectfully dissent from their explicit, substantive determination on the basis of this record that defendant Jermaine Williams has not demonstrated the prejudice necessary to prove that he was denied his constitutional right to effective assistance of counsel.[2] Because I believe that this may be the dispositive issue in this case, I cannot concur in the remainder of the majority opinion or the outcome.

What concerns me most about this case is that Williams' trial counsel failed to present an insanity defense. A reasonably prudent attorney, aware that Williams was living in a group home, even if not because of a mental illness as defined by the Legislature,[3] would have at least investigated the *possibility* of presenting expert testimony concerning Williams' sanity. Given the heinous facts of this case, Williams' comments about voices telling him to commit the crimes should have made defense counsel pursue this defense vigorously because it was one of the only viable trial strategies available. Yet, there is absolutely no evidence in the record that defense counsel made any effort to determine whether an expert would testify on behalf of Williams concerning his sanity at the time of the crime.

[1] US Const, Am VI; Const 1963, art 1, § 20.

[2] *Id.*

[3] See MCL 330.1400(g).

Defense counsel's comments on the record make it plain that he simply did not know much, if anything, about how the insanity defense works, much less that it was an affirmative defense. Even when made aware that it was an affirmative defense, it never occurred to defense counsel that he had to prepare and present that defense. Though clearly unprepared to present this defense at trial, defense counsel did not even ask for a continuance so he could find an expert who would testify directly concerning the issue for the defense. Instead, defense counsel allowed the prosecution's psychiatric expert to testify without any contradictory testimony. Defense counsel also stipulated to several issues that bordered on, though they did not resolve, questions concerning Williams' mental status. If ever there were a case of deficient performance, this appears to me to be it.

While the majority and I can ultimately agree that this was deficient performance, we part company when it comes to determining whether this deficient performance prejudiced Williams to the extent that it denied him a fair trial and therefore requires reversal.[4] Simply put, I do not know how we can decide whether this obviously ineffective attorney caused Williams prejudice on the basis of the current record. It is routine for this Court to conclude that, when there is "overwhelming" evidence of guilt, a defendant is not entitled to reversal, having failed to prove prejudice.[5] However, the very strength of the physical evidence presented to the jury in this case made insanity that much more critical as a defense. This evidence of insanity would have served as mitigating evidence, of which there was virtually none at trial.

To the extent that the majority works around this prejudice issue by suggesting that Williams' statements to the *prosecution's* psychiatric expert do not make him seem insane, I suggest that this misses the point. Certainly, without impugning the expert's integrity, I can see the logic in having the prosecution's expert have opinions that support the prosecution. What this testimony does not answer is whether there was another expert opinion on the matter of Williams' sanity that could have, and should have, been introduced at trial in order to refute the prosecution's expert. Nor can I find it dispositive that, when Williams confessed his crimes to the staff at the home where he was living, he expressed a certain amount of self-concern. Williams made these statements *after* committing the sexual assault, which should cast some doubt on the value of this evidence in determining his sanity at the time of the sexual assault. True, an expert evaluating Williams' sanity at the time he committed this crime would also have to rely on statements made after the crime. However, the critical point is that we, as appellate jurists, utterly lack the expertise to conclude independently whether these comments are consistent or inconsistent with sanity, much less that they comprise any significant portion of the information an expert would need to determine whether Williams was insane. We are not mental

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[4] See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994) ("[T]o find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.").

[5] See, e.g., *People v Ramsdell*, 230 Mich App 386, 407; 585 NW2d 1 (1998); *People v Wyngaard*, 226 Mich App 681, 685; 575 NW2d 48 (1997), rev'd on other grounds 462 Mich 659 (2000).

health professionals. We are not in a position to render an expert opinion on the basis of this sort of isolated comments taken from the cold record in this case.

I hasten to add that I have no way of determining whether *any* expert would have concluded that Williams was insane at the time he committed the offenses. If no expert would conclude that he was insane at the time he committed the crime, then Williams cannot demonstrate prejudice; the insanity defense would not have been available and, therefore, defense counsel had no reason to present a meritless defense.[6] If this is true, Williams would not be entitled to a new trial even though his trial counsel was ineffective. However, if an expert had been able to testify in support of the insanity defense, then I would consider this a case meriting reversal and a new trial.

Because the record does not resolve this dilemma in any way, I would have preferred to handle this case differently than the majority. Rather than affirming or reversing on the basis of this record, I would have remanded this case for a *Ginther*[7] hearing while retaining jurisdiction. I would have instructed the trial court to give Williams an opportunity to secure and present expert testimony supporting his claim that he was entitled to an insanity defense and, therefore, his trial counsel was ineffective for failing to present this evidence. Though it should be apparent from the transcript of the *Ginther* hearing itself, the trial court would then make findings of fact regarding whether an insanity defense was cognizable given the expert testimony. I would then rely on the record created in the *Ginther* hearing to examine the prejudice prong of the ineffective assistance of counsel analysis. Only if I could determine that Williams was not denied a fair trial because of prejudice stemming from defense counsel's ineffective assistance would I reach the other issues in this case.

/s/ William C. Whitbeck

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[6] See, generally, *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

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