

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UNPUBLISHED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

LC No. 97-003229

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

V

RONNIE GARRETT,

Defendant-Appellee.

No. 228653

Wayne Circuit Court

LC No. 97-003229

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

WILDER, J. (*concurring in part, dissenting in part.*)

I respectfully dissent from part III(A) of the majority opinion and concur in result only with regard to parts III(B) and III(E). I join with the majority on the balance of the opinion.

In part III(A) the majority concluded that the trial court failed “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.” I disagree.

In *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), this Court found that in order to find that a defendant was deprived of a fair trial due to ineffective assistance of counsel, the evidence must establish a reasonable probability that the result of the proceedings would have been different. A “reasonable probability” is “a probability sufficient to undermine confidence in the outcome.” *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998), quoting *United States v Bagley*, 473 US 667, 676-677; 105 S Ct 3375; 87 L Ed 2d 481 (1985). Here, the trial court stated that “whether there is a reasonable likelihood of acquittal. . . . That’s a guessing game.” This statement by the trial court constitutes a finding that the likely outcome of

suppression of the identification testimony is indeterminable, subject only to speculation, which does not amount to a showing that counsel's representation was so prejudicial that defendant was deprived of a fair trial. *People v Pickins*, 446 Mich 298, 309; 521 NW2d 797 (1994). Accordingly, I would find that there is insufficient basis for a remand on this issue, and that the trial court abused its discretion in granting a new trial because counsel failed to seek suppression of the identification testimony.

In part III(B), I agree with the majority that remand is necessary in order for the trial court to explain "why the lack of more meetings" between defendant and his counsel "constituted ineffective assistance of counsel and whether it affected the outcome of the trial," *ante* at 8. However, I disagree that on this record we can find as a matter of law that "it would have been reasonable to expect that counsel and defendant would formulate different strategies for the second trial." In contrast, because the prosecutor would expect defendant to change strategies for the second trial, and since defense obtained a hung jury – and therefore prevented defendant from being convicted – in the first case, it may have been sound trial strategy not to change strategies.

Finally, with regard to part III(E), this Court has held that "although reference to a polygraph test is inadmissible, it does not always constitute error requiring reversal." *People v Nash*, 244 Mich App 93, 98; 625 NW2d 87 (2000), citing *People v Pureifoy*, 128 Mich App 531, 535; 340 NW2d 320 (1983) and *People v Rocha*, 110 Mich App 1, 8; NW2d 657 (1981). Further, because this Court has acknowledged that "a reference [to a polygraph] may be a matter of defense strategy," *Nash, supra*, quoting *Rocha, supra*, it cannot be said that a defense counsel's intentional mention of a polygraph automatically establishes ineffective assistance of counsel. Thus, while I agree remand on this issue is warranted, I would instruct the trial court that on remand, it must determine whether defense counsel's reference to a polygraph examination was a matter of sound trial strategy, *Nash, supra; Rocha, supra*, and would also instruct the trial court to determine whether defense counsel's mention of the polygraph, in this case, "seriously affected the fairness of the trial" that required "reversal of defendant's convictions." *Nash, supra* at 101; see also *id.* at 98, citing *People v Kiczenski*, 118 Mich App 341, 346-347; 324 NW2d 614 (1982); *People v Turner*, 213 Mich App 558, 575-576; 540 NW2d 748 (1995), citing *Rocha, supra* at 8-9 (discussing the factors that a trial court must analyze in determining whether reversal is warranted based on erroneous mentioning of polygraph).

/s/ Kurtis T. Wilder