

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellant,

UNPUBLISHED  
March 23, 2010

v

ROBERT K. BRANNON,  
  
Defendant-Appellee.

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No. 292617  
Monroe Circuit Court  
LC No. 06-035769-FC

Before: DAVIS, P.J., and FORT HOOD and SERVITTO, JJ.

DAVIS, J. (*dissenting*)

I respectfully dissent. I agree with the majority's thorough recitation of the applicable legal standards. However, I believe that the majority and the trial court misapply them by inappropriately and unfairly evaluating counsel's performance on the basis of hindsight.

This case turned almost entirely on the credibility of the complaining witness, who described an incident that occurred when she was approximately six years old, more than a decade before the trial. Of note, some of her statements were inconsistent, she delayed reporting the incident for a considerable time, and her initial disclosure omitted details that she included later. Detective David Berg, with whom the complaining witness talked at the Kane County Child Advocacy Center in Illinois, testified that in his experience, children seldom disclose everything initially, and the ten-year gap between the incident and her disclosure thereof was also not uncommon. The complaining witness's interviews were not recorded because protocol at the time did not call for any recording.

Defendant was convicted of one count of first-degree criminal sexual conduct, after which he moved for a new trial and requested a *Ginther*<sup>1</sup> hearing. The trial court granted a hearing on defendant's contention that he received ineffective assistance of counsel, which was based on the assertion that trial counsel failed to present any expert testimony and failed to inquire into the proposed testimony of the prosecution's expert.<sup>2</sup>

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>2</sup> The prosecution listed Dr. Kathleen Okla as an expert witness, but ultimately chose not to present her testimony.

Trial counsel acknowledged at the hearing that he had known that the complaining witness's credibility was significantly at issue. He was aware of four potential expert witnesses: plaintiff's expert, Dr. Kathleen Okla; and Drs. Terrance Campbell, Debra Poole, and Galatzer-Levy. Dr. Poole told trial counsel that she was too busy to assist. Trial counsel testified that he was concerned about asking Dr. Galatzer-Levy to testify because information about a contemporaneous charge against defendant might be brought out; nevertheless, Dr. Galatzer-Levy provided trial counsel with helpful information about the correct methodology of forensic interviewing. Trial counsel never talked to Dr. Okla, although he obtained a transcript of testimony from another case involving Dr. Okla, and he conferred with an attorney from that case.

Trial counsel communicated with Dr. Campbell multiple times. After reviewing some materials sent by trial counsel, Dr. Campbell told trial counsel that he could provide favorable testimony that could be used to attack the complaining witness's credibility. However, Dr. Campbell also cautioned that he would expect Dr. Okla—who was still on the prosecution's witness list—to provide certain opinions with which he would be forced to agree. Thus, his testimony would have some unfavorable aspects, as well. Trial counsel admitted that he did not know what Dr. Okla would testify to, but he relied on Dr. Campbell's assessment and believed that Dr. Okla was an agent of the prosecution and therefore inappropriate for him to contact.

After the prosecution informed trial counsel that it did not intend to call Dr. Okla, trial counsel believed that he would no longer require an expert to rebut the prosecution's expected testimony that a ten-year delay in reporting was common and not indicative of a lack of veracity. Furthermore, trial counsel believed that Dr. Campbell could be turned into a pro-prosecution witness on cross-examination. Trial counsel also testified that he believed that the complaining witness's credibility was already in doubt and that he had a strong alibi defense. Dr. Campbell himself testified at the *Ginther* hearing, and he acknowledged that he told trial counsel that he might agree with some parts of Dr. Okla's testimony, but he maintained that he believed his testimony would have been helpful to the defense.

Dr. Okla testified at the *Ginther* hearing that she had never received any materials to review in this case, nor was she familiar with the facts, until she reviewed them in preparation for the *Ginther* hearing. She opined that the complaining witness's testimony was highly likely to be unreliable, and furthermore that as an expert in more than 200 criminal cases, she had never refused to speak to opposing counsel about her potential testimony. Both she and Dr. Campbell testified that they had concerns about the accuracy of the complaining witness's memory, particularly after ten years; furthermore, current studies show that sexually abused teens and children generally will disclose all of what happened. Another attorney, who had focused on, among other things, child sexual and physical abuse cases for the past 20 years, opined that defendant received ineffective assistance of counsel. She concluded that trial counsel failed to adequately investigate the issue of the ten-year delay in reporting and failed to call one, if not two, critical witnesses, which denied defendant a substantial defense.

The trial court found that defense counsel failed to adequately investigate the benefit of expert witnesses, denying defendant the effective assistance of counsel. The trial court found that this failure deprived defendant of a substantial defense because the victim's reliability or credibility was not challenged in a significant way. The trial court also faulted defense counsel's

failure to contact Dr. Okla, and it noted that even though Dr. Okla had not reviewed any records prior to trial, it is clear that she or any other expert witnesses could have been of immense assistance to the trier of fact in sorting out the evidence.

It is certainly apparent, *in hindsight*, that the expert witnesses who testified at the *Ginther* hearing were of the view, *after the fact*, that Drs. Campbell and Okla would have provided testimony favorable to the defense and likely to cast doubt on the complaining witness's credibility. It is *not* apparent that this should have been clear to trial counsel at the relevant time—which is to say, *prior* to trial. Rather, it appears that, *at the time*, trial counsel was under the reasonable—albeit possibly, as it turned out, mistaken—impression that that calling an expert witness on the issue of the delay in disclosure could damage defendant's case more than help it. I am not convinced that trial counsel's decision to, in effect, let a sleeping dog lie, particularly after the prosecution decided not to call an expert of its own, was an unsound trial strategy. I am also not persuaded that one attorney, even a particularly experienced attorney, second-guessing another establishes that trial counsel's strategy was unsound. Likewise unpersuasive is the fact that the strategy failed. I am, however, convinced that under these circumstances it was an abuse of discretion to evaluate counsel's performance on the basis of after-the-fact speculation as to what could have been.

I would reverse.

/s/ Alton T. Davis