

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CONRAD ALLEN FOSTER,

Defendant-Appellant.

UNPUBLISHED
November 6, 2001

No. 192819
Recorder's Court
LC No. 95-007564

ON REMAND

Before: O'Connell, P.J., Gribbs and Smolenski, JJ.

PER CURIAM.

This case returns to us on remand from our Supreme Court. Having reviewed the transcript of the *Ginther*¹ hearing conducted by the trial court, we conclude that defendant was not denied the effective assistance of trial counsel. Therefore, we affirm his convictions.

After a bench trial, defendant was convicted of assault with intent to commit great bodily harm less than murder, MCL 750.84, and felony-firearm, MCL 750.227b. The trial court sentenced defendant to a term of two to ten years' imprisonment for the assault conviction and to a term of two years' imprisonment for the felony-firearm conviction. Defendant appealed as of right, arguing that he was entitled to a new trial because his trial counsel did not seek admission of the audio tape of defendant's calls to a 911 operator during the assault. Defendant argued that his trial counsel rendered ineffective assistance when he failed to seek admission of that tape.

This Court affirmed defendant's conviction and ruled that defendant was not entitled to a hearing on his ineffective assistance claim.² By order dated March 21, 2000, our Supreme Court remanded the case back to this Court with specific instructions. The Supreme Court directed this Court to remand the case to the Wayne Circuit Court for an evidentiary hearing on defendant's ineffective assistance claim. In addition, the Supreme Court instructed this Court to retain jurisdiction over the matter.³ On April 4, 2000, this Court entered an order implementing the Supreme Court's instructions. Our order required the trial court to conduct an evidentiary

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

² *People v Foster*, unpublished memorandum opinion of the Court of Appeals, issued March 24, 1998 (Docket No. 192819).

³ *People v Foster*, 461 Mich 993 (2000).

hearing on defendant's ineffective assistance claim. Our order required the trial court to hear and decide the matter within fifty-six days. Our order also required the trial court to prepare a transcript of the hearing on remand and to file that transcript with this Court within twenty-one days after completion of the proceedings.⁴ Had our order been implemented, this case could have been returned to this Court for resolution in May or June, 2000.

Unfortunately, that did not occur. Although the trial court conducted an evidentiary hearing on July 27, 2000, defendant's trial counsel was not available to testify at that time. Therefore, the trial court continued proceedings until trial counsel's testimony could be obtained. Defendant's appellate counsel then filed several motions in the trial court, attempting to disqualify the trial judge from further participation in the case. While those motions were ultimately unsuccessful, they succeeded in delaying the evidentiary hearing further.

On May 9, 2001, after lack of progress in the trial court, this Court issued yet another order, on its own motion.⁵ That order directed the trial court and defense counsel to comply with specific requirements, and to complete the evidentiary hearing. On June 1, 2001, the trial court conducted the continued evidentiary hearing and heard testimony from defendant's trial counsel. By order dated June 1, 2001, the trial court denied defendant's motion for a new trial. The trial court concluded that defendant's trial counsel did not render ineffective assistance. We agree.

Effective assistance of counsel is presumed, and defendant's burden to prove otherwise is a heavy one. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). To justify reversal, "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." *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). To demonstrate prejudice, "the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant argues that his trial counsel was ineffective because he failed to seek admission of the audio tape of defendant's calls to a 911 operator during the assault. At the *Ginther* hearing, defendant's trial counsel testified that he knew of the 911 tape before trial. It is undisputed that he did not seek admission of that tape during trial. However, counsel indicated that trial witnesses testified regarding the information contained in the 911 tape. Because it was not his practice to introduce cumulative evidence in a bench trial, defendant's counsel elected not to move for admission of the actual tape.

At the *Ginther* hearing, the 911 tape was produced and played on the record. The tape revealed that defendant placed two separate calls to the 911 operator. Defendant placed the first call at 12:47, stating:

⁴ *People v Foster*, unpublished order of the Court of Appeals, entered April 4, 2000 (Docket No. 192819).

⁵ *People v Foster*, unpublished order of the Court of Appeals, entered May 9, 2001 (Docket No. 192819).

Listen, I need a squad car over here. There's a female picking up a knife and threatening me in my own god-damn house.

I want a squad car over here now. She's picking up a weapon intimidating me, threatening me in my own house. I need a squad car right here, 8524 Lauder.

Defendant placed the second call to the 911 operator at 12:56. He stated, in pertinent part:

Hey, listen. You know what? There's been a accidental shooting at my residence. I asked you to send the damn police.

During the second call, defendant also stated that the accidental shooting occurred while he and the woman were "wrestling and the gun went off."

The trial counsel reviewed the above evidence and concluded that, even if the tape had been offered into evidence, it would not have altered the guilty verdict. We agree that the omitted evidence would not have altered the outcome of the proceedings. Defendant testified at trial that the shooting was accidental. The victim admitted at trial that she possessed a knife at one point during the altercation, and that defendant had called police. The trial court considered and rejected defendant's claim that the victim intimidated him by threatening him with the knife. Comparing defendant's size with that of the victim, the court simply did not believe that the victim could have intimidated defendant. Further, the trial court noted that the victim had left the knife in the bedroom, and did not have it in her possession when defendant shot her in the kitchen. The evidence was sufficient to permit the trial court, as finder of fact, to draw those conclusions from the evidence. Because defendant has failed to demonstrate "a reasonable probability that, but for counsel's error, the result of the proceeding would have been different," we affirm his convictions. *Stanaway, supra* at 687-688.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael R. Smolenski