STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED November 18, 2008
v	No. 279219 Wayne Circuit Court
ORLANDO FLOWERS, Defendant-Appellee.	LC No. 98-001357

Before: Schuette, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted of first-degree felony murder, MCL 750.316(1)(b), two counts of armed robbery, MCL 750.529, two counts of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to life imprisonment for the murder conviction, 15 to 30 years' imprisonment for each of the armed robbery convictions, six to ten years' imprisonment for each of the assault convictions, and two years' imprisonment for the felony-firearm conviction. This Court affirmed defendant's convictions and sentences. *People v Flowers*, unpublished opinion per curiam of the Court of Appeals, issued February 27, 2001 (Docket No. 218593). In addition, our Supreme Court denied defendant's application for leave to appeal. *People v Flowers*, 465 Mich 879; 635 NW2d 316 (2001). Defendant then sought relief from judgment in the trial court under MCR 6.500. The prosecutor appeals by leave granted from the trial court's order granting defendant's motion for relief from judgment. We reverse.

The prosecutor argues that defendant cannot meet the requirements of MCR 6.508 and, therefore, was not entitled to relief from judgment. Specifically, the prosecutor asserts that defendant did not overcome the presumption that his trial and appellate counsel were effective and, therefore, he cannot establish "good cause" for not raising his claims of ineffective assistance of counsel in his direct appeal or "actual prejudice" resulting from it. We agree.

I. STANDARD OF REVIEW

We review a trial court's ruling granting a motion for relief from judgment for an abuse of discretion. *People v Clark*, 274 Mich App 248, 251; 732 NW2d 605 (2007). The findings of fact supporting the trial court's decision are reviewed for clear error. *Id*. Once a defendant has

exhausted the appellate process, the only remaining manner in which to successfully challenge his conviction is by satisfying the requirements of MCR 6.500. *People v Watroba*, 193 Mich App 124, 126; 483 NW2d 441 (1992).

II. ANALYSIS

MCR 6.508(D)(3) bars a trial court from granting relief from judgment if the defendant is alleging "'grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in prior motion.'" *People v McSwain*, 259 Mich App 654, 680; 676 NW2d 236 (2003), quoting MCR 6.508(D)(3). To have that "bar" removed, the defendant must meet the burden of showing two factors: (1) "good cause for failure to raise such grounds on appeal or in a prior motion[,]" and (2) "actual prejudice from the alleged irregularities that support the claim for relief." *Id*.

"Good cause" may be established by proving the ineffective assistance of trial and appellate counsel. *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995). For purposes of challenging a conviction following a trial, the court rule defines "actual prejudice" as a situation where "but for the alleged error, the defendant would have had a reasonably likely chance of acquittal" or "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[.]" MCR 6.508(D)(3)(b)(i),(iii).

Defendant and codefendant Eric Woods arrived at the victims' residence in defendant's vehicle. Defendant brought a gun with him. Codefendant Woods used that gun to hold the residents at gunpoint, while defendant retrieved various items from the house. Codefendant Woods fatally shot one of the residents and seriously injured another. An additional individual was shot as well. Defendant made an incriminating statement to police while he was unaware that an attorney retained by his father had contacted the police department regarding his status. The trial court suppressed the statement, finding that defendant's rights were violated when police failed to inform him that the attorney had called.

At trial, Ricci Wafford, the surviving victim, testified that he heard codefendant Woods ask defendant if he should kill Wafford, to which defendant replied, "I don't give a . . . ." The trial court admitted the statement, over defense counsel's objection, for the non-hearsay purposes of showing its effect on the listener. Defendant did not testify at trial.

In his motion for relief from judgment, defendant first argued that trial counsel was ineffective for erroneously advising him that his suppressed statement could be used to impeach him if he testified, and for not challenging the admission of his conversation with Woods as being unfairly prejudicial. Defendant also alleged that appellate counsel was ineffective for not raising trial counsel's ineffectiveness with regard to these issues in defendant's direct appeal. The trial court granted defendant's motion, finding both counsels ineffective.

Both defendant, and the trial court, relied on *People v Gonyea*, 421 Mich 462; 365 NW2d 136 (1984). The prosecutor argues on appeal that *Gonyea* is not applicable. We agree.

In *Gonyea*, the defendant was sentenced on a plea-based conviction and then "prodded into accompanying two sheriff's detectives to retrace his route on the night of the killing he was

accused of having committed." *Id*. at 465. When the defendant asked to have his counsel present, he was incorrectly told that his counsel agreed to allow the detectives to question him. *Id*. Our Supreme Court first pointed out that Const 1963, art 1, § 20 of the Michigan Constitution and the Sixth Amendment are identical, as they relate to a defendant's right to counsel. *Id*. at 469.

The Court in *Gonyea* considered the applicability of *Harris v New York*, 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971), which stands for the proposition that statements taken in violation of a defendant's Fifth Amendment right to counsel may be used to impeach the defendant even though they may not be used substantively. The Court held that while it would apply *Harris* to cases involving Fifth Amendment rights, it would not apply it to Sixth Amendment cases. *Gonyea*, *supra* at 475-476. After discussing and distinguishing *Harris* at length, the Court held that "any inculpatory statements extracted from a defendant in violation of Const 1963, art 1, § 20 right to counsel are inadmissible for both substantive and impeachment purposes." *Id*. at 480-481. We find that *Gonyea* is expressly limited to cases involving Sixth Amendment violations.

The Sixth Amendment right to counsel attaches when "adversarial legal proceedings have been initiated against a defendant by way of indictment, information, formal charge, preliminary hearing, or arraignment." *People v Marsack*, 231 Mich App 364, 376-377; 586 NW2d 234 (1998). The statement at issue here was made before defendant was brought before a court or any formal charges were filed against him. Therefore, the correct basis for suppression of defendant's statement to police is a violation of his Fifth Amendment right to counsel and against self-incrimination.

In *People v Stacy*, 193 Mich App 19; 484 NW2d 675 (1992), the defendant made a statement to police after requesting counsel. *Id*. at 23. At trial, the prosecutor attempted to impeach the defendant with that statement. Citing *Gonyea*, *supra* at 473-483, this Court explained that the Michigan Supreme Court has not settled the issue of whether, under the Michigan Constitution, a defendant may be impeached with a statement taken by police in violation of the defendant's Fifth Amendment rights. *Stacy*, *supra* at 24.

Gonyea was a plurality decision, with Justice Cavanagh concurring that the statement was inadmissible for any purpose, but not clarifying if the result was based on Michigan or federal law. *Id*. at 24. This Court explained that under Michigan law, "'statements taken in violation of a defendant's right to counsel, if voluntary, may be used for impeachment purposes although they could not have been used in the prosecutor's case-in-chief.'" *Id*. at 25, quoting *People v Paintman*, 139 Mich App 161, 169-170; 361 NW2d 755 (1984). This Court expressly concluded that it would not diverge from the current state of the law and, therefore, the defendant could be impeached with his statement. *Id*. at 25.

Effective assistance of counsel is presumed and, therefore, defendant carries a high burden of successfully proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). This Court will not substitute its own judgment for defense counsel's trial strategy and will not use the benefit of hindsight to determine counsel's effectiveness. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Appellate counsel is entitled to this same form of deference. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

In *Stacy*, *supra* at 24, this Court refused to apply the *Gonyea* ruling to statements obtained in violation of a defendant's Fifth Amendment rights. Furthermore, our Supreme Court has not extended *Gonyea* to cases involving Fifth Amendment violations. Thus, defendant's statement that was taken in violation of his Fifth Amendment rights could have been used to impeach him, and his trial counsel advised him accordingly. Therefore, defendant could not overcome the presumption that trial counsel was effective, and he could not sufficiently establish that appellate counsel was deficient for failing to raise trial counsel's ineffectiveness with respect to the *Gonyea* issue on appeal.

In his motion for relief from judgment, defendant also argued that trial counsel was ineffective for not challenging the admission of the statements exchanged between defendant and codefendant Woods as more prejudicial than probative. The trial court agreed with defendant, finding that trial counsel should have moved for suppression of these statements and challenged them beyond merely objecting to them as hearsay at trial. This Court has held that evidence is unfairly prejudicial if it is marginally relevant and may be given undue weight by the jury. *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003).

Defendant's convictions were based on the theory that he aided and abetted codefendant Woods in the shootings. Defendant's statement, "I don't give a . . .," in response to codefendant Woods's question about killing Wafford is clearly prejudicial. However, it is also highly relevant to defendant's intent and knowledge. It was important for the jury to hear evidence regarding defendant's role in the crimes and his knowledge of codefendant Woods's intentions and actions. Therefore, defendant's response to codefendant Woods's question was more than "marginally relevant." Additionally, his response is probative of the fact that, at the very least, he knew codefendant Woods was holding Wafford at gunpoint and was fully aware that codefendant Woods was contemplating killing Wafford.

Trial counsel objected to the statement's admission on the basis that it was hearsay; however, the court overruled the objection. Clearly, trial counsel knew the statement was potentially damaging to defendant's case. However, he also presumably was aware of the statement's probative value and, therefore, decided that any further challenges to its admission may not be fruitful. To establish ineffective assistance of appellate counsel, defendant must rebut the presumption that "appellate counsel's decision regarding which claims to pursue was sound appellate strategy." *Hurst*, *supra* at 642. Appellate counsel challenged the admission of this statement on appeal. While he did not specifically claim that the statement was unfairly prejudicial, he too may have determined that trial counsel's decision not to raise that issue was sound trial strategy.

To sufficiently establish the "cause" prong of MCR 6.508(D)(3), a defendant must show that counsel "'made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Reed*, *supra* at 384, quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). We find that defendant has failed to meet this requirement.

Under MCR 6.508(D)(3), defendant must also establish "actual prejudice" in order to obtain relief from judgment. *Gonyea* does not apply; therefore, defendant would not have a "reasonably likely chance of acquittal" if trial counsel erroneously relied on that case when advising defendant. In addition, an additional objection by trial counsel to the admission of

defendant's conversation with codefendant Woods, whether successful or not, would in no way negate the significant evidence against defendant.

"MCR 6.508 protects unremedied manifest injustice, preserves professional independence, conserves judicial resources, and enhances the finality of judgments." *Reed, supra* at 378-379. Furthermore, "[n]either the guarantee of a fair trial nor a direct appeal entitles a defendant to as many attacks on a final conviction as ingenuity may devise." *Id*. at 389-390. Both "good cause" and "actual prejudice" are required for post-judgment relief under the court rule. Therefore, it was improper for the trial court to grant defendant's motion for relief from judgment if he did not meet his burden of satisfying the requirements in MCR 6.508.

If trial counsel was sufficiently effective, then appellate counsel was not ineffective for failing to raise the issue of trial counsel's effectiveness on appeal. In addition, appellate counsel was not ineffective for failing to pursue those claims that trial counsel allegedly overlooked. Defendant did not overcome the presumption that his trial and appellate counsel were effective and, therefore, the trial court erred in finding "good cause" for defendant's failure to raise his claims of ineffective assistance of counsel in his direct appeal and "actual prejudice" resulting from it.

Reversed.

/s/ Bill Schuette
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald