

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 17, 2011

v

RONALD GENE MCINTOSH, II,
Defendant-Appellant.

No. 299442
Kent Circuit Court
LC No. 09-001003-FH

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent and would remand for a *Ginther*¹ hearing to determine whether or not the defendant received ineffective assistance of counsel. The sole evidence upon which defendant's conviction rested was marijuana discovered on his person during a traffic stop. The officer testified that the basis for the traffic stop was a defective rear brake light, a traffic violation. See MCL 257.697; MCL 257.697b. Both the defendant and the driver of the vehicle in which defendant was traveling testified at trial that the brake light was not defective. If in fact the brake light was not defective, then the traffic stop was pretextual and the evidence arising from it would have had to be suppressed as discovered in violation of the Fourth Amendment. This would almost certainly have resulted in dismissal of the charges.

Despite this potentially dispositive Fourth Amendment issue, defense counsel failed to file a motion to suppress the evidence. I would accordingly remand for a *Ginther* hearing to determine whether a lawful basis for the stop existed and if not, whether defense counsel had any reasonable strategic basis to have failed to bring a motion to suppress. If there was no lawful basis for the stop and defense counsel did not have a reasonable strategic basis for not raising the issue, then defendant is entitled to a new trial.

/s/ Douglas B. Shapiro

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).