

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

HENDERSON JACKSON,

Defendant-Appellee.

UNPUBLISHED
October 27, 1998

No. 208666
Kent Circuit Court
LC No. 92-057804 FC

Before: Saad, P.J., and Jansen and Bandstra, JJ.

PER CURIAM.

This case is on remand from the Supreme Court for consideration as on leave granted. 456 Mich 892 (1997). The prosecution appeals from the trial court's order of February 4, 1997 granting defendant a new trial on the basis of ineffective assistance of counsel. We reverse.

On July 20, 1992, a jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c). On October 5, 1992, at sentencing, the trial court granted the prosecution's motion to accord "collateral estoppel/res judicata status" to the prior determination in front of a different Kent Circuit Court judge that defendant was guilty of being a fourth habitual offender,¹ MCL 769.12; MSA 28.1084. Defendant was, thus, sentenced as a fourth habitual offender to life imprisonment.

Defendant appealed to this Court. This Court remanded to the trial court for a *Ginther*² hearing to determine whether defendant was denied the effective assistance of counsel by counsel's failure to move to suppress evidence of his semen and body hair samples (deoxyribonucleic acid or DNA evidence) on the basis that the affidavits in support of the search warrants to obtain that evidence were insufficient. *People v Jackson*, 213 Mich App 245, 247; 539 NW2d 758 (1995), nullified 451 Mich 885 (1996). Following the *Ginther* hearing, the trial court concluded that the affidavits were subject to attack and that trial counsel's failure to move to suppress the evidence on this ground constituted ineffective assistance of counsel. The trial court then granted defendant a new trial.

The prosecution argues that the trial court erred when it granted defendant a new trial because, although trial counsel's failure to move to suppress the DNA evidence may have been unreasonable, defendant cannot show that he was prejudiced by trial counsel's deficiency. We agree.

A trial court's decision regarding a motion for new trial is reviewed for an abuse of discretion. *People v Leonard*, 224 Mich App 569, 578; 569 NW2d 663 (1997). This Court's review, however, requires us to examine the reasons given by the trial court in order to determine if the trial court abused its discretion. *Id.*, p 580. The trial court granted defendant's motion for new trial based upon a finding that he was denied the effective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that there the representation so prejudiced defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). In order to show that counsel's performance was deficient, defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To demonstrate prejudice, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*, pp 687-688.

Although we agree that the affidavits supporting the search warrants were defective in several respects and, therefore, subject to attack, we find that the failure to move to suppress the DNA evidence does not constitute ineffective assistance of counsel because defendant cannot show that counsel's representation prejudiced him. Even if counsel had moved successfully before trial to suppress the DNA evidence on the basis of improper search warrants, the DNA evidence would have been inevitably discovered and, thus, properly admitted at trial.

In *People v Kroll*, 179 Mich App 423, 429; 446 NW2d 317 (1989), this Court discussed the inevitable discovery exception to the exclusionary rule:

The purpose of the inevitable discovery doctrine is to block setting aside convictions that would have been obtained without police misconduct. . . . The inevitable discovery doctrine is recognized in Michigan and may justify the admission of otherwise tainted evidence which ultimately would have been obtained in a constitutionally accepted manner. *People v Spencer*, 154 Mich App 6; 397 NW2d 525 (1986); *People v Harajli*, 148 Mich App 189; 384 NW2d 126 (1986), lv den 426 Mich 867 (1986). The test is whether the prosecution can establish by a preponderance of the evidence that that the information ultimately or inevitably would be discovered by lawful means.

Had trial counsel moved to suppress the DNA evidence, as the product of an invalid search warrant, the same evidence would have been discovered by lawful means, namely a valid search warrant.

A search warrant may not issue unless probable cause exists to justify the search. *People v Sloan*, 450 Mich 160, 166-167; 538 NW2d 380 (1995). Probable cause exists when the facts and circumstances would allow a person of reasonable prudence to believe that the evidence of a crime or contraband sought is in the stated place. *People v Chandler*, 211 Mich App 604, 612; 536 NW2d

799 (1995). Further, a new affidavit would have to be free of the taint of the original search. Put another way, the facts gleaned from the original DNA testing of the blood could not be used to establish probable cause. *People v Hill*, 192 Mich App 54, 56; 480 NW2d 594 (1991); *People v Crampton*, 180 Mich App 288, 294; 446 NW2d 626 (1989).

There was sufficient information available to establish probable cause for the issuance of a valid search warrant. The DNA obtained from the crime scene was properly obtained and the question was whether defendant's DNA matched the semen obtained at the crime scene. Even if the initial search warrant to obtain defendant's blood was improper, his blood would inevitably have been obtained based on the following information. Defendant was discovered within two blocks of the victim's home peering through the window of another woman's house. Defendant was disheveled and dirty, his clothes were sweat-stained, and he had in his possession a flashlight and deodorant. The victim described her assailant as smelling extremely offensive and having a raspy voice. Defendant was described by a police officer as having a raspy voice.

A line up occurred between the drafting of the first affidavit and the second affidavit.³ The victim did not identify defendant in the line up. However, no reference to the line up was made in the second affidavit. The circumstances surrounding the line up are nearly as compelling to establishing probable cause than if the victim were to have actually identified defendant at the line up. Defendant refused to stand without his crutches and, although he spoke the fictitious information (name, address, etc.), he refused to speak the tell-tale phrase, "I'm a dope fiend." The victim did not identify defendant, but instead identified the man next to defendant. The significant difference was the crutches which the victim testified was the deciding factor in her ultimate choice.

At the *Ginther* hearing, the trial court found that the description of the suspect and the representation that defendant generally matched that description to be the most troubling defects in the original affidavits. Although the trial court found that there were some consistencies, such as skin color, stocky build, and general height, it noted that the ages were completely inconsistent and improperly admitted from the affidavit. The trial court did, however, recognize that defendant looked much younger than his stated age. In our opinion, if an affidavit included the consistencies as well as the inconsistencies between the suspect's description and defendant's appearance, and also included the circumstances in which the victim viewed her assailant,⁴ the information would be fairly presented and sufficient for a magistrate to still conclude, considering all the information, that probable cause existed for the search.

The original affidavit also included general references to defendant's prior convictions for breaking and entering and sexual assaults, however, it omitted the fact that the breaking and entering occurred over twenty years ago. Although the convictions were relatively old, they were substantially similar and suggest a modus operandi.

Considering the totality of the foregoing evidence, a valid search warrant would have been and could have been obtained to extract blood from defendant. The DNA evidence would have been inevitably discovered and the fact that counsel failed to move to suppress the evidence is of no moment. Defendant cannot show that he was prejudiced by counsel's representation under these circumstances

because there is no showing that there is a reasonable probability that the result of the proceeding would have been different. The DNA evidence would have been inevitably discovered pursuant to a valid search warrant. Therefore, the trial court erred in finding that defendant was denied the effective assistance of counsel and abused its discretion in granting defendant a new trial. The trial court's order granting defendant a new trial is reversed.

Reversed.

/s/ Henry William Saad

/s/ Kathleen Jansen

/s/ Richard A. Bandstra

¹ The propriety of allowing the trial court to apply the doctrine of res judicata under these circumstances was affirmed by this Court in defendant's prior appeal. *People v Jackson*, 213 Mich App 245, 248-251; 539 NW2d 758 (1995); nullified 451 Mich 885 (1996).

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³ Defendant was subject to two blood drawings because the blood obtained by the first drawing degraded and became insufficient for testing.

⁴ The victim had a split-second glimpse of her assailant before he threw a blanket over her head.