

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW CHARLES HOLBROOK,

Defendant-Appellant.

UNPUBLISHED

July 29, 2008

No. 271562

Wayne Circuit Court

LC No. 06-000721-01

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

A jury convicted defendant of second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to prison terms of 15 to 25 years for the murder conviction and two years for the felony-firearm conviction. Defendant appeals as of right. We reverse and remand for a new trial.

This case arises from the shooting death of Lavaile Manciel. Defendant's theory at trial was that he acted in self-defense when he fired the shot that struck Manciel.

Defendant's friend, Chris Wirth, telephoned defendant to tell him that he was attacked by a group of five or six people after someone threw a rock at his truck near the Americana Motel. Wirth indicated that he was getting a gun and was going to go back and confront the individual who threw the rock. Defendant contacted another friend, Mark Brown, and they decided to go to the area to ensure that multiple attackers did not gang up on Wirth.

While en route, defendant and Brown observed Wirth's vehicle pulled over on Eight Mile. Wirth had been pulled over by the Detroit police for a lane violation. Wirth informed the officers that he had just been involved in an altercation, and stated that he was fearful his attackers were following him. The officers escorted Wirth home.

After arriving at home, Wirth again called defendant. Defendant and Brown went to Wirth's house. Defendant entered the house and observed Wirth loading his weapon. Wirth and defendant then returned to defendant's vehicle. After learning from Wirth that his attackers did not have weapons, defendant took Wirth's gun, removed the clip, placed the clip in the car's

glove compartment, and returned the empty gun to Wirth.¹ Defendant drove the group to the area where the altercation had occurred.

As the men drove down a street near the Americana Motel, Wirth observed one of the men who had attacked him sitting on the porch in front of a home. Defendant pulled his vehicle over, and Wirth got out of the backseat and approached the individual, who was later identified as Kyrice Higgins. Defendant stayed by his car as Wirth approached Higgins. At that point, defendant observed movement on the porch of the home, heard a “pop,” and saw a muzzle flash coming from near the home. Both Brown and defendant testified that the porch light of the house was not on and there were no operational streetlights. Defendant, who has a concealed weapons permit, knew that someone was shooting at them, and so pulled his weapon and fired one shot toward the muzzle flash. Brown corroborated defendant’s testimony that he observed the muzzle flash that prompted defendant to draw his weapon and fire. Defendant then heard Wirth exclaim that he had been shot.² Defendant instructed Wirth to get into the car, and then drove away. Defendant subsequently pulled the car over to check Wirth’s injuries. Wirth had a “hole” in his left ankle.

Defendant testified that he was unaware that the shot he fired had struck someone until the police approached him several days later.

Defendant contends that he was denied his right to the effective assistance of counsel by defense counsel’s failure to have Manciel’s clothing tested for gunshot residue because a positive gunshot residue test would have lent support to defendant’s claim that he fired the shot that killed Manciel in self-defense after Manciel fired a weapon toward defendant. Defendant’s claim that he was denied effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Leblanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). While the trial court’s factual findings are reviewed for clear error, the questions of constitutional law are reviewed de novo. *Id.*

In order to prevail on a claim of ineffective assistance of counsel, a defendant must establish that his counsel’s assistance “fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that defense counsel’s actions were sound trial strategy. *Id.* In order to demonstrate prejudice, defendant must establish that there is a reasonable probability that, but for the mistakes of his attorney, the result of the trial would have been different. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). The proper inquiry is whether, as a result of counsel’s performance, the outcome of the trial was fundamentally unfair, unreliable, or prejudicial. *Lockhart v Fretwell*, 506 US 364, 369; 113 S Ct 838; 122 L Ed 2d 180 (1993). The failure to make a reasonable investigation can constitute ineffective assistance of counsel. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005).

Testimony at trial established that gunshot residue might remain on physical objects for an indefinite period of time. The record also reveals that the police had possession of Manciel’s

¹ Brown confirmed that defendant took and emptied Wirth’s weapon.

² Wirth was shot in the ankle.

clothing. Because defendant's self-defense theory depended, inter alia, upon the jury believing that Manciel fired the first shot, and because defense counsel had the means to support the theory by conducting a simple test, the failure to conduct the test was not reasonable.

At the hearing on defendant's motion for a new trial, defense counsel testified that a negative result on the gunshot residue test would have been fatal to any possibility of a verdict of acquittal. However, under the circumstances of this case, the failure to test Manciel's clothing for gunshot residue was not a reasonable strategic decision. If the gunshot residue test would have come back positive, which it subsequently did, defendant's theory would have been corroborated not only by Brown, but also by the results of the gunshot residue test. Even the seemingly damaging effect of a negative gunshot residue test could have been minimized by highlighting the fact that the police conducted gunshot residue tests on Wirth and Higgins and, despite knowing that Wirth had been shot, failed to timely conduct such tests on Manciel's clothing. Defense counsel could have argued that the police failed to timely conduct a residue test and that any residue that might have been on the clothing dissipated in the process of collecting and storing the evidence.

Defense counsel's failure to have Manciel's clothing tested for gunshot residue amounted to the failure to make a reasonable investigation and that this failure cannot be attributed to a sound trial strategy. Defendant is therefore entitled to a new trial if he can demonstrate that the result of the trial would have likely differed had defense counsel provided effective assistance. We conclude that the result of the trial would likely have been different had the victim's clothing been tested for gunshot residue before trial and the positive test results presented to the jury. The evidence would have provided support for defendant's theory of the case. Additionally, the evidence would have contradicted the testimony of the prosecution's only eyewitness, Kyrice Higgins, an admitted drug dealer and convicted criminal, who stated to the police that Manciel did not possess or fire a weapon on the night in question.

In light of our conclusion that defendant was denied the effective assistance of counsel and that he is entitled to a new trial, we need not address defendant's remaining issues.

Reversed and remanded for a new trial. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald

/s/ Michael J. Talbot

/s/ Pat M. Donofrio