

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEROME COREY PAHOSKI,

Defendant-Appellant.

UNPUBLISHED
February 25, 2010

No. 289991
Wayne Circuit Court
LC No. 06-004634

Before: Fitzgerald, P.J., and Cavanagh and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree murder, MCL 350.316(1)(a), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to two concurrent terms of life without parole for the murder convictions and a consecutive two-year term for the felony-firearm conviction. On appeal, this Court conditionally affirmed defendant's convictions and sentences but remanded for the trial court to determine if defendant had undergone neurological testing before trial. If the testing had not been completed, the trial court was directed to provide defendant the opportunity to undergo the appropriate testing and then to conduct an evidentiary hearing to determine if the test results supported an insanity defense and a new trial was warranted. *People v Jerome Pahoski*, unpublished opinion per curiam of the Court of Appeals, decided June 17, 2008 (Docket No. 272906) ("*Pahoski I*"). Defendant now appeals the trial court's opinion following the initial remand. We reverse and again remand for proceedings consistent with our orders in *Pahoski I*. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On the initial remand, the trial court did not afford defendant the opportunity for neurological testing. Instead, the court held an evidentiary hearing at which it took testimony from defendant's expert witness, psychologist Steven Miller, and defendant's trial counsel. Dr. Miller had not been able to assess defendant's mental status at the time of the offense because of lack of neurological testing, which would have to be done by a different expert. Defendant's trial counsel testified that he did not abandon the insanity defense but rather was prevented from gathering all the facts by the trial court's denial of a continuance and a court order for neurological testing. After hearing this testimony, the trial court performed a harmless error analysis and concluded that defendant was not prejudiced and a new trial was not required.

We again remand for the trial court to afford the defendant the opportunity for neurological testing. The trial court's actions denied defendant the right to present the insanity defense. "[A] court by definition abuses its discretion when it makes an error of law." *People v Shahideh*, 277 Mich App 111, 118; 743 NW2d 233 (2007), rev'd on other grounds 482 Mich 1156 (2008), quoting *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006), quoting *Koon v United States*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996). Here, the trial court did not follow this Court's instructions, which is an error of law and an abuse of discretion.

Defendant also argues that he was denied the right to effective assistance of counsel by his counsel's going to trial without expert neurological testing, and by abandoning defendant's insanity defense. Defendant is guaranteed the effective assistance of counsel by the Sixth and Fourteenth Amendments to the United States Constitution. To demonstrate ineffective assistance, defendant must show that counsel's performance "fell below an objective standard of reasonableness." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004), citing *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Defendant must overcome the presumption that the challenged action could have been trial strategy. Defendant must also show that counsel's performance denied him a fair trial, i.e., a reasonable probability that the outcome would have been different but for counsel's errors. *Strickland*, *supra* at 689, 694; *Grant*, *supra* at 485-486.

In this case, it was the actions of the trial court, not defense counsel, that deprived defendant of the right to present a potentially meritorious insanity defense. "A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999); *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Here, trial counsel tried to get a neurological expert appointed, but the trial court denied the request. Refusing to proceed with the trial was not a viable option, as defense counsel could have been held in contempt.

Reading the trial court's opinion on remand, it is clear that the trial court misread Dr. Miller's testimony in finding that he "only" wanted the neurological testing to rule out memory loss due to brain injury. Several facts supported defendant's insanity defense. Family reported a head injury, two jail psychiatrists thought defendant was psychotic or schizophrenic, defendant was receiving psychiatric medicines in jail, and defendant said he had heard voices since childhood. Dr. Miller thought a head injury plus a traumatic event (i.e., killing two people) could have caused a memory loss. Childhood trauma could lead a person to deal with anxiety by splitting it off, and this could present as memory problems. If defendant could not remember the killings because of a mental disease or defect, Dr. Miller would have been more convinced that he was mentally ill. Thus, the neurological testing bore directly on Dr. Miller's expert opinion regarding whether defendant was mentally ill at the time of the crime. By denying defendant's request for a neurological examination a second time, and by performing a premature harmless error analysis, the trial court once again deprived defendant of the opportunity to present his insanity defense.

Reversed and remanded for the trial court to afford defendant the opportunity for neurological testing and for an evidentiary hearing, in accord with *Pahoski I*. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Mark J. Cavanagh

/s/ Alton T. Davis