

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONNIE GARRETT,

Defendant-Appellant.

UNPUBLISHED

January 11, 2002

No. 221184

Wayne Circuit Court

Criminal Division

LC No. 97-003229

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

RONNIE GARRETT,

Defendant-Appellee.

No. 228653

Wayne Circuit Court

Criminal Division

LC No. 97-003229

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right from his jury conviction of felony murder, MCL 750.316, and first-degree home invasion, MCL 750.110A(2) (Docket No. 221184), while the prosecution appeals on leave granted from the trial court's order granting defendant a new trial on the basis of ineffective assistance of trial counsel (Docket No. 228653). Because we remand to the trial court for a more complete ruling on the motion for new trial, we hold defendant's appeal in abeyance and retain jurisdiction pending the trial court's further ruling.

I

This case arises out of the death, by blunt force trauma to the head, of seventy-three year-old Mayrose Hall, who lived by herself in her home in Detroit. The prosecutor's theory of the case was that defendant broke into Hall's home, intending to commit a larceny, and when he was surprised to find her at home, he struck and killed her.

The evidence against defendant was not overwhelming and a previous jury trial ended in a hung jury¹. There was no eyewitness to the killing and no physical evidence linked defendant to the crime or placed him inside the home of the victim. The only witness to identify defendant at trial, a neighbor of the victim, had failed to identify defendant in a photo line-up and a corporeal line-up, identifying someone else in both. In another corporeal line-up with defendant present, the same witness failed to identify anyone. However, descriptions of a car similar to the one defendant drove as well as defendant's statement to the police² placed him in the neighborhood around the time of the crime.

In addition, defendant's wife testified at his preliminary examination. Her testimony was read into the record of both trials. The gist of the testimony was that defendant told his wife that he had entered a home while distributing flyers in the neighborhood, was surprised to find a lady in the house and pushed her down. According to her testimony he did not admit striking the unidentified woman and he denied intending to hurt her. She also testified that defendant threatened her with harm if she ever revealed what he told her.

Defendant's wife was precluded from testifying at both trials on the basis of the marital privilege although she testified during the motion for new trial hearing that she wanted to testify and retract her preliminary examination testimony. Defendant also testified at the hearing that he wanted his wife to testify at trial.

As noted, defendant was convicted as charged, of first-degree felony murder and first-degree home invasion. After sentencing he moved for a new trial on the basis of ineffective assistance of trial counsel.

A three-day hearing was conducted³ over a six-week period during which defendant and his wife both testified. Numerous other witnesses also testified, including three lawyers: the first lawyer hired to represent defendant after his arrest and who was replaced about a month before the first trial, an expert criminal defense attorney, and the lawyer who represented defendant in both trials.

The trial court announced its decision on the record about six weeks after the last day of the hearing. It addressed twelve instances of alleged ineffective assistance of counsel, finding six of them to merit relief and ordering a new trial. This appeal on the prosecutor's application for leave to appeal followed.

II

The prosecution now argues that the trial court abused his discretion in granting defendant's motion for a new trial. We are unable to decide the issue on the basis of the current record.

¹ The same judge presided over both of defendant's trials.

² Defendant did not testify at either trial, but in his statement to police he denied involvement in the crime.

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

The legal framework on which we review this issue was succinctly set out in *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999):

A trial court may grant a new trial to a criminal defendant on the basis of any ground that would support reversal on appeal, or because it believes that the verdict has resulted in a miscarriage of justice. MCR 6.431(B). A trial court's decision to grant a new trial is reviewed for an abuse of discretion. See, e.g., *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). In order to determine whether the trial court abused its discretion, we are required to examine the reasons given by the trial court for granting a new trial. *Id.* This Court will find an abuse of discretion if the reasons given by the trial court do not provide a legally recognized basis for relief. See *id.*; *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 539-543; 506 NW2d 890 (1993).

The basis on which to evaluate claims of ineffective assistance of counsel is well known. In order to support the claim that counsel was ineffective a defendant must establish that

(1) the performance of counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that counsel used sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121, 115 S Ct 923; 130 L Ed 2d 802 (1995). *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998).

Put another way, defendant must show that his counsel's representation was so prejudicial that he was deprived of a fair trial and that but for the error, there was a reasonable probability that the result of the proceedings would have been different. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

However, as noted by the *Plummer* court,

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway*, supra at 687, 571 NW2d 557. When considering a claim of ineffective assistance of counsel, counsel's performance must be considered without the benefit of hindsight. Moreover, a defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). *Plummer*, supra at 308.

III

The trial court's ruling in this case is not entirely clear and does not fully analyze the issues raised by defendant as required by the case law cited above. Our purpose in remanding is to provide the court the opportunity to explain its ruling within the legal framework outlined in the case law so that meaningful appellate review is possible. On remand the trial court is

directed to address each of the instances of ineffective assistance of counsel as determined in its April 2000 opinion within these parameters. The individual findings of ineffective assistance of counsel are as follows.

A. Failure to Move to Suppress In-Court Identification

As noted, only one witness identified defendant⁴ at trial in spite of his earlier inability to identify defendant on three separate occasions⁵. Trial counsel testified at the motion hearing that while he believed there might have been a legal basis on which to move to suppress the identification testimony, he chose to forego objection on the basis of some rather convoluted reasoning, but he also acknowledged that it is never in the best interests of a criminal defendant to be identified. This was the keystone of the trial court's ruling who determined that the failure to attempt to suppress the identification testimony was "ineffective on its face" and we agree. We can conceive of no valid strategy for failing to seek suppression of the only positive identification of defendant at trial where there is at least an arguable basis to do so.

However, the inquiry cannot end there. The trial court declined to reach the crucial issue of whether the failure of counsel to attempt suppression of the identification testimony might have made a difference in the outcome, saying instead, "[W]hether there is a reasonable likelihood of acquittal That's a guessing game." We do not agree, but point out that the determination of whether the outcome was affected by counsel's error is exactly the type of decision incumbent on the trial court to make in the circumstances of this case. It is the responsibility of the trial court to determine if counsel's failure to seek suppression of the identification testimony deprived defendant of a substantial defense which might have made a difference in the outcome of the trial.

The trial court heard both trials in this case and was in a unique position to determine whether the in-court identification had an independent basis or was so suggestive and conducive to misidentification as to deny defendant due process of law. *Stoval v Denno*, 388 US 293, 301-302; 87 S Ct 1967, 1972; 18 L Ed 2d 1199 (1967); *People v Anderson*, 389 Mich 155, 169; 205 NW2d 461 (1973); *People v Williams*, 244 Mich App 533, 542; 624 NW2d 575 (2001)⁶. Even if counsel's reasoning for not challenging the in-court identification was sound strategy in the first trial, it could not have been so in the second trial when he knew the witness would identify defendant and counsel was free to argue in a motion to suppress the identification that the witness was able to identify defendant *only* when defendant was isolated with defense counsel at

⁴ Another witness, also a neighbor of the victim, testified that she thought defendant looked like the man she saw in the neighborhood, but she wasn't sure of her identification. She also made an equivocal identification at a corporeal line-up

⁵ This witness identified defendant for the first time in defendant's first trial which ended in a hung jury.

⁶ We acknowledge that the case law in this area focuses on suggestive pretrial identification procedures. However, on the facts of this case, where the witness was given numerous opportunities to identify defendant before trial and failed on each occasion, it seems obvious that the circumstances of identifying defendant in the courtroom are fraught with suggestive potential and should have been challenged.

counsel table in the courtroom under circumstances which, presumably, were highly suggestive and might have provided sufficient support for a motion to suppress. See *People v Gray*, 457 Mich 107, 115; 577 NW2d 92 (1998); *People v Kachar*, 400 Mich 78, 96-97; 252 NW2d 807 (1977).

The trial court was also in a unique position to determine if the balance of the admissible evidence against defendant was sufficient to overcome the error of counsel even had the identification evidence been suppressed. Its failure to do so leaves us unable to determine whether there has been an abuse of discretion.

On remand we direct the trial court to fully explain its reasoning in the context of this case and the case law cited in this opinion and decide anew whether defendant is entitled to a new trial on the basis of ineffective assistance of counsel.

B. Failure of Counsel to Meet with Defendant

Counsel met with defendant only twice between the first and second trials, once to convey a plea bargain offer from the prosecutor. The trial court found this “on its face ineffective” given the seriousness of the charges against defendant and suggesting that it indicated a lack of adequate trial preparation on the part of counsel. However, the court again failed to explain how this failure actually affected the outcome of the second trial.⁷ *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). There is no question that having tried the case to a hung jury in the first trial, it would have been reasonable to expect that counsel and defendant would formulate different strategies for the second trial and that one meeting to do so might not be sufficient. However, whether this analysis played a part in the trial court’s ruling or how it would have affected the outcome is not clear from the record of the trial court’s ruling. On remand, we direct the trial court to explain its reasoning, i.e., why the lack of more meetings constituted ineffective assistance and whether it affected the outcome of the trial, either standing alone or cumulatively with the other instances of ineffective assistance.

C. Failure to Obtain Transcripts of the First Trial

The record is clear that trial counsel made no attempt to obtain transcripts of the first trial before the second trial started in spite of the fact that at least six months separated the two trials. The trial court ruled on this claim by merely saying, “I think that’s ineffectiveness.” Defense counsel made numerous arguments in support of the allegation that the failure to obtain the transcripts constituted ineffective assistance of counsel, but the court cited none of them in its ruling and gave no other reason for his conclusion. The court also failed to explain how this failure of counsel affected the outcome of the trial, in both instances leaving us to speculate about the basis for his decision⁸. On remand, we direct the trial court to explain why, in the

⁷ Near the end of his ruling on the motion, the trial court did indicate that the error in failing to move to suppress the identification testimony was exacerbated by the other errors and that the “totality of the findings” resulted in the conclusion that “Defendant was ineffectively represented.”

⁸ The trial court did imply that it accepted one of counsel’s arguments in this regard, where it found defendant’s Exhibit J outlining witness inconsistencies from the first trial to the second to
(continued...)

context of this case, the failure to obtain the transcript of the first trial amounted to ineffective assistance of counsel and how that failure affected the outcome of this trial.

D. Failure to Move to Redact Statement Regarding Defendant's Methadone Use

During the first trial while one of the investigating officers was reading defendant's statement to the jury, counsel successfully moved to have a reference to defendant's methadone use redacted. Counsel made no such attempt at the second trial. Again, the trial court ruled, "I think that was ineffective assistance of counsel", without further explanation and again we direct on remand the trial court to explain its reasoning.

E. Polygraph Reference

During trial an assistant prosecutor was called on to read the preliminary examination testimony of defendant's wife into the record. Defense counsel was then permitted to extensively cross-examine the witness⁹. During defense counsel's cross-examination, he asked the witness if she knew what a polygraph was. The prosecutor's objection was sustained and the examination moved on to other matters. The trial court's ruling on this matter in regard to the motion for new trial was as follows, "As I understand the law in this State, any mention of polygraph in the presence of the jury is reversible error. To do it purposefully or intentionally is ineffective."

The trial court cited no authority for the conclusion that even a mention of the word "polygraph" is reversible error, described no prejudice to defendant resulting from the brief, unanswered question and it made no effort to explain how the outcome of this case might have been affected by it. On remand the trial court is directed to address these matters left unanswered in its ruling.

F. Failure to Request a Detroit Jury

Because of the date of the offense in this case, defendant was entitled on request to a jury drawn only from residents of the City of Detroit. (3rd Circuit LCR 6.410.) Defense counsel demanded and received such a jury in his first trial. Defendant claimed that he clearly communicated to trial counsel after the first trial his demand for a Detroit jury on re-trial. No request for a Detroit jury was made before the second trial and defendant's jury panel was drawn from residents across Wayne County, not exclusively Detroit. Defendant claimed that this amounted to ineffective assistance of counsel and the trial court agreed saying "That is ineffective assistance of counsel", without further explanation or support. On remand the trial court is instructed to explain the basis for its conclusion that the failure to request a Detroit jury amounted to ineffective assistance and how that impacted the ultimate outcome of defendant's second trial.

(...continued)

support his ruling.

⁹This was a highly unusual procedure, but there was only minimal opposition to it by the prosecution.

Remanded for further proceedings consistent with this opinion. The trial court is ordered to conclude and file its ruling within sixty-three days of the release of this opinion. We retain jurisdiction.

/s/ Janet T. Neff

/s/ Jessica R. Cooper