

Court of Appeals, State of Michigan

ORDER

People of Mi v George Edward Bancroft

Docket No. 297810

LC No. 2009-003641 FC

Kirsten Frank Kelly
Presiding Judge

David H. Sawyer

Amy Ronayne Krause
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued June 21, 2012 is hereby VACATED. A new opinion is attached to this order which corrects the first sentence of the third full paragraph on page 10 of the June 21, 2012 opinion.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

AUG 14 2012

Date


Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 14, 2012

v

GEORGE EDWARD BANCROFT, JR.,

Defendant-Appellant.

No. 297810
Macomb Circuit Court
LC No. 2009-003641-FC

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(A), and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to life imprisonment without the possibility of parole for the first-degree murder conviction and to a consecutive two-year term for the felony-firearm conviction. We affirm.

I. BASIC FACTS AND PROCEDURAL HISTORY

A. TRIAL

For 18 years, defendant and Paul Weber had an on-again, off-again intimate relationship. They shared at least one joint account and lived together with Randy Clark, a disabled man they treated like their son. On March 8, 2009, Weber was found in his bed with a gunshot wound to the head. The prosecutor argued that defendant shot Weber in his sleep after Weber discovered that defendant had been making numerous and substantial unauthorized withdrawals from Weber's accounts. In contrast, defendant's theory of the case was that Weber committed suicide because he was depressed about his numerous health issues.

While there were a number of witnesses who testified regarding the financial transactions as well as Weber's state of mind near the time of his death, the focus of much of the testimony was on the physical evidence surrounding the manner of his death. The consensus among the witnesses who investigated Weber's death was that the scene was inconsistent with a suicide.

Responding officers found Weber lying in bed, partially on his left-hand side and left-hand back, with his arms crossed on the edge of the blankets. It appeared as if Weber had been

sleeping. Officers visually surveyed Weber's body and the surrounding area for a gun but were unable to find one.

As part of the investigation, defendant was transported from the residence he shared with Weber to the Chesterfield Police Department. During the initial interview, defendant stated to Detective Brian Chadwick that he had gone to the casino the night before and returned home between 3:00 a.m. and 3:30 a.m. He denied hearing anything that sounded like a gunshot and described how he only checked on Weber because he had not woken up by 9:30 a.m. According to Chadwick, defendant became upset when the interview concluded and he learned that he was going to be held for a short time while Weber's death was being investigated. Chadwick explained to defendant that this was also being done for his safety because the gun had not been located. Unprompted, defendant told Chadwick that he had seen the butt of a gun between Weber's crossed arms. Defendant invoked his right to an attorney and questioning ceased.

Chadwick returned to defendant's residence before Weber's body was moved and stood where defendant stated that he had seen a gun. He was unable to see a gun from that vantage point. It was not until Weber's body was moved that a .38 special revolver was found partially under Weber's left arm. His fingers were resting on top of the gun, as opposed to being inside the trigger guard.

Dr. Daniel Spitz, the Macomb/St. Clair County Medical Examiner, ruled the manner of death a homicide. Spitz testified:

We're dealing with a death that involves a close range gunshot wound of the head. Secondly, we're dealing with a scene and, and blood evidence that [is] not consistent with this being [a] self-inflicted wound. Specifically, the location of the right arm of this individual doesn't add up as far as a wound that could have been self-inflicted. I would expect complete loss of purposeful movement such that the right arm should have fallen solely to, due to the effects of gravity which would have put the arm to the right side of the body, maybe even hanging off the bed. Secondly, or thirdly, there is a weapon, a gun, which is completely against what I would expect as far as the location of that weapon if this was a self-inflicted wound.

. . . the gun is essentially underneath the left arm. So, not only is the arm in a very inconsistent location if this was a self-inflicted wound, but the gun is, is in an impossible position if this was a self-inflicted wound. There's really no way for that gun to be underneath the left arm . . . And there's also some evidence at the scene which indicates to me that, there's some blood evidence around the scene which I, I don't have an explanation for other than somebody transferred that blood from this location to other areas in the residence, because certainly this person, this decedent was not in any type of condition to be able to move anywhere around this home and transfer blood from his injury or body to other areas of the residence.

Police officer John Willer did not believe the scene evidenced suicide. “I would expect that the gun would have either fell, fall out his hands at the time he made the shot or had been still wrapped within the knuckle, caught up in his knuckle with his finger around the trigger, possibly.” Because shooting a gun is a “violent thing,” it was “very rare that you see something just kind of drop to, to a concealed position-type deal.”

Detective Jason Dawidowicz testified that “I don’t think it was possible for [Weber] to commit suicide in the position he was in.” “Typically, you’re able to find the hand gun either, in my experience, it’s always been either on the bed visible, or it might be, the reason I checked the floor, is the gun has a recoil and a lot of times from the force of shooting the gun, it would knock it out of his hands on the floor . . . I’ve never seen a gun in that position before.”

Sean Moticciolo from Macomb’s medical examiner’s office testified that the scene was “suspicious” because Weber “appeared to be sleeping . . . And, I didn’t see a gun in ready view, readily available.” The gun was found partly under Weber’s left arm and “I just wouldn’t expect it to fall in that place.”

Detective Brett Sojda testified that the position of the gun was “a little odd or, if it’s a suicide that is, assuming it’s a suicide, I found that to be an odd place for it.”

The jury convicted defendant of first-degree premeditated murder and felony-firearm and defendant filed a claim of appeal. We granted defendant’s motion to remand for a *Ginther*¹ hearing in order to determine whether defendant received the effective assistance of counsel at trial. *People v Bancroft*, unpublished order of the Court of Appeals, entered February 17, 2011 (Docket No. 297810).

B. GINTHER HEARING

Defendant argued that he was denied the effective assistance of counsel because trial counsel failed to obtain an expert who would have testified that the physical evidence was consistent with suicide.

1. TESTIMONY OF LJUBISA DRAGOVIC

In a previously-submitted affidavit, Oakland County Medical Examiner Ljubisa Dragovic averred that he had reviewed the physical evidence in order to offer an opinion on Weber’s cause of death. Dragovic found “no physical evidence to support the determination of homicide as manner of death of Paul Weber. In fact, all the physical evidence supports a self-inflicted gunshot wound.”

Dragovic was less sure of this opinion at the time of the *Ginther* hearing. He testified that there was “no way of deciding whether the wound had been self-inflicted or inflicted by someone else.” Dragovic reviewed Dr. Spitz’s testimony, the photographs, the autopsy report,

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

and some of the police reports. Based solely on the physical evidence – the body at the scene, the location of the wound, location of Weber’s body and arms, and the location of the weapon – there was no “physical distinction on the basis of these physical findings whether this is a suicide or a homicide. Because . . . it fulfills everything for a suicide, but it fulfills also everything – or almost everything for a staged suicide.” Dragovic admitted that at the time he signed his affidavit, he was not fully aware of the other circumstantial evidence, including defendant’s confession, which was not referenced to at trial.²

Dragovic explained:

As a medical examiner, you come to a conclusion – first of all, the first principle of death investigation by firearm is it is a homicide until proven otherwise. The second principle is that *you look at the totality of the findings* and you make a determination of a – of the – the category of the manner of death based on your investigation. *And I fully agree with your autopsy where Dr. Spitz classified as a – a homicide.* However, the question that was put to me is – what a very specific question by the – by the people from the public defender’s office, is there physical evidence that is unquestionably pointing to this being a suicide. And that’s what I am – I am talking about. I’m not talking about additional . . . information . . . in front of the Trier of Fact. You are discussing only the issues that – that you’re looking at, not the other information that you may have that brought you to the point of determining that something is a homicide. Of which *I would not have any dispute of – as far as the decision-making process of my colleague.*

[B]ased on the information and based on the specific issue of questioning the physical evidence that is used as a detriment for something being a suicide versus a homicide, there is no – that fine line in the material that had been presented to me. The fine line comes in what you refer to the police report, the confession, and the – and the explanation there, which – of course, *a medical examiner has to take into consideration in determining the manner of death . . .* [(emphasis added).]

Dragovic concluded that the physical evidence, standing alone, was not “determinant in this case.” Where physical evidence supports a finding of either homicide or suicide, other circumstances must be taken into consideration.

The trial court then questioned Dragovic:

Q. So your opinion in this case takes into account all the physical evidence that you were presented with? All the blood evidence?

² A more detailed discussion regarding defendant’s confession will follow below.

A. That's correct. All – all the – the information about the location of – of things, I took into consideration, and I – I'm not saying on the basis of the physical evidence, you can't make a distinction.

Q. Now, let me just stop you there. So your conclusion is based on all the physical evidence it's indeterminate as between it was a homicide or a suicide, is that true?

A. That's correct.

Q. That's something different than what your affidavit says, though, because your affidavit says "there's no physical evidence to support a determination of homicide, and all the physical evidence supports a self-inflicted gunshot wound." That's something different than indeterminate, wouldn't you agree? Or am I missing – am I missing something? Indetermin[ate] means it could go either way.

A. Yeah, that's right. And that – that's – that is the – the point that I'm trying to make. There is nothing there that – based on what you can tell – that this is a homicide. There is – there is more in keeping of self-inflicted injury just by – by the overall findings *without knowing additional circumstances*. And that – that's the point of – of distinction there. [(emphasis added).]

2. DEFENSE COUNSEL

For his part, defense counsel testified that his strategy was to develop inconsistencies in the witnesses' testimony regarding the crime scene. Counsel explained that, while the witnesses all suspected homicide, they gave different reasons for why. Some witnesses pointed to the position of the gun and others pointed to the position of Weber's body:

Q. [by defense counsel]: And so I take it that part of your strategy was to point out to the jury that despite this seemingly uniform suspicion because there were so many different reasons given for it, they shouldn't put too much weight on that?

A. That's exactly right. Because what I need, as any defense attorney tries to do, is point out the inconsistencies in the prosecution's case so when they were up there, and if a police officer said I found that the placement of the weapon was indicative to me of suicide as opposed to homicide, then I would say well, was it the placement of the arm or did you find this. And they'd say no, no, no, no. And then the other ones would say it was just the arm, not the gun. So try to magnify that and try to argue that to the jury.

Defense counsel also believed that Dr. Spitz's testimony was unassailable, given his reputation in the community. "My thinking was that the caliber of Dr. Spitz['s] testimony, his CV and – and everything that to find somebody of that caliber to counter that I – I thought would have been prohibitively expensive. And I'm not sure that I would have found somebody and – and so I – I did not present anybody to refute Dr. Spitz's testimony."

Defense counsel was also concerned that calling an expert witness would have opened the door for reference to defendant's confession.

Evidence that defendant confessed to the murder was presented at the first day of defendant's preliminary examination. While defendant had previously invoked his right to counsel, detectives later discovered some bloody clothing in defendant's bedroom and confronted defendant with the new information. Detective Feld testified:

Q. [by prosecutor]. And when you interviewed the Defendant could you please describe to the Court what it was that you did when you spoke to the Defendant?

A. I sat down with him I identified myself I advised him that there was new evidence that we had uncovered after he was initially interviewed by Detective Chadwick. I advised him I just wanted to get his explanation regarding this new evidence.

Q. And what if anything had the Defendant say [sic] at that time?

A. At that time he said, is it – “Can I have an attorney with me?” I advised him that he could.

Q. And then, what if anything happened after that?

A. I told him he could have an attorney with him but I didn't – I wanted him to appear remorseful, I told him I didn't know how remorseful it would appear if he wanted to have an attorney with him. And then I said, “But, that's fine, I just wanted to tell you about the bloody T-shirt that was found in your bedroom.”

Q. And was this the first time that the actual piece of evidence that was found was mentioned to him?

A. Correct.

Q. And what if anything did Defendant do at that point?

A. In question form he, something to the effect of “Bloody clothes?” is what he stated.

Q. To you?

A. Correct.

Q. And what if anything did you do?

A. I said, “Yes,” I said, “We found bloody clothes, bloody clothes were found in your bedroom, a white bloody T-shirt and I just wanted—“ and I reiterated, “I wanted to – your explanation on that?”

Q. What if anything happened following that?

A. I believe there was a long pause, he appeared very upset.

Q. When you say he appeared very upset what in fact were you seeing the Defendant do?

A. He started to cry, put his head in his hands there was a pause there he was becoming emotional. After a few minutes he requested a cigarette, and said he was willing to talk about it, but he just wanted a cigarette. I said that was fine, I could – well, I had said I would ask a boss, who later found he was okay with it. But I assured him that I was going to read him his Miranda Rights again, before we talked again and he said he was okay with that.

After being read his rights, defendant admitted that he shot Weber because he was “hearing voices.” Interestingly, when the second day of the preliminary hearing began, the prosecutor asked the court to strike the testimony regarding defendant’s confession. On the first day of defendant’s trial, the prosecutor reiterated that she would not be using defendant’s “*Miranda*-defective” confession during her case-in-chief.

At the *Ginther* hearing, defense counsel testified as to his fear that, although the prosecutor agreed not to use defendant’s confession in its case in chief, calling an expert as to the manner of Weber’s death could have opened the door to testimony about the confession:

Q. [by the prosecutor]: Is it fair to say that when an expert has to testify all the relevant data has to be provided to them?

A. One hundred percent, absolutely.

Q. And if you were to have met Dr. Dragovic in preparation for the trial – part of the trial – you would have supplied him the confession, correct?

A. Yes, I would have.

Q. Regardless of how the Court would have ruled on it in or out, that is data that that expert has to review before he can formulate his expert opinion, correct?

A. Absolutely.

Q. Did you and [the prosecutor] have any informal conversations leading up to the trial as to areas of testimony, what she was planning on getting into or what she thought, well, if this door is open, don’t forget I might go in that area? Do you remember any of that?

A. You know, to be honest with you, at – at that – I don't remember anything specific, but I – I know the law well enough to know that just because you agree or because the judge disallows something doesn't mean that it can't come in through an alternative means. So you have to be very careful. Nothing that I know is kept out one hundred percent absolute. So you have to be careful about not opening the door or a crevice because than [sic] they would be fully allowed to come in.

Q. Okay. If Dragovic were to testify that in his opinion it's a suicide, do you think it would have been fair for [the prosecutor] to cross-examine on what he used to make that determination?

A. Absolutely.

Q. Would – if that testimony was prevented by Dragovic during trial, would that have opened the door, in your opinion, to [the prosecutor] being able to cross-examine Dragovic on the confession?

A. That was my biggest apprehension.

Q. The bottom line, though, sir, you felt that if you would have called an expert in pathology or forensic pathology to go over the possibility of it being a suicide, you would have opened up the door for a Miranda defective confession?

A. Absolutely, sir. And also I think almost an expert on anything else because I would have been duty-bound to give them all of the evidence. So almost any expert on any area could possibly be, because I'm sure [the prosecutor] would have said did you see this and were you privy to this, and so – I – very much so with the medical examiner because that's the big question, suicide or homicide. But with any expert that was a big concern.

Because an expert would need to be supplied with *all* of the relevant information, defense counsel did not consider making a motion in limine to limit the expert's testimony to only the physical evidence; such a motion did not appear to be a "viable" option.

3. TRIAL COURT'S FINDINGS

The trial court faulted trial counsel for not obtaining an expert but concluded that defendant was not prejudiced by the omission.

Specifically, the trial court found that "[t]he prosecution's retention of a well-respected expert is not, in itself, a reason for the defense to forego attempting to retain a qualified expert" and that counsel's "uncritical acceptance of a prosecution expert's opinion can hardly be deemed effective advocacy." Additionally, the trial court rejected defense counsel's concerns regarding

the expense of procuring an expert, especially in light of the fact that the trial court had previously approved defense counsel's request for \$2,000 to retain a "suicide expert" (presumably to testify as to Weber's state of mind and possible depression at the time of his death).

The trial court further found:

[T]rial counsel's concerns about "opening the door" to introduce defendant's confession were completely unfounded. MRE 703 provides that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence." While an expert may testify without first disclosing underlying facts and data, an expert witness "may in any event be required to disclose the underlying facts or data on cross-examination." MRE 705.

The prosecution has failed to direct the Court's attention to any authority which holds a constitutionally invalid confession must be disclosed to a forensic pathologist in order for the pathologist to render an expert opinion concerning the cause of death. On the other hand, the evidence upon which an expert's opinion is based must be independently admissible. There is no dispute that a forensic pathologist might consider evidence in addition to the physical evidence at the scene in determining the cause of death. However, it does not follow that the pathologist should be allowed – much less required – to consider otherwise inadmissible evidence in rendering his or her expert opinion. Furthermore, even if trial counsel's concern regarding the confession had been well founded, this still does not excuse his failure to retain an expert and bring an appropriate motion in limine. For all of these reasons, the Court concludes that trial counsel's performance was deficient. [(footnote omitted).]

The trial court concluded that, although counsel was ineffective, there was no reasonable probability that the results of defendant's trial would have been different even if defense counsel had secured Dragovic as a witness. Primarily, the trial court noted that Dragovic's affidavit was unequivocal that the manner of death was suicide; whereas Dragovic's testimony at the *Ginther* hearing was equivocal – the physical evidence equally supported a finding of homicide or suicide. The trial court concluded that while Dragovic's testimony "might have been somewhat beneficial to defendant, since the witnesses called by the prosecution opined that the physical evidence [] suggested a homicide rather than a suicide . . . [g]iven the considerable circumstantial evidence pointing to defendant's guilt, the Court is not convinced that – absent counsel's error – there is a reasonable probability that the jury's verdict would have been different."

Defendant now complains that the trial court erred in finding that defense counsel's failure to call an expert was not prejudicial to his defense.

II. ANALYSIS

Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 487, 484; 684 NW2d 686

(2004). We review the trial court's factual findings for clear error and constitutional law considerations de novo. *Id.* Clear error exists if we are "left with a definite and firm conviction that a mistake has been made." *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004).

Generally, to establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of trial would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 276 Mich App 407, 415; 740 NW2d 557 (2007). A defendant bears the heavy burden of showing that counsel's performance was deficient and that the defendant was prejudiced by the deficiency. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Decisions regarding what evidence to present and whether to call witnesses are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

A *Walker*³ hearing was never held regarding voluntariness of defendant's confession. Instead, defense counsel secured the prosecutor's agreement not to use defendant's confession during the prosecutor's case-in-chief. We are not persuaded that a motion in limine would have eliminated defense counsel's concern regarding the use of the confession during cross-examination of his expert.

Although there was some concern that defendant's confession might have been made after he exercised the right to counsel, the first detective did, in fact, cease questioning defendant in the first interview once the right to counsel was asserted by defendant. Defendant later confessed to a second detective who had explained that additional evidence had been recovered. Defendant was read his *Miranda*⁴ rights before both interviews. While defendant mentioned an attorney during the second interview, the prosecution could have successfully argued that defendant did not unambiguously or unequivocally assert his right. *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995). Based on the record before this Court, we conclude that it was sound trial strategy for counsel to avoid having the trial court consider the voluntariness of defendant's confession.

Additionally, defense counsel's fear that an expert's testimony would open the door to evidence of defendant's confession was reasonable. Trial counsel testified that he was concerned that the prosecution would ask any expert during cross-examination whether the confession changed his opinion. In fact, that is exactly what occurred during the *Ginther* hearing. Dragovic

³ *People v Walker* (On Rehearing), 374 Mich 331, 338; 132 NW2d 87 (1965).

⁴ *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

testified that the *physical* findings relative to the body did not establish whether Weber's death was a suicide or a homicide staged to look like a suicide; however, when the physical evidence was taken together with the confession and other circumstantial evidence, Dragovic fully agreed with the medical examiner's conclusion that it was a homicide. MRE 705 provides: "The expert may testify in terms of opinion or inference and give reasons therefore without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." Assuming Dragovic had testified at defendant's trial that, based on his expert opinion, the manner of Weber's death was a suicide and not a homicide, the prosecution would have been within its right to question Dragovic whether his opinion took into consideration other relevant information, including defendant's confession.

We believe that in finding that defense counsel was ineffective, the trial court in this case erroneously used hindsight to judge counsel's conduct. We believe that defense counsel's fear of opening the door to defendant's confession was legitimate under the circumstances. The potential damage the confession posed significantly outweighed any benefit the expert offered, especially where defense counsel was able to vigorously cross-examine the witnesses as to their conflicting reasons for judging the manner of death to be a homicide. Thus, it was sound trial strategy for counsel to avoid any determination that the confession was admissible. Accordingly, defense counsel was not ineffective for failing to call an expert witness to testify as to the manner of Weber's death.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Amy Ronayne Krause