

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHAWN HARLAND THOMAS,

Defendant-Appellant.

UNPUBLISHED

November 23, 2004

No. 237034

Wayne Circuit Court

LC No. 00-002659-01

AFTER REMAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SHAWN THOMAS,

Defendant-Appellee.

No. 247888

Wayne Circuit Court

LC No. 00-002659

AFTER REMAND

Before: Murphy, P.J., and Griffin and White, JJ.

PER CURIAM.

In these consolidated appeals, defendant, in Docket No. 237034, appealed as of right his bench trial convictions for second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b. In Docket No. 247888, the prosecution appealed by leave granted the trial court's order granting defendant's motion for a new trial predicated on defendant's claim of ineffective assistance of counsel. In our original unpublished per curiam opinion in this case, we held:

We remand for a ruling on the issue of prejudice in regard to the trial court's order granting defendant a new trial in Docket No. 247888, and we reserve ruling on the appellate issues raised in Docket No. 237034 until final resolution of Docket No. 247888 is completed and then only if necessary.

[*People v Thomas*, unpublished opinion per curiam of the Court of Appeals, issued July 29, 2004 (Docket Nos. 237034 & 247888).]¹

In the opinion, we ruled that “the trial court did not err in finding that counsel was ineffective and that counsel’s performance was deficient.” *Id.*, *slip op* at 4. However, we remanded to the trial court because the court’s “ruling does not include a specific, clear, and necessary finding on the matter of prejudice, i.e., whether there existed a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.” *Id.* To justify reversal on the basis of ineffective assistance of counsel, a defendant must satisfy a two-part test by showing (1) a deficient performance by counsel, and (2) prejudice to the defendant. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).² On remand to the trial court, the court stated:

[T]his court firmly states that had there been evidence presented in the trial to show Witness Curry and Witness Lockhart’s motivation to lie, had there been evidence to show Witness Curry and Witness Lockhart’s opportunity to contrive consistent versions of the offense, and had defense counsel utilized the scientific evidence readily available, with such, would have established that a reasonable probability existed that the results would have been different. That’s my ruling.

We permitted the prosecutor to file a supplemental brief after remand. However, in this brief, the prosecutor does not argue error relative to the trial court’s “prejudice” finding on remand, but rather argues that we misapplied the law and imposed are “own findings of fact without any deference to counsel’s professional judgment over trial strategy.”³ In other words, the prosecutor is challenging our prior ruling that found no error with respect to the trial court’s conclusion that defense counsel’s performance was deficient. For the most part, the prosecution is presenting now the same arguments presented in its original appellate brief. This opinion does not concern a motion for rehearing or reconsideration, but rather it is meant to address any matters arising out of the issue for which remand was ordered. The prosecutor never filed a motion for reconsideration of our original opinion. Accordingly, if the prosecutor wishes to challenge our ruling in regard to the affirmance of the trial court’s finding that counsel’s performance was deficient, it must do so in an application for leave to appeal presented to the Michigan Supreme Court. Moreover, assuming that we must consider the prosecutor’s

¹ An accompanying order of remand was also issued. *People v Thomas*, unpublished order of the Court of Appeals, entered July 29, 2004 (Docket No. 247888).

² Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law, with questions of constitutional law being reviewed de novo and factual findings being reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

³ The prosecutor does briefly accuse the trial court of simply relying on our opinion and not reviewing the record in rendering its finding of prejudice. However, the trial court had previously looked extensively at the issue of ineffective assistance of counsel in the evidentiary hearing and our remand order, to a great degree, was merely seeking clarification.

argument, it is devoid of merit. We applied the correct legal principles concerning an ineffective assistance of counsel claim and did not impose our own findings without deference to defense counsel's judgment. *Thomas*, slip op at 2-4. We reviewed the evidence presented at the *Ginther*⁴ hearing which was relied on by the trial court in support of its ruling to grant a new trial, and we found no error. *Id.* We acknowledged that a defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy, *id.*, slip op at 2, but counsel's actions did not reflect sound trial decisions. The problem regarding the arguments presented by the prosecutor, aside from being improper at this time in this forum, is that the arguments address a particular issue or matter, such as the scientific evidence, and maintain that the evidence would not have benefited defendant premised on the prosecutor's interpretation of the evidence. A new trial was granted, in part, because the trial court was not even permitted to interpret and weigh this evidence itself for the reason that it was never presented by defense counsel. The prosecutor is forced to address and interpret numerous matters that were never made known to the trial court.

Considering that the prosecutor does not challenge the trial court's finding of prejudice, and also taking into consideration the record and that this case involved a bench trial making it difficult to find error in a judge concluding that there existed a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different, we find no error in the court's ruling on remand and affirm the order granting defendant a new trial.

Having determined that the trial court did not err in granting defendant a new trial, issues presented in Docket No. 237034 become moot. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). Whether defendant was competent to stand trial and waive his right to a jury trial is now irrelevant. Of course, defendant has the right to raise competency issues in relation to the new trial. Additionally, defendant shall again be presented with the choice of demanding a jury trial or waiving the right to a jury trial and requesting a bench trial. We note that a bench trial request is subject to the prosecutor's consent and the approval of the trial court as provided in MCR 6.401.

Affirmed with respect to Docket No. 247888. Resolution of issues presented in Docket No. 237034 is deemed unnecessary as the issues are moot.

/s/ William B. Murphy
/s/ Richard Allen Griffin
/s/ Helene N. White

⁴ *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973).