

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN HARLAND THOMAS,

Defendant-Appellant.

UNPUBLISHED

July 29, 2004

No. 237034

Wayne Circuit Court

LC No. 00-002659-01

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SHAWN THOMAS,

Defendant-Appellee.

No. 247888

Wayne Circuit Court

LC No. 00-002659

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

In these consolidated appeals, defendant, in Docket No. 237034, appeals as of right his bench trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. In Docket No. 247888, the prosecution appeals by leave granted¹ the trial court's order granting defendant's motion for a new trial predicated on defendant's claim of ineffective assistance of counsel. We remand for a ruling on the issue of prejudice in regard to the trial court's order granting defendant a new trial in Docket No. 247888, and we reserve ruling on the appellate issues raised in Docket No. 237034 until final resolution of Docket No. 247888 is completed and then only if necessary.

¹ *People v Thomas*, unpublished order of the Court of Appeals, entered July 3, 2003 (Docket No. 247888).

At trial, defendant was convicted on the basis of testimony by Eddie Curry and Reginald Lockhart. Curry said he witnessed defendant shoot the victim, and Lockhart testified that defendant told him that he shot the victim. Defense counsel offered no evidence on defendant's behalf. Following defendant's convictions, he moved for a new trial, raising several grounds, including various claims related to his competency to waive his right to a jury trial and competency to stand trial, along with claims of ineffective assistance of counsel. Evidentiary hearings were held. Defense counsel admitted at the *Ginther*² hearing that his strategy was simply to discredit Curry and Lockhart. The trial court concluded that defendant's claims relating to his competence were without merit. However, the trial court also concluded that defense counsel's performance at trial amounted to ineffective assistance of counsel, and the court granted defendant a new trial.

The prosecution appeals the trial court's order granting defendant's motion for new trial, arguing that the trial court improperly viewed counsel's actions in hindsight, engaged in second-guessing with respect to counsel's decisions, and disregarded the presumption that counsel's actions constitute sound trial strategy. Further, the prosecutor argues that the trial court misapplied the legal standard applicable to ineffective assistance claims, where it stated that the result "could have come out the same way," instead of making a finding that there was a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.

A trial court's decision regarding a motion for new trial is reviewed for an abuse of discretion. *People v Kevorkian*, 248 Mich App 373, 410; 639 NW2d 291 (2001). With respect to the underlying question whether counsel was ineffective, however, our review is de novo. *Id.* at 410-411. That is, whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law, with questions of constitutional law being reviewed de novo and factual findings being reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles involving a claim of ineffective assistance of counsel, stated:

To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the

² *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).

proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

With respect to the issue of whether counsel’s performance was deficient, the trial court found that counsel ignored significant evidence that would have aided the defense. Significantly, trial counsel failed to point out that Curry and Lockhart had a motivation to lie because, according to defendant’s mother, they both “hated defendant.” Defendant’s mother testified that Lockhart beat defendant so severely he required medical treatment, and stole defendant’s car. Despite the fact defendant’s mother felt there “was a conspiracy” against her son, trial counsel accepted, without further cross-examination, Lockhart’s statement at trial that he and defendant merely knew each other since grade school. Similarly, trial counsel accepted Curry’s statement that he knew defendant “for a couple years.”

Moreover, trial counsel failed to point out that Willie Lockhart, who is Reginald Lockhart’s uncle, and Curry had been arrested together in February 2000. It was during this stay in jail, two years after the victim’s death, that Curry finally came forward with his inculpatory evidence about defendant’s involvement in the crime. Trial counsel obtained a private investigator, who presented him with the arrest report linking Willie Lockhart and Curry. The private investigator also made defense counsel aware that the 911 call about the victim’s shooting was made from Willie Lockhart’s house. Trial counsel admitted that it may have been helpful to highlight this link between the witnesses, but he did not. He was unsure if this decision was intentional.

Similarly, trial counsel did not use any of the scientific evidence available in an attempt to discredit Curry’s account of the story. Curry’s statement to the police was that defendant held a gun inside the victim’s car and shot him. Curry also stated that after the shooting, the victim’s car rolled backwards diagonally across the street, striking a tree and coming to rest. However, the autopsy report showed no signs of a close-range firing, such as gunpowder residue. Defendant’s appellate counsel retained a ballistics expert, who concluded that Curry’s account of the shooting was unlikely, based on the trajectory of the shot that killed the victim and the position of the victim’s driver’s side window. Rather than adduce these facts at trial, trial counsel merely stipulated to the cause of death. Moreover, the private investigator concluded that Curry’s original account of the events of the shooting was impossible, as Curry initially said that the car in which defendant was riding pulled up behind the victim’s car, which would have prevented it from rolling backward. Curry changed his testimony at trial, but this discrepancy was not highlighted at trial.

Also, trial counsel failed to gather evidence that he acknowledged it would have been useful to obtain. Specifically, he failed to obtain a ballistics expert to determine whether the gun used was a semi-automatic or a revolver. As the firearms expert stated, the bullet found in the victim was almost certainly from a semi-automatic, which, based on Curry’s account of the shooting, would have resulted in a spent casing being found, most likely in the victim’s car. However, no spent casings were found, either inside or outside the car. Curry never mentioned whether anyone took the spent casing when they took the money from the victim’s car.

There was additional evidence presented at the *Ginther* hearing reflecting a failure on trial counsel's part to utilize all legal avenues available to procure certain relevant witnesses and a failure to highlight to the court further inconsistencies between Curry's version of events and the physical evidence.

Generally, a trial attorney's decision not to present evidence is presumed to be a matter of sound trial strategy, and this Court will not substitute its judgment for that of trial counsel. *People v Marcus Davis*, 250 Mich app 357, 368; 649 NW2d 94 (2002). However, such a decision can amount to ineffective assistance of counsel when it prevents a defendant from presenting a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996); *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). In this case, trial counsel's failure to pursue any of this evidence at trial denied defendant the ability to put on a meaningful or substantial defense. Rather than present any meaningful evidence challenging Curry and Lockhart's version of the shooting, trial counsel opted merely to suggest that they were lying. As the trial court observed, "simply relying on trying to defeat the credibility of the two witnesses fell far short of reasonable standards for a lawyer in this case." The trial court made this observation after noting that counsel had many resources at his disposal with which to undermine or attempt to undermine the credibility of the two main witnesses against defendant. We conclude that the trial court did not err in finding that counsel was ineffective and that counsel's performance was deficient.

In regards to whether defendant was prejudiced by counsel's deficient performance and whether the trial court applied the appropriate legal standard for assessing prejudice, the prosecution makes much out of the following statement made by the court when it rendered its ruling:

This case could have ended up the same place the same way if all of those resources had been used, all of those theories had of been – I mean it's possible.

The "possibility" of a different outcome does not amount to prejudice as a defendant must show the existence of a reasonable "probability" that, but for counsel's errors, the result of the proceeding would have been different. *Carbin, supra* at 600. We are presented with unusual circumstances, in that the judge who heard the motion for new trial sat as the trier of fact in the bench trial. Arguably, the judge may have thought it improper, after conducting the *Ginther* hearing, to "definitively" state how he would have ruled at trial had he heard the evidence presented at the *Ginther* hearing. Possibly, the judge made the challenged statement merely in an effort not to reveal to the parties how he might rule in a new trial should he again sit as the trier of fact. Alternatively, the comment may have simply reflected the judge's belief that he could not state with *absolute* certainty that an acquittal would have resulted. It is also possible, on the other hand, that the trial court was mistaken regarding the proper prejudice standard or inadvertently failed to apply the standard. We reject, however, any claim that the trial court, in essence, definitively found a lack of prejudice, under the appropriate standard set forth in *Carbin*, in light of the verbiage used by the court in the above-referenced quote. Our comments are mere speculation. The trial court's ruling does not include a specific, clear, and necessary finding on the matter of prejudice, i.e., whether there existed a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Such a ruling is necessary to permit proper appellate review. Accordingly, we remand to the trial court

for a clear ruling on whether defendant was prejudiced, as defined above, by defense counsel's deficient performance.

Remanded for articulation regarding prejudice in Docket No. 247888 within 56 days. With respect to Docket No. 237034, we find it unnecessary to rule at the present time pending resolution of Docket No. 247888. We retain jurisdiction.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White

Court of Appeals, State of Michigan

ORDER

People of MI v Shawn Thomas

Docket No. 247888

LC No. 00-002659

William B. Murphy
Presiding Judge

Richard Allen Griffin

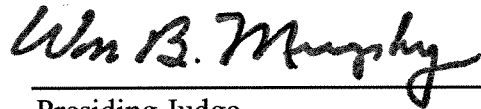
Helene N. White
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, we remand for a ruling on the issue of prejudice in regard to the trial court's order granting defendant a new trial in Docket No. 247888, and we reserve ruling on the appellate issues raised in Docket No. 237034 until final resolution of Docket No. 247888 is completed and then only if necessary.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.



Presiding Judge



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUL 29 2004

Date



Chief Clerk