Court of Appeals, State of Michigan

ORDER

People of MI v Bernard Chauncey Murphy

Docket No. 258397

LC No. 04-001084 01

Bill Schuette
Presiding Judge

Richard A. Bandstra

Jessica R. Cooper
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued July 27, 2006 is hereby VACATED. A new opinion is attached to this order.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 12 2006
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v BERNARD CHAUNCEY MURPHY, Defendant-Appellant.	FOR PUBLICATION July 27, 2006 9:05 a.m. No. 258397 Wayne Circuit Court LC No. 04-001084-01

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

SCHUETTE, P.J.

In this case involving the right to appellate counsel during an interlocutory appeal, defendant, Bernard Chauncey Murphy, appeals as of right his jury trial convictions for two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 15 to 30 years in prison for the armed robbery convictions and two years in prison for the felony-firearm conviction. We reverse and remand for a new trial.

I. FACTS

On April 23, 2004, the prosecution appealed by leave granted the trial court's order excluding evidence of a shotgun. On April 23, 2004, this Court entered a peremptory order reversing the trial court's order and remanding for further proceedings. *People v Bernard Murphy*, unpublished order of the Court of Appeals, issued April 23, 2004 (Docket No. 255101). This case proceeded to trial and defendant was convicted.

Between 5:30 and 6:15 a.m. on November 27, 2003, Christopher Holman and his fiancée, Tammy Isaac, were traveling in Isaac's car to see the Thanksgiving Day parade. While they were stopped at a traffic light in Detroit, a black Dodge Ram pickup truck struck them from behind. Holman got out of the vehicle and discovered there was no damage. A man, whom Holman identified as defendant, got out of the passenger seat of the pickup truck holding a shotgun and yelled, "get down on the ground now." Holman got down on the ground, and defendant told Holman to give all his money to the driver of the pickup truck. Holman removed all the money from his wallet, $175, and gave it to the driver.

Meanwhile, defendant tapped on the passenger window with the gun and twice ordered Isaac to get out of the car. Isaac got out of the car and defendant grabbed her and threw her on

the ground. Defendant pointed the gun at Isaac, threatened to kill her, and demanded all her money. Defendant searched the car and removed two cellular telephones and Isaac's purse. Isaac's purse contained about $23, spare keys to Holman's vehicle, and Isaac's driver license, social security card, credit cards and bankcard. Defendant inquired about whether Holman had given the driver his money. After Holman demonstrated that his wallet was empty, defendant and the driver returned to the pickup truck and drove off. Holman and Isaac drove to the state police department in Taylor where they reported the incident.

On November 28, 2003, Sergeant Ramon Childs received an unrelated carjacking complaint involving a sawed-off shotgun and a black pickup truck that was possibly a Chrysler vehicle. Near the area where the complaint originated, Childs encountered a black Dodge pickup truck and followed it to a gas station. The pickup truck parked adjacent to a gas pump and four men got out. Childs saw two men go into the store, one walk to the side or rear of the station, and one stand near the pickup truck. After Childs saw the men get back into the pickup truck and drive out of the station, he called for backup. More police officers arrived and they stopped the pickup truck on a nearby street. Defendant was the driver of the pickup truck. Childs found live shotgun shells in the pickup truck, and the police searched the gas station, where they found more live shotgun shells in the garbage next to the gas pump where the black pickup was parked. They also found a sawed-off shotgun in the rear of the gas station. The black pickup truck was registered to Melvin J. Murphy, Sr., who shared an address with defendant.

Defendant argues that the assistance of counsel was denied him when his trial counsel failed to file a brief opposing the prosecution's emergency interlocutory appeal. The trial court had issued an order suppressing evidence of a shotgun obtained in a gas station dumpster, but the prosecution's appeal of that order was successful in admitting the weapon into evidence. Trial counsel for defendant was not served with the prosecution's notice of its application for leave to appeal because she had failed to update her address in the Bar Journal directory, nor was defendant served. Trial counsel's subsequent motion for a stay was granted when she stated her intention to move for reconsideration of the appeal. Neither trial counsel nor defendant's court-appointed appellate counsel so moved, the latter explaining that he did not have sufficient information from the record to seek leave for reconsideration before the period expired. Defendant contends that the prosecution's brief to this Court was misleading in its facts section and that he was effectively denied representation before this Court in the appeal, warranting automatic reversal of his conviction under *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Alternatively, he argues that the resulting admission of the shotgun into evidence sufficiently prejudiced the trial court under the test described in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), to require reversal.

II. STANDARD OF REVIEW

This Court's review of the ineffective assistance claim is limited to errors apparent on the record because no *Ginther*[1] hearing was held. *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003). Although the deprivation of counsel issue was not raised before the

[1] *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

trial court, it is an allegation of structural error requiring automatic reversal. *Cronic*, *supra* at 659-660; *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005).

III. DEPRIVATION OF COUNSEL

Defendant argues that his convictions should be automatically reversed because his trial counsel was ineffective in failing to oppose the prosecution's application for leave to appeal the trial court order suppressing evidence of the shotgun found at the gas station. We agree.

On April 22, 2004, this case was set for trial and the prosecution asserted that, after seeing the sawed-off shotgun seized from the gas station, Holman and Isaac agreed that it looked like the weapon used during the robbery. No witnesses testified at this time. Holman described the robbers' vehicle as a black Dodge Ram pickup truck. Pursuant to a carjacking allegation the following morning,[2] Childs began following a black Dodge Ram pickup truck in Detroit. The pickup truck entered a gas station, and four individuals got out. One individual went into the store, one went to the rear of the gas station, and two stayed near the trash receptacles and gas pumps.

While Childs called for backup, the four men returned to the pickup truck and drove out of the gas station. The police stopped the pickup truck and arrested all four men. One live shotgun shell was found in the pickup truck, and the police found a sawed-off shotgun in "a trash receptacle dumpster type container behind the gas station" and more live shotgun shells in the trash receptacle near where the two individuals had been standing. All the recovered shotgun shells were consistent with the shotgun found behind the gas station. The prosecution specifically requested admission of the testimony of the police officers who observed the pickup truck at the gas station and retrieved the shotgun and shells from the gas station. The trial court would not permit the officers to testify about the shotgun because Childs did not see anyone carrying any weapons or take anything behind the gas station. The prosecution then broadened its request to include the shotgun. Here, there was no testimony that any of the four individuals at the gas station were carrying anything to the location where the shotgun was found; thus, the trial court concluded that the gun was not admissible under *People v Hall*, 433 Mich 573; 447 NW2d 580 (1989).

On April 22, 2004, the trial court entered an order denying the prosecution's motion with respect to the shotgun and granting it with respect to the shotgun shells found in the vehicle and the gas station's trash bin. The trial court also denied the prosecution's motion for stay. The same day, the prosecution filed an emergency application for leave to appeal with this Court, including a motion for immediate consideration, an emergency motion for stay, and a motion to waive production of transcript. The trial was scheduled to begin on April 26, 2004. This Court granted the motion for immediate consideration, waived the transcript requirements, dismissed the motion for stay as moot, and remanded to the trial court for further proceedings. The Court

[2] We note that this carjacking allegation appears to correlate to the closed appeal discussed *supra*, involving a victim who was delivering newspapers. See *People v Charles Terrell Jones & Bernard Chauncey Murphy*, unpublished opinion per curiam of the Court of Appeals, issued November 10, 2005 (Docket No. 254939).

reasoned that the trial court abused its discretion in excluding evidence of the shotgun because it was relevant under *Hall*, *supra* at 573, and peremptorily reversed the trial court's order. *People v Bernard Murphy* unpublished order of the Court of Appeals, issued April 23, 2004 (Docket No. 255101).

On April 26, 2004, the trial court was scheduled to begin trial, and the trial court learned of this Court's order. The trial court stated that, in the prosecution's application for leave to appeal with this Court, the statement of the facts was incomplete and the reason for the trial court's finding was inaccurate. Defense counsel also asserted that there were discrepancies between the police reports and the prosecution's statement of the facts. On April 26, 2004, the trial court entered another order regarding the prosecution's motion to admit evidence of the shotgun and shotgun shells. This order stated that the evidence of the shells from the pickup truck and the gas station would be admitted and that the evidence regarding the shotgun would not be admitted. The order further stated:

> 1) there was no testimony that a black Dodge Ram occupant was carrying anything at all to the back or side of the gas station @ McNichols and Wyoming; 2) that there was a break in the chain of observation at the gas station before defendant's [sic] Murphy's arrest and therefore [*Hall*] does not apply because there is no nexus between the shotgun and/or any similar object and the Dodge Ram and/or the gas station.[3]

At the April 26, 2004 hearing, the prosecution explained that it served notice of its application for leave to appeal to the address Erwin had provided in the bar directory. However, Erwin stated that it was not the current address. Erwin moved the trial court for a stay because she was anticipating filing a motion for reconsideration and "going to the Supreme Court if necessary." The trial court granted the stay, but Erwin never sought reconsideration with this Court or leave to appeal to the Michigan Supreme Court.

Neil Leithauser was appointed to represent defendant "about two weeks" after this Court peremptorily reversed the trial court's order regarding the shotgun. Leithauser did not seek reconsideration with this Court, explaining that he "didn't have any information really on the case where [he] could have a handle on it" before the period for reconsideration expired. Leithauser stated, "we don't even have a case," and decided not to seek an application for leave with the Supreme Court because he "didn't think [he] had enough of a record to do that."

The trial in this case was postponed until September, 2004 and was assigned to a new judge due to a scheduling conflict. The second trial judge apparently disregarded the first trial court's April 26, 2004 order and allowed the prosecution to present the shotgun. At trial, Holman testified that the passenger of the pickup truck was holding a shotgun and that he got a look at the weapon. The prosecution presented Holman with the shotgun recovered from the gas

[3] It is unclear why the trial court entered a second order to the same effect after the April 22, 2004 order was reversed. However, at the April 26, 2004 hearing, the trial court expressed extreme displeasure with the prosecution, who drafted the April 22, 2004, order.

station. Holman agreed that it looked like the weapon used in the robbery, but he could not definitively say that it was the same one. Isaac, who admitted that she did not really know anything about guns, described the gun as a "long handgun." Isaac examined the shotgun recovered from the gas station and she stated that she was 50 percent sure it was the same weapon used during the robbery.

This Court has found that "throughout pretrial, trial and sentencing proceedings, trial counsel remains 'trial counsel' even though he or she, during the course of a defendant's representation, is faced with various appellate duties and, thus, wears the hats of both trial and 'appellate' counsel." *People v Johnson*, 144 Mich App 125, 132; 373 NW2d 263 (1985).

The Supreme Court requires automatic reversal when there has been an "actual or complete denial of the assistance of counsel altogether, where prejudice is so likely that case-by-case inquiry is not worth the cost." *Cronic*, *supra* at 692. The Court later stated "the same is true on appeal." *Roe v Flores-Ortega*, 528 US 470, 483; 120 S Ct 1029; 145 L Ed 2d 985 (2000). In cases for which prejudice is presumed to be less likely, the Court provided a two-pronged method: "(1) counsel's conduct fell below basic standards of assistance, and (2) but for counsel's professional failures, the result of the trial would likely have been different." *Strickland*, *supra* at 687-88. The seventh circuit has further explained when the *Strickland* test cannot be applied:

> [T]he Court's opinions in *Strickland* and *Cronic* convinces us that the Court does not intend for the *Strickland* test to control the former class of cases. The crucial premise on which the *Strickland* formula rests -- that counsel was in fact assisting the accused during the proceedings and should be strongly presumed to have made tactical judgments… Thus, both *Strickland* and *Cronic* expressly treat cases involving the total lack of assistance of counsel as separate and distinct from cases involving ineffective assistance of counsel. *Siverson v O'Leary*, 764 F2d 1208, 1216 (CA 7, 1985).

Therefore, the current case turns on whether defendant's counsel made an objectively reasonable strategic decision (*Strickland*, *supra* at 688), or was in effect "missing in action" or otherwise absent from the proceeding altogether by failing to file a brief for her client, depriving him of the protections of the adversary system.

Persuasive authority has consistently held for the latter. The Seventh Circuit applied the *Cronic* standard in a case similar to that presently before this Court, holding that trial counsel's failure to file amounted to complete denial of assistance of counsel:

> In this case, Thomas's attorneys' failure to file a brief on his behalf on the State's Rule 604(a)(1) appeal from the trial court's suppression order amounted to a complete denial of assistance of counsel during a critical stage. For purposes of the appeal, no brief meant no representation at all. *United States ex rel Thomas v O'Leary*, 856 F2d 1011, 1016-17 (CA 7, 1988).

Therefore, we find a complete denial of assistance occurred in the present case, as well.

Similarly, while the Sixth Circuit *at first appears* to apply the *Strickland* test in *Fields v Bagley*, 275 F3d 478 (2001) the Court automatically assumed that the test's second criterion (showing sufficient prejudice for the reasonable likelihood of a different result) had already been met by the fact that counsel failed to file a brief, holding that because "Fields was not able to present any argument to advocate for affirmation of the suppression order" that fact was "by itself… enough to show prejudice." *Fields, supra* at 485. That Court thus used the *Strickland* test merely for proof that the proceeding was prejudiced when the defendant's counsel did not file a brief opposing the appeal of a suppression order. The Sixth Circuit's reasoning is further revealed when the opinion cites *O'Leary* and *Cronic* for support in its conclusion. *Fields, supra* at 485.

Like the court in *Fields*, this Court's persuasive authority in *Johnson, supra* at first seems to contradict the holding of *O'Leary*. However, although this Court applied the *Strickland* test, it did so because several important factual differences separated it from the above cases. In *Johnson*, the defendant's first counsel declined to file a brief opposing a prosecutorial appeal to this Court that was ultimately successful, and was therefore dismissed by the defendant. The defendant's newly appointed counsel promptly and explicitly refused to appeal this Court's decision, concluding that it would be frivolous. *Johnson, supra* at 129. The defendant later requested another representative for that reason, but the trial court agreed with his counsel, explaining that counsel was correct in its assessment, as did this Court in a subsequent appeal: "Both the trial court and his appointed counsel concluded that such an appeal would have been futile and would only serve to unnecessarily delay the defendant's trial and they were right." *Johnson, supra* at 135. These circumstances are vastly different from those in the case at hand. The circumstances in *Johnson* expressly negate an assumption of prejudice, as both defendant counsel and the trial court exercised deliberate and sound legal judgment. The United State Supreme Court in *Smith v Robbins*, 528 US 259, 286; 120 S Ct 746; 145 L Ed 2d 756 (2000), examined the relationship between a defendant's right to counsel and the presumption of prejudice, or the lack thereof, as follows:

> The applicability of *Strickland's* actual-prejudice prong to Robbins's claim of ineffective assistance follows from *Penson* [*v Ohio*, 488 US 75, 109 S Ct 346, 102 L Ed 2d 300 (1988)] where we distinguished denial of counsel altogether on appeal, which warrants a presumption of prejudice, from mere ineffective assistance of counsel on appeal, which does not. [*Id.*]

The defendant's counsel in *Johnson* made a strategic decision, consciously determining not to appeal, which was deemed sufficiently persuasive by both this Court and the court below.

In contrast, the facts of the present case reveal a complete denial of assistance of counsel. First, defendant's trial counsel rendered herself unavailable for prompt service of notice of the prosecution's appeal, by failing to inform the prosecution of her business address, since it differed from that published in the Bar Journal. Second, while counsel did move for a stay of the proceedings, she failed to seek reconsideration by this Court or to seek leave to appeal to our Supreme Court once this Court ruled against her client. Therefore, it is reasonable to conclude that defendant justifiably relied on his belief that he was being zealously represented in the appeal, and his counsel's failure to represent him as she led him to expect may further violate his right to assistance of council. *Roe, supra* at 480. In this case, in which the trial court clearly

supports its suppression order, a supporting brief by counsel could not be considered frivolous, nor could failing to file it be considered reasonably strategic.

The available authority indicates that an interlocutory appeal similar to that in the current case constitutes a critical stage. The Seventh Circuit held in *O'Leary* that a "critical stage is one where potential substantial prejudice to defendant's rights inheres in the particular confrontation and where counsel's abilities can help avoid that prejudice. *O'Leary*, at 1014, citing the Supreme Court in *Coleman v Alabama*, 399 US 1; 90 S Ct 1999; 26 L Ed 2d 387 (1970). In fact, the *O'Leary* court implied that the appeal was a critical stage by simply noting the admitted evidence's resultant utility to the prosecution during the trial:

> The State's Rule 604(a)(1) appeal from the state trial court's suppression hearing was equally as critical. Surely the result was no less crucial to Thomas than Judge Kaplan's ruling on the suppression motions. Indeed, after the appellate court reversed the state trial court's suppression of Thomas's and Clark's statements, the disputed evidence was admitted at Thomas's trial and he was convicted. *O'Leary, supra* at 1014.

The Sixth Circuit concurred in *Fields*, and the Fifth Circuit followed suit in dicta:

> Goebel argues that counsel's failure to file an answer brief in the interlocutory appeal deprived him of his constitutional right to counsel at a critical stage of the criminal proceeding and therefore the presumption of prejudice under *Cronic* applies. He relies on *United States ex rel Thomas v O'Leary*, 856 F2d 1011 (CA 7, 1988), in which the court applied the presumption of prejudice in *Cronic* where appellate counsel failed to file an opposition brief in the appeal of an order granting suppression. The court in *Thomas* expressly found that the interlocutory appeal was a critical stage of the proceedings. We agree… *Goebel v State*, 848 So2d 479-80 (Fla. Dist. Ct. App. 2003).

In short, defendant was denied assistance of counsel at the critical stage of an interlocutory appeal of an order suppressing evidence of the weapon he allegedly used in the commission of a crime for which he was convicted. Although Michigan Law does not speak directly to this matter, substantial persuasive authority indicates, and we agree, that defendant was both completely denied assistance of counsel and that the interlocutory appeal was a critical stage in his trial.

Defendant also argues that the trial court erred in admitting Holman's identification of him based on defendant's voice. Our decision in the preceding issue renders the identification issue moot.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper