STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME COREY PAHOSKI,

Defendant-Appellant.

UNPUBLISHED
June 17, 2008

No. 272906
Wayne Circuit Court
LC No. 06-004634-01

Before: Gleicher, P.J., and O'Connell and Kelly, JJ.

GLEICHER, J. (*concurring in part and dissenting in part*).

I concur with the majority's determination that the trial court properly refused to give defendant's requested self-defense jury instruction. I also agree that the trial court abused its discretion by failing to grant defendant an adjournment in which he could secure neuropsychological testing. However, I respectfully disagree with the remedy selected by the majority because it permits the trial court to deny defendant an opportunity to pursue an insanity defense.

The majority concludes that "reversing defendant's convictions and sentences outright is not a remedy that is justified by the circumstances." Instead, the majority holds that before granting defendant a new trial, the trial court must first determine whether the neuropsychological testing results "support Dr. Miller's tentative insanity theory." Rather than affirming defendant's convictions and permitting the trial court to decide whether the test results merit a new trial, I would adhere to the procedure established by this Court in *People v Shahideh*, 277 Mich App 111, 121-122; 743 NW2d 233 (2007). Consistent with *Shahideh*, I believe that the trial court should afford defendant an opportunity to undergo neuropsychological testing, and then should permit defendant and his counsel to decide whether a triable issue exists concerning defendant's sanity at the time of the charged offense. *Id*. at 120. If defendant decides to present an insanity defense, I would require the trial court to vacate his convictions and hold a new trial, in accordance with the procedure outlined in *Shahideh*, which notably did not invest the trial court with the discretion to reject a proposed insanity defense that the defendant and his counsel deemed "triable." *Id*. at 120-121; see also MCR 7.215(J)(1).

I disagree with the majority's determination that the trial court should conduct an evidentiary hearing after completion of the testing "to determine if defendant was, in fact, denied his right to present an insanity defense or if the defense was properly barred." Under the circumstances presented here, the decision whether to present an insanity defense should reside

solely with defendant. In my view, the trial court may not properly determine whether the neuropsychological testing results warrant an insanity plea or "verify" defendant's insanity theory.

The remedy chosen by the majority rests on its opinion that the trial court may deny defendant an insanity defense because of poor cooperation on defendant's part. According to the majority, Dr. Miller's report "suggested that defendant was less than cooperative," and a "trial court's finding that a defendant is less than 'fully' cooperative in the testing requires the trial court to bar presentation of the insanity defense." In my view, however, the majority and the trial court clearly misinterpret Dr. Miller's concern that defendant could not "provide any useful information concerning his mental state or his behavior at the legally relevant time," as defendant's failure to cooperate. Dr. Miller did not characterize defendant's behavior as uncooperative, but instead hypothesized that defendant "may be psychologically blocking access to these memories or may be avoiding talking about his actual symptoms or thought processes." The absence of clarity regarding defendant's behavior precipitated Dr. Miller's request for the neuropsychological testing. Further, Dr. Daigle's final report states that defendant eventually completed all testing and exams necessary for Daigle to conclude that "neither the statutory criteria for mental illness nor the requirements for legal insanity have been satisfied." Dr. Daigle's ability to render a definitive conclusion regarding defendant's sanity distinguishes this case from *People v Hayes*, 421 Mich 271; 364 NW2d 635 (1984), in which our Supreme Court held that a defendant's failure to cooperate with a forensic examination may preclude his ability to present an insanity defense, pursuant to MCL 768.20a(4).

Because defendant here complied with MCL 768.20a, in my view the trial court has no role to play in defendant's decision whether to pursue an insanity defense, and the court thus may not restrict his right to present an insanity defense based on *the court's own* interpretation of the neuropsychological test results.

> Psychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party. [*Ake v Oklahoma*, 470 US 68, 81; 105 S Ct 1087; 84 L Ed 2d 53 (1985).]

I would hold that if defendant seeks a new trial after completing the neuropsychological testing, the trial court must honor defendant's election, vacate his convictions and sentences, and conduct a new trial.

/s/ Elizabeth L. Gleicher