STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 21, 2012
v	No. 302679 Wayne Circuit Court
KEVIN WILKINS, Defendant-Appellant.	LC No. 10-003843-FH

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

PER CURIAM.

Defendant Kevin Wilkins is a mentally challenged, middle-aged man. One evening while defendant was running down the street, Detroit police officers approached him on suspicion of being involved in an earlier carjacking. The prosecution contended that defendant forcefully resisted arrest. Following defendant's bench trial convictions of one count of assaulting, resisting, or obstructing a police officer causing injury, MCL 750.81d(2), and an additional count of assaulting, resisting, or obstructing a police officer, MCL 750.81d(1), appellate counsel (Todd A. Kaluzny) filed a motion for new trial based on the ineffective assistance of trial counsel (Sequoia Dubose). According to the affidavit of an independent eyewitness with no prior connection to defendant, the police officers brutally attacked defendant despite his compliance with their orders. Kaluzny challenged Dubose's failure to investigate and present the testimony of this eyewitness. Specifically, Kaluzny contended that it was unsound trial strategy not to interview the eyewitness and personally adjudge his credibility.

We agree with Kaluzny that Dubose's failure to interview Adams appears objectively unreasonable and inconsistent with sound trial strategy. We therefore remand to the trial court for a *Ginther* hearing,[1] after which the court must determine whether attorney Dubose was constitutionally ineffective. If the lower court determines that Dubose was ineffective, the court must vacate defendant's convictions and sentences and conduct a new trial if requested by the prosecution.

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

We review a trial court's denial of a motion for new trial for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). The underlying question of whether defendant received ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 281 (2011). To establish ineffective assistance, a defendant must show that counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 289-90.

The defendant must overcome the strong presumption that counsel employed sound trial strategy. *Id*. at 290. Failure to call a particular witness at trial is presumed to be a matter of strategy, *People v Seals*, 285 Mich App 1, 20; 776 NW2d 314 (2009), and will only constitute ineffective assistance when it deprives the defendant of a substantial defense. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Similarly, the failure to interview witnesses does not automatically establish ineffective assistance absent a showing that counsel was rendered "ignoran[t] of valuable evidence which would have substantially benefited the accused" as a result. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Yet, "'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . [C]ounsel has a duty to make a reasonable decision that makes particular investigations unnecessary.'" *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004) (alterations in original), quoting *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

> A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by professional judgments. Counsel must make an independent examination of the facts, circumstances and laws involved . . . . This includes pursuing all leads relevant to the merits of the case. [*Grant*, 470 Mich at 486-487 (quotation marks and citations omitted).]

Leading up to trial, Dubose was faced with a statement made by his mentally challenged client to the police immediately after his arrest. Defendant told the investigating officer:

> "I was running down the street going to the store when the police told me to stop. I got claustrophobia. So I fear being in close [sic] places. The white officer scared me. I like black and white officers to be together. The white officer told me to stop. Then they told me to get on the ground. I was waving my arms like this." And he indicated he moved his arms, his folded arms both left and right across his body . . . . "Then the officer threw me on the ground. I kept moving because I was scared . . . ."

Defendant further told the investigator that he did not intend to injure anyone:

> "I was injured, too. I was swinging my arms. If I did it I apologize to him. I didn't ball up my fist. . . . I know I got injured. I'm not trying to say anything about the officers, but you can see I got injured . . . ."[2]

At some point before trial, Dubose became aware that an eyewitness, Dedric Adams, saw defendant's arrest while standing inside a nearby barber shop. Defendant's nephew, Michael E. Martin, found Adams while investigating his uncle's arrest. Martin learned from Adams that defendant had not resisted arrest, but was beaten by the officers despite his compliance with their order to stop. Martin gave Dubose Adams's phone number, but Dubose never contacted this eyewitness.

Martin also gave Adams the attorney's contact information. Adams averred in an affidavit that when he tried to contact Dubose, the attorney's outgoing voicemail message "said not to leave a message" because his "phone was broken." Adams further attested that he saw defendant "walking down the street" when officers approached and "told him to stop and put his hands up." Adams asserted that defendant complied but asked, "What did I do?" Adams claimed that another officer "tackled [defendant] for no apparent reason while he had his hands up." Adams denied seeing defendant "make any threatening gestures or give any suggestion of having a weapon of any kind" or "throw a punch or physically assault the officers, or try to run away from the officers." Despite defendant's compliance, Adams averred that "approximately eight officers came out and beat him up," were "extremely brutal," pushed defendant's "face in snow water," and one officer "thr[e]w a knee into [defendant's] head."

We find it incumbent upon Dubose to explain why he chose not to interview Adams as a potential witness before defendant's trial. In this regard, we rely upon *Grant*, 470 Mich 477. In *Grant*, defendant was accused of sexually assaulting his girlfriend's two young nieces. *Id.* at 480. Defense counsel fought the charges on the theory that the older victim's physical injuries were actually caused by a bicycle accident as she had originally told her physician, or by another assailant, and that she fabricated the allegations against the defendant. *Id.* at 487. The younger victim's evidence was weak and was easily rebutted absent her sister's more damning claims. Before trial, defendant provided his counsel with a list of a dozen potential witnesses who knew both the child victims and the defendant. *Id.* at 482. Counsel chose to interview only two or three of those witnesses and failed to ask them if they knew of any eyewitnesses to the older victim's bicycle accident. *Id.* at 482. Accordingly, counsel did not learn that the victims' young male cousins saw the bicycle accident and may have been able to refute the older victim's claim at trial that the defendant had caused her injury. *Id.*

The *Grant* Court held:

> In this case, counsel's performance was not objectively reasonable. Defendant was facing three counts of sexual misconduct. Two of them were founded wholly on the sisters' statements implicating defendant. The third and

[2] No evidence supported that defendant had any involvement in the carjacking and the prosecutor declined to pursue charges in that regard.

most serious of them was founded on the older girl's statements and an underlying physical injury. The best refutation of all the charges would have been strong substantive evidence that the older girl's injury was caused by something or someone other than defendant. Had that charge been defeated, then the other two would have been greatly weakened, given the questionable credibility of the two girls as witnesses. The development of defense counsel's trial strategy had to consider these facts. His failure to conduct a more thorough investigation to uncover evidence to support an alternate causation theory was objectively unreasonable.

* * *

At the *Ginther* hearing before the trial court on defendant's claim of ineffective assistance of counsel, defense counsel responded to questioning. He said that his theory had been that the older girl was in the habit of telling lies and could not be trusted. His "main thrust was that this girl was a liar" and he "welcomed" her testimony that she had lied about the bicycle accident. She had been, he theorized, either injured in a bicycle accident or by a sexual assault, but, regardless, was falsely accusing defendant.

Yet, counsel did not think it necessary to be prepared to prove the occurrence of the bicycle accident in order to substantiate his theory that it had caused the injury. He felt that additional witnesses would not be vital. He failed to contact most of the persons whose names defendant had provided for his own defense. He failed to inquire whether anyone in the family had seen and could testify about the fact of the alleged bicycle accident and its role in causing the injury. He failed to act on statements from the witnesses that he did interview that the girls' brother may have seen the accident. [*Id.* at 486-487.]

"Counsel had readily available to him information that should have prompted further inquiries," *id.* at 488, but he sat by without supporting his defense theory. Phrasing the question as "whether there was a reasonable probability that the outcome would have been different had defense counsel adequately investigated the facts before developing his strategy," *id.* at 496, the Court held that "[c]ounsel's failure to investigate his primary defense prejudiced defendant." *Id.* at 493. In doing so, the Court noted:

[T]his is not an instance in which counsel failed to discover facts after a reasonable inquiry that would have caused an effective attorney to inquire further. As stated, at no time did counsel direct his investigators to ask whether anyone had seen the bicycle accident. . . . His failure to conduct an investigation to determine if known witnesses had direct evidence to substantiate his defense was objectively unreasonable . . . .

Moreover, this is not a case of counsel disregarding one possible, alternate theory of defense in favor of a better one, after finding the first "contradictory, confusing, incredible, or simply poor." . . . As stated above, counsel's theory was that the girl was a liar and had falsely accused defendant. This was a sound

> defense strategy. Had it been fortified by adequate investigation, it would have shown the weakness in the prosecutor's case, and it could have made a difference in the verdict . . . .
>
> This case differs from one in which there has been a failure to call witnesses whose potential testimony defense counsel already knows. . . . Here, counsel did not interview half of the people whom defendant identified as potentially having helpful information. He did not know what testimony these witnesses would give. He did not know where they had been or what they had seen. [*Id.* at 492-493 (citations omitted).]

In *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996), the Supreme Court similarly found counsel ineffective for failing to investigate and present eyewitnesses who would have testified that the defendant did not shoot at the victim. In *Johnson*, the defense theory was that the defendant was actually fleeing from the victim who was shooting at him and a third party shot the victim during the chase. *Id.* at 117. After sentencing, the defendant sought an evidentiary hearing based on the affidavits of six eyewitnesses that they saw "the entire episode and that the defendant did not shoot a gun at any time." *Id.* at 118. Defendant's trial counsel failed to keep notes and could not remember whether he had interviewed any of the potential witnesses, let alone what they might have said. *Id.* at 119. Based on counsel's admissions, the Court found "no sign that counsel made a strategic decision not to call the six witnesses." *Id.* at 124. Rather, the failure to call witnesses to support the defense, in light of the evidence that defense counsel failed to adequately prepare for the case, amounted to constitutionally deficient assistance. *Id.* at 124-125.

Here, Dubose was called upon to interview a single witness. He knew the identity of the potential witness before trial and that the witness's testimony was potentially exculpatory. Dubose was also aware that defendant suffered from a mental impairment that limited his ability to effectively communicate. Despite this knowledge, Dubose apparently elected against interviewing the eyewitness and instead called defendant as the sole witness for the defense.

We discern no reason from this record excusing Dubose's decision not to interview Adams and to forego "fortif[ying]" his defense theory with "adequate investigation." *Grant*, 477 Mich at 492.[3] The current record supports that an evidentiary hearing is necessary to explore defendant's claims that his mental impairment rendered him a less than fully competent witness, and that Adams's testimony would have completely exonerated him from the charges of assaulting, resisting or obstructing a police officer. On remand, Dubose may be able to explain how his decisions amounted to sound trial strategy. If not, however, and the prosecution continues to pursue charges, the trial court must award defendant a new trial.

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[3] We note that, had defendant's trial occurred later in time, defense counsel may have been able to argue that defendant legally resisted an illegal arrest. See *People v Moreno*, ___ Mich ___; ___ NW2d ___ (Docket No. 141837, filed April 20, 2012), overruling *People v Ventura*, 262 Mich App 370; 686 NW2d 748 (2004). We will not find counsel ineffective for failing to raise an argument that was not available at the time of trial.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly
/s/ Mark T. Boonstra