STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED September 16, 2008
v	No. 275750 Grand Traverse Circuit Court
JAMES FREDRICK GAINFORTH, Defendant-Appellee.	LC No. 84-004452-FC

Before: Sawyer, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Following a jury trial in 1985, defendant was convicted of first-degree premeditated murder, MCL 750.316, and armed robbery, MCL 750.529. He was sentenced to life imprisonment for the murder conviction and 40 to 60 years' imprisonment for the armed robbery conviction. Plaintiff now appeals by leave granted from the trial court's December 20, 2006, order granting defendant's motion for relief from judgment, which awarded defendant a new trial. We reverse.

I. Background

Defendant's convictions arise from the 1984 robbery of a Shell Mini-Mart in Traverse City, during which a store clerk, James Burton, was fatally shot. Two accomplices, Kevin Snyder and Doug Hutchinson, testified against defendant at trial and identified defendant as the shooter. There was no other direct evidence implicating defendant in the offense.

After defendant was convicted, he appealed his convictions to this Court. His appellate attorney, Michael Haley, who was also defendant's trial attorney, filed an *Anders*[1] motion to withdraw on the ground that the appeal was frivolous. Defendant filed a response and requested that substitute appellate counsel be appointed in order to raise allegedly meritorious issues. This Court granted the motion to withdraw and affirmed defendant's convictions and sentences, stating "after a full examination of all the proceedings, that the appeal is wholly frivolous." *People v Gainforth*, unpublished order of the Court of Appeals, entered March 10, 1987 (Docket No. 85697). The Supreme Court subsequently denied defendant's letter request for counsel.

[1] *Anders v California*, 386 US 738; 87 S Ct 1396; 18 L Ed 2d 493 (1967).

People v Gainforth, unpublished order of the Supreme Court, entered January 20, 1988 (Docket No. 80542).

On August 12, 2004, defendant filed a pro se motion for relief from judgment. He asserted that Haley was ineffective at trial for failing to present medical evidence that would have shown that he was physically incapable of accurately aiming a rifle. He also asserted that the prosecution presented false testimony when it allowed its firearms expert to testify that he could not exclude the recovered rifle as the murder weapon. The trial court found that there was possible merit to defendant's motion and appointed an attorney to represent him. The trial court conducted an evidentiary hearing at which defendant presented evidence that he was discharged from the army for failure to qualify with his weapon due to vision problems. He also presented the testimony of Dr. Kenneth Musson, who examined defendant's eyes in February 2006. The trial court found that the issue regarding the firearms expert's testimony was not a basis for relief. With regard to defendant's ineffective assistance of counsel claim, however, the trial court found that defendant showed that there was good cause as to why he did not raise this issue on direct appeal and defendant suffered actual prejudice as a result. Therefore, it granted defendant's motion and ordered a new trial.

II. Motion for Relief from Judgment

"It is well established that we review a trial court's grant of relief from judgment for an abuse of discretion and that we review a trial court's findings of fact supporting its ruling for clear error." *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003) (citations omitted). This Court must first "consider a trial court's findings of fact and then [] consider that court's ultimate decision." *Id*. at 682. "[A] trial court's findings of fact are clearly erroneous 'if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made.' " *Id*., quoting *People v Gistover*, 189 Mich App 44, 46; 472 NW2d 27 (1991). Deference is given to the trial court's findings, but those findings may be clearly erroneous even if there is some evidence to support the findings. *McSwain, supra* at 682-683. "[A]n abuse of discretion can be found only where 'an unprejudiced person, considering the facts on which the trial court [relied], would find no justification or excuse for the ruling made.' " *McSwain*, *supra* at 685, quoting *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000).[2]

MCL 6.508(D)(3), which governs motions for relief from judgment, provides in pertinent part:

> (D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion
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> * * *

[2] The *McSwain* Court rejected the default abuse of discretion standard announced in *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), in favor of this definition as the standard applicable to motions for relief from judgment. *Id*. at 685.

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(iv) in the case of a challenge to the sentence, the sentence is invalid.

The court may waive the "good cause" requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

In his motion for relief from judgment, defendant argued that Haley was ineffective at trial for failing to investigate and present evidence of his vision defect. Because this issue could have been raised on direct appeal, defendant first had to prove good cause for not raising it then. MCR 6.508(D)(3). Defendant also asserted that Haley was ineffective for failing to raise the issue of ineffective assistance of counsel on appeal. Ineffective assistance of appellate counsel can constitute good cause under MCR 6.508(D)(3). *People v Reed*, 449 Mich 375, 378-379; 535 NW2d 496 (1995).

> To excuse this double procedural default defendant must "show that [trial] counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." [*People v*] *Pickens*, [446 Mich 298, 303; 521 NW2d 797 (1994).] Defendant must also show that appellate counsel's performance fell below an objective standard of reasonableness and was constitutionally deficient. [*Reed, supra* at 390.]

Because we conclude that defendant failed to establish that he was prejudiced by Haley's performance, we need not determine whether the trial court clearly erred in finding that Haley's performance was objectively unreasonable.[3]

> "[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." [*Strickland v Washington*, 466 US 668, 697; 104 S Ct 2052; 80 L Ed 2d 674 (1984).]

"To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, *supra* at 694.

The evidence at the evidentiary hearing established that defendant had a vision defect at the time of the offense. His central vision was not clear. Whether there was a reasonable probability that the jury would have acquitted defendant had it been presented with evidence of his vision defect depends on the strength of the evidence supporting defendant's claim that he could not have accurately aimed the rifle to shoot Burton because of this vision defect. The evidence of defendant's vision defect only calls into question the accomplices' credibility and tends to highlight weaknesses in the prosecution's case if it supports defendant's contention that he was physically incapable of firing the fatal shot.

Defendant's army records do not definitively support such a conclusion. Defendant's army records did not specify at what distance defendant failed to qualify with his weapon. Defendant told a police officer when he was arrested that he could not qualify at 300 meters. Defendant's accomplice, Hutchinson, who was in the army at the same time as defendant, stated that he shot at distances of 100 to 300 yards. The shooter fired at Burton from, at most, 150 feet.[4] Assuming that 100 yards is the minimum distance needed to qualify with one's weapon in the army, such a distance is twice the maximum distance from which the fatal shot was fired—a significant difference.

Dr. Musson's testimony also did not support defendant's claim that he was physically incapable of firing the fatal shot. Dr. Musson estimated that defendant's vision improved to its current level, near normal, in at most one year from the date of his army discharge, which was

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[3] The trial court did not specifically address the prejudice prong before finding that defendant established good cause.

[4] Hutchinson testified at trial that defendant was 50 to 60 feet from the store when he fired at Burton, who was inside the store when he was shot. The parties appear to agree that the fatal shot was fired from over 100 feet away, and the maximum distance suggested by the parties is 150 feet.

months before the shooting. Even assuming defendant's vision at the time of the offense was the same as last noted in his army medical records, 20/50 in both eyes, based on Dr. Musson's testimony, defendant could read a 5.625-inch-high letter at 150 feet. Dr. Musson testified that because defendant's defect was relative, he could not discern a specific letter in the center of his vision, but he could detect that a letter was there. He stated that less visual acuity was needed to discern an object than to discern a letter at a distance. Burton, an adult male object, was shot in the back on the left side adjacent to his shoulder blade. Although defendant's defect may have prevented him from placing the rifle sight in the center of Burton's back or on a letter displayed on Burton's back, there is no evidence that it prohibited him from sufficiently seeing Burton and sighting in on his back. While Burton's back through the sight may not have been crystal clear, Dr. Musson's testimony indicates that defendant could see that an object was in the sight.

Because the evidence regarding the nature and effect of defendant's vision defect did not show that he could not have sufficiently aimed the rifle in order to fire the fatal shot, defendant failed to establish that there was a reasonable probability that the jury would have acquitted him had it heard the evidence. Thus, he failed to prove that Haley was ineffective as trial or appellate counsel. Accordingly, we conclude that the trial court clearly erred in finding that defendant established good cause under MCR 6.503(D)(3) and abused its discretion in granting defendant's motion for relief from judgment.

In light of our decision, it is unnecessary to address whether defendant established actual prejudice under MCR 6.508(D)(3)(b)(i) or if the trial court properly interpreted the "actual prejudice" standard. We note, however, that as interpreted in *McSwain, supra*, there appears to be no significant distinction between the actual prejudice standard under MCR 6.508(D)(3)(b)(i) and the prejudice prong of an ineffective assistance of counsel claim. Both require a finding that the jury would have been "reasonably likely to acquit" had it been presented with the omitted evidence. *Carbin, supra* at 600; *McSwain, supra* at 688.

As an alternative basis for affirmance, defendant asserts that the prosecutor knowingly presented false and misleading evidence when he allowed Lieutenant Michael Arrowood to testify at trial that changing parts of the rifle, superglue from a latent print examination, and cleaning were all possible explanations for why he was unable to exclude the recovered rifle as the murder weapon, even though the recovered bullet's striations did not match those on the test shots from the recovered rifle.

A prosecutor may not knowingly present false testimony. *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). Even if the prosecutor did not solicit false testimony from a state witness, due process is offended if he allows it to stand uncorrected when it appears. *Id.* at 568. Defendant does not argue that the prosecutor independently knew that Lieutenant Arrowood presented false testimony. Rather, he asserts that this knowledge was imputed to him. Defendant's only evidence that Lieutenant Arrowood presented false testimony is the contradictory opinion of firearms expert David Balash, who testified at the evidentiary hearing. To prove falsity of a statement in a perjury case, there must be "evidence of circumstances bringing strong corroboration of the contradiction." *People v Cash*, 388 Mich 153, 162; 200 NW2d 83 (1972). Simple contradiction is insufficient. *People v Kozyra*, 219 Mich App 422, 429; 556 NW2d 512 (1996). Balash's testimony only establishes the contradiction. Defendant did not show that Balash's opinion represented irrefutable scientific fact. Thus, his opinion was insufficient to establish that Lieutenant Arrowood purposefully testified falsely.

Further, even if Lieutenant Arrowood's testimony could be considered false, knowledge of falsity is not imputed to the prosecutor merely because a government witness's testimony conflicts with another's statement. *People v Lester*, 232 Mich App 262, 278; 591 NW2d 267 (1998). There was nothing inherent in Lieutenant Arrowood's testimony or facts known to any other government witness that suggested that the prosecutor should have known it was false. Accordingly, there was no error and the trial court did not abuse its discretion in refusing to grant defendant's motion for relief from judgment on this basis.

Reversed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra