STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED November 16, 2001
V	No. 228359 Wayne Circuit Court
TRAVIS BOSWELL, Defendant-Appellee.	LC No. 73-007043

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

The prosecution appeals by leave granted from the trial court's order granting defendant's motion for relief from judgment of conviction.[1] Defendant and his brother were convicted of two counts of first-degree murder, MCL 750.316, and one count of assault with intent to commit murder, MCL 750.83, in 1973. After defendant's appeal, defendant filed a motion for relief from judgment. The trial court appointed counsel, limited defendant's issues, and then granted defendant's motion for relief from judgment. The trial court found that defendant was denied the effective assistance of trial and appellate counsel because the same counsel represented both defendant and his brother, and this dual representation constituted a conflict of interest. We reverse.

Both defendant and his brother worked at the Lear Siegler plant in Detroit for a short time in June and/or July 1973. In July 1973, when they returned together to get their final paychecks, they argued with a security guard, Lester Drum, who ordered them off the plant property. After Drum unsnapped his gun, defendant and his brother agreed to leave. Before leaving, however,

[1] The procedure for motions for relief from judgment is contained in subchapter 6.500 of the Michigan Court Rules and was added by order of March 30, 1989, and was effective October 1, 1989. *People v Jackson*, 465 Mich 390, 395; 633 NW2d 825 (2001). In the instant case, defendant's conviction occurred before the effective date of subchapter 6.500. Although the issue was not raised in the instant appeal, we note that our Supreme Court recently held that subchapter 6.500 procedures do apply to convictions that occurred before the effective date of the rule. *Jackson, supra* at 391.

defendant asked Drum if Drum thought he was the only man in the city who had a gun and threatened to come back and blow Drum's head off, but that Drum would never know when. Drum testified that on September 10, 1973, defendant's brother opened the door to the guard shack and shot Drum and two other security guards, while defendant stood silently next to his brother. There was no evidence that defendant had a gun. The other two security guards died. Drum survived two gunshot wounds. Although one other witness could identify defendant's brother, no witnesses could identify defendant other than Drum. Defendant and his brother were represented by the same attorney at trial and presented alibi defenses.

The prosecution first argues that defendant's motion for relief from judgment was barred by MCR 6.508(D)(2) because defendant had raised the argument of ineffective assistance of counsel in a prior appeal. Indeed, this Court's review of defendant's prior appeals reflects that defendant raised numerous ineffective assistance of counsel claims and claims that the trial court erred by not questioning defendant and his brother about the joint legal representation. Defendant asserts that MCR 6.508(D)(2) does not preclude this particular appeal because he has not previously raised these exact issues. Giving defendant the benefit of the doubt, we can agree that defendant did not previously argue that his representation by the same attorney who was defending his brother constituted a conflict of interest.

The prosecution argues that defendant's motion should fail because defendant did not establish good cause for failing to raise this issue in earlier appeals or proceedings and actual prejudice as required by MCR 6.508(D)(3). With this, we agree.

The Michigan Supreme Court addressed the requirements of "cause" under MCR 6.508 in *People v Reed*, 449 Mich 375, 378 (Boyle, J.), 402 (Cavanagh, J.); 535 NW2d 496 (1995):

> "Cause" for excusing procedural default is established by proving ineffective assistance of appellate counsel, pursuant to the standard set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), or by showing that some external factor prevented counsel from previously raising the issue.

Defendant did not argue that some external factor prevented counsel from raising the issue. Instead, he argued that the issue was not raised because of ineffective assistance of appellate counsel. The trial court found that appellate counsel was ineffective for failing to raise this issue because appellate counsel also operated under a conflict of interest because he too represented both defendant and his brother.

In *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998), our Supreme Court recently addressed an ineffective assistance of counsel claim premised on an actual conflict of interest. The Court in *Smith* first stated that to prove a claim of ineffective assistance of counsel under *Strickland*, a defendant must establish that "counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *Smith*, *supra*. With regard to a conflict of interest claim, the *Smith* Court held that "a defendant 'must establish that an actual conflict of interest adversely affected his lawyer's performance."' *Id*., quoting *Cuyler v Sullivan*, 446 US 335, 350; 100 S Ct 1708; 64 L Ed 2d 333 (1980). The *Smith* Court further adopted the *Cuyler* standard that "[p]rejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting

interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Smith*, *supra* at 557.

Here, defendant's appellate counsel on his direct appeal represented both defendant and his brother. It appears that appellate counsel filed one brief and that the brief only contained arguments that related to both defendant and his brother, as this Court did not separately address any issue for either defendant or his brother. Even the argument that the trial court failed to question defendant and his brother about their choice to be represented by the same counsel was raised as to both defendant and his brother. We may not, however, automatically conclude that appellate counsel suffered a conflict of interest as appellate counsel could have addressed this issue without prejudicing defendant's brother's case. This Court would have separately reviewed defendant's brother's issues if defendant had abandoned his alibi defense and instead argued that he was merely present while his brother shot the guards. Therefore, we conclude that under these specific facts, no conflict of interest existed as to appellate counsel.

If appellate counsel was not ineffective because of a conflict of interest, the next question becomes whether he was ineffective for failing to raise the conflict of interest issue with regard to trial counsel. The *Reed* Court described ineffective assistance of appellate counsel in the following manner:

> Dealing with the defaults in reverse order, we first observe that under the deferential standard of review, appellate counsel's decision to winnow out weaker arguments and focus on those more likely to prevail is not evidence of ineffective assistance. Nor is the failure to assert all arguable claims sufficient to overcome the presumption that counsel functioned as a reasonable appellate attorney in selecting the issues presented. The question is whether a reasonable appellate attorney could conclude that the comments made by the prosecutor were not worthy of mentioning on appeal. [*Reed*, *supra* at 391(Boyle, J.), 402 (Cavanagh, J.) (citation omitted).]

This Court must determine if a reasonable appellate attorney could conclude that no meritorious appellate issue existed in regard to whether trial counsel were ineffective because he jointly represented both defendants. After reviewing the record, we conclude that defendant has not established that trial counsel had an actual conflict of interest. Here, the trial court in this case concluded that a conflict of interest "necessarily occurred" because the only defense available to defendant's brother was an alibi defense, whereas defendant also had the "mere presence" defense. We conclude, however, that the "mere presence" defense, though technically "available," was not a viable defense under the facts of this case. Just two months before the shootings, defendant and his brother had previously threatened the type of revenge against Drum that occurred. The "mere presence" defense was highly implausible in light of defendant's involvement in the previous altercation and his close, albeit silent, presence while security guards were deliberately shot. See *People v Palmer*, 392 Mich 370, 378; 220 NW2d 393 (1974) (aiding and abetting "includes the actual or constructive presence of an accessory, in preconcert with the principal, for the purpose of rendering assistance, if necessary"). Although his strategy did not work, trial counsel evidently believed an alibi defense was better than a mere presence defense, which we agree was implausible. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502

(2000) (counsel is not required to advocate a meritless position); *People v Stewart* (*On Remand*), 219 Mich App 38, 42; 555 NW2d 715 (1996) (this Court will not second-guess matters of trial strategy, and the fact that a strategy did not work does not constitute ineffective assistance of counsel). Although the prosecution did not present any direct evidence that defendant performed acts or gave encouragement that assisted his brother in committing the crime or that defendant intended the commission of the crime, *People v Norris*, 236 Mich App 411, 419-420; 600 NW2d 658 (1999), those elements could be inferred beyond a reasonable doubt from Drum's testimony that two months before the shooting, defendant threatened to come back to the plant and shoot him.

As the "mere presence" defense was not a viable defense, this issue was a weaker argument to be winnowed out and was not worthy of mentioning on appeal. *Reed, supra* at 391 (Boyle, J.), 402 (Cavanagh, J.). Therefore, appellate counsel was not ineffective for failing to raise the issue of ineffectiveness of trial counsel in joint representation, and defendant has not shown good cause for failing to raise this issue in previous appeals. *Id.* at 378, 391 (Boyle, J.), 402 (Cavanagh, J.).

Further, defendant has not established actual prejudice pursuant to MCR 6.508(D)(3). MCR 6.508(D)(3)(b) defines actual prejudice in the following manner:

> As used in this subrule, "actual prejudice" means that, . . . in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal; . . . in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of the effect on the outcome of the case; . . . .

It is impossible to determine how the jury would have voted had defendant presented a "mere presence" defense instead of an alibi defense. However, the question here is whether acquittal would have been reasonably likely had defendant presented a mere presence defense. MCR 6.508(D)(3). It was Drum's testimony that implicated defendant in the shooting. Drum testified that in July 1973, defendant threatened, "to blow Drum's brains out," and that on September 10, 1973, defendant arrived with and stood by as his brother shot Drum and the two other security guards.

Certainly, when considering defendant's threat to Drum, it could be inferred beyond a reasonable doubt that defendant assisted his brother and intended for his brother to shoot Drum and the other security guards. That is, they returned as promised to "settle a score." This Court cannot find that it is reasonably likely that defendant would have been acquitted had he presented a mere presence defense. Considering the facts that led up to[2] the shooting, we believe that defendant's contention that he was merely present would greatly strain credibility, and it is highly

[2] Had there been no prior altercation or threats, we might conclude differently. But that is not the case.

unlikely that "but for" the error, "defendant would have had a reasonably likely chance of acquittal."

We reverse.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey