

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE LONZELL WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

November 15, 2007

No. 266084

Wayne Circuit Court

LC No. 04-012592-01

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree murder, MCL 750.317, one count of assault with intent to murder, MCL 750.83, and one count of using a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1). Defendant was sentenced to 30 to 60 years in prison for the second-degree murder conviction, and 20 to 40 years in prison for the assault with intent to murder conviction, to be served concurrently with each other and consecutive to a two-year prison sentence for the felony-firearm conviction, with credit for 323 days served in jail. Defendant appeals as of right, and we affirm.

Defendant first argues that the prosecutor committed misconduct in failing to produce an endorsed res gestae witness (Paul Sherlock) for trial, and by failing to provide materials during the discovery period to defense counsel. The role and responsibility of a prosecutor differs from that of other attorneys: her duty is to seek justice and not merely to convict. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003); *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Dobek, supra*. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Dobek, supra* at 63-64.

As defendant notes, the prosecutor no longer has a duty under Michigan law to produce potential res gestae witnesses. See MCL 767.40a¹; *People v Cook*, 266 Mich App 290, 295; 702

¹ MCL 767.40a states, in pertinent part,

(continued...)

NW2d 613 (2005). Instead, the prosecutor is obligated to continually inform the defendant of all potential res gestae witnesses who are known or become known to the prosecution, and to provide reasonable assistance to the defendant in locating the res gestae witnesses upon request. MCL 767.40a.

Sherlock was homeless at the time of trial, and there was some evidence indicating that he was also addicted to heroin. At the direction of the prosecutor, a Detroit police officer was able to find Sherlock and serve him with process, and the two made arrangements for the officer to pick Sherlock up and take him to trial to testify on the appropriate date. However, Sherlock failed to appear at the date and time they had decided upon. In light of the fact that Sherlock was homeless and likely not easily located, we find that the efforts of the prosecutor complied with the requirements of the statute.

Aside from the fact that the prosecutor did nothing wrong in the attempt to procure Sherlock for trial, it is equally clear that Sherlock's testimony would not have had any real effect on the trial's outcome. Defense counsel repeatedly referenced the shovel with blood on it found in Sherlock's apartment and questioned the failure of the investigating officers to confiscate it as evidence. However, as noted by one of the investigating officers in his testimony, the fatality and other injuries in this case were caused by gunshots, not by beatings or any other sort of injury that could be inflicted by a shovel. Hence, any testimony by Sherlock about the shovel

(...continued)

(1) The prosecuting attorney shall attach to the filed information a list of all witnesses known to the prosecuting attorney who might be called at trial and all res gestae witnesses known to the prosecuting attorney or investigating law enforcement officers.

(2) The prosecuting attorney shall be under a continuing duty to disclose the names of any further res gestae witnesses as they become known.

(3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

(4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

(5) The prosecuting attorney or investigative law enforcement agency shall provide to the defendant, or defense counsel, upon request, reasonable assistance, including investigative assistance, as may be necessary to locate and serve process upon a witness. . . . If the prosecuting attorney objects to a request by the defendant on the grounds that it is unreasonable, the prosecuting attorney shall file a pretrial motion before the court to hold a hearing to determine the reasonableness of the request.

would have been immaterial, and there is nothing further in the record to show how Sherlock could add any information that was not already part of the trial record. The failure of Sherlock to appear at trial did not deprive defendant of a fair trial. *Dobek, supra*.

Defendant also argues that the proper remedy for the prosecution's failure to turn over photographs of the crime scene is reversal because there is a "reasonable likelihood" that disclosure of the photographs would have been beneficial to the defense's claim that the police committed numerous errors and omissions during their investigation of the case. However, the law is not consistent with defendant's claims. MCR 6.201(B) states that the prosecuting attorney must provide to a defendant, upon request,

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report and interrogation records concerning the case, except so much of a report as concerns a continuing investigation;

(3) any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

Photographs, even those that were taken by a law enforcement officer in his official capacity, are not explicitly contemplated by the court rule, and even defendant acknowledges that the photographs were not by themselves exculpatory such that he could claim relief under part (1) of the rule.

In addition, even if defendant were entitled to a remedy, reversal would not be the only appropriate remedy. "A trial court has discretion to fashion a remedy for noncompliance with a discovery order or agreement. The exercise of that discretion involves a balancing of the interests of the courts, the public, and the parties." *People v Loy-Rafuls*, 198 Mich App 594, 597; 500 NW2d 480, rev'd on other grounds, 442 Mich 915 (1993) (citations omitted). In this case, defense counsel informed the court that the photographs had not been made available to the defense until the middle of the trial, which was the second trial in the case. The remedy that the court apparently felt was appropriate was for defendant to receive the photographs. Because this was within the discretion of the court, and because there was no apparent prejudice to defendant as a result of the late discovery of the photographs, there is no evidence that defendant did not receive a fair trial. See *id*.

Defendant next argues that the trial court erred by failing to give the jury the "missing witness" instruction, CJI2d 5.12, and, citing *People v Stanaway*, 446 Mich 643, 655-656; 521 NW2d 557 (1994), by refusing to inspect in camera the contents of a folder that the court had

determined were not discoverable. In *Stanaway*, our Supreme Court considered whether a defendant has the right to access materials that are protected by a statutory privilege. The Court held that “where a defendant can establish a reasonable probability that the privileged records are likely to contain material information necessary to his defense, an in camera review of those records must be conducted to ascertain whether they contain evidence that is reasonably necessary, and therefore essential, to the defense.” *Id.* at 649-650. The Court stated that “[t]he issue in this case is discovery access to information that would be useful at trial for impeachment purposes or useful as exculpatory evidence.” *Id.* at 664. The Court further stated that

in *certain* circumstances an in camera review of the records is necessary so as not to undermine confidence in the outcome of the trial. In camera inspection of privileged information by the court is a useful intermediate step between full disclosure and total nondisclosure. Where the defendant has made the required showing, in camera inspection of privileged documents by the judge strikes the delicate balance between the defendant’s federal and state constitutional rights to discover exculpatory evidence shielded by privilege, and the Legislature’s interest in protecting the confidentiality of the therapeutic setting. [*Stanaway*, *supra* at 678-679 (emphasis in original, citations and quotation marks omitted).]

Defendant has not established a reasonable probability that anything in the file would have been useful to his defense. Indeed, defense counsel stated at trial that he did not know whether the material in the folder was potentially useful to the case, and the officer testified in response to the court’s questioning that he did not use any of the information in the file for this case, save one sheet of paper utilized to refresh his recollection about a name. Consequently, the court’s decision not to review the materials did not constitute an abuse of discretion sufficient to meet the high standard required by this Court to reverse its decision. *Id.* at 677.

Although he did not request one from the trial court, defendant now argues that the trial court should have given a missing witness instruction to the jury regarding Sherlock. If the prosecution fails to call a listed witness and has failed to delete that witness from its witness list, it may be appropriate for the trial court to read CJI2d 5.12, the missing witness instruction. *People v Perez*, 469 Mich 415, 420-421; 670 NW2d 655 (2003). However, as we have already concluded, defendant did not establish that Sherlock was a *res gestae* witness. Furthermore, the language of the instruction is counter to the circumstances of the case, in that defendant concedes on appeal that the prosecution was not obligated to produce Sherlock. MCL 767.40a. Thus, to have instructed the jury that it was the prosecution’s responsibility to produce Sherlock, and that his absence should be construed against the prosecution, would not have been proper in light of the statutory authority and the record in this case.

Finally, defendant claims that his attorneys were ineffective for failing to request a missing witness instruction and for failing to formally request a due diligence hearing regarding the prosecution’s efforts to produce Sherlock. Although we have stated that the prosecution was not obligated to produce Sherlock, we will address both issues in turn.

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, sec 20, is the right to effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). The right to the effective assistance of counsel is

substantive and focuses on the actual assistance received. *Pubrat, supra* at 594. Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Bell v Cone*, 535 US 685; 122 S Ct 1843, 1850; 152 L Ed 2d 914 (2002); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407; ___ NW2d ___ (#267867, rel'd 8/9/07), slip op p 3. Certain circumstances are so likely to prejudice the defendant that no showing of prejudice is required, including a complete denial of counsel or an entire failure to subject the prosecutor's case to meaningful adversarial testing. *Bell, supra* at 695-696; *Cronic, supra* at 659; *Frazier, supra* at 243.

Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002); *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Deference is afforded to counsel's strategic judgments, but strategic choices made after an incomplete investigation are reasonable only to the extent that reasonable professional judgments support the limitation on investigation. *Wiggins v Smith*, 539 US 510; 123 S Ct 2527, 2535, 2539; 156 L Ed 2d 471 (2003).

We agree with the trial court's decision on remand, that defendant has not shown that he was denied of his right to the effective assistance of counsel. At the *Ginther*² hearing, defense counsel testified that the decision to not request an evidentiary hearing, or a missing witness instruction, was a conscious strategic decision made during trial. As to the hearing, counsel concluded, reasonably we might add, that the police did all they could under the circumstances in seeking to bring Sherlock to trial. As to the missing witness instruction, counsel testified that after having Sherlock's statement in evidence, the defense was better off not complicating the issue by possibly raising issues about Sherlock's background. These are reasoned decisions that we cannot second-guess on appeal. *LaVearn, supra*.

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Christopher M. Murray

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