

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
October 25, 2011

v

LORINDA IRENE SWAIN,

Defendant-Appellee.

No. 304228
Calhoun Circuit Court
LC No. 2001-004547-FC

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order granting defendant's motion to supplement her motion for relief from judgment and hold an evidentiary hearing. We affirm and remand for further proceedings consistent with this opinion.

I

Defendant was convicted in 2002 of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). This Court affirmed defendant's convictions in February 2004. Defendant moved for relief from judgment in September 2004 and for a new trial in February 2005; the trial court denied both motions. Defendant did not appeal the trial court's denial of her motion for relief from judgment, and this Court denied defendant's delayed application for leave to appeal the trial court's denial of her motion for a new trial. On March 19, 2009, defendant filed another motion for relief from judgment through new appellate counsel, requesting relief on three grounds: (1) newly discovered evidence of innocence from defendant's neighbor and the victim's school bus driver and also the victim's brother's recantation of his trial testimony; (2) ineffective assistance of trial and appellate counsel for failing to investigate defendant's neighbor and the bus driver; and (3) ineffective assistance of appellate counsel for failing to either exhaust or advise defendant to exhaust her state appellate remedies. The trial court conducted an evidentiary hearing, concluded that there is a "significant possibility" that defendant is innocent, granted defendant's motion for relief, and set aside defendant's convictions. After denying plaintiff leave to appeal, our Supreme Court remanded the case to this Court, where we reversed the trial court's grant of judgment relief.

On remand to the trial court, plaintiff moved to both reinstate defendant's convictions and revoke bond. Defendant moved for leave to supplement her March 2009 motion for relief from judgment. Defendant argued in her motion that Dennis Book, who lived with her during a portion of the time relevant to the allegations of sexual abuse, told Detective Guy Picketts¹ that the sexual abuse never occurred. Defendant claimed that the prosecution committed a *Brady*² violation because this information was not disclosed to the defense before trial. Defendant also requested that the trial court resolve two undecided claims from her original March 2009 motion: (1) her claim that the victim's brother recanting his testimony was newly discovered evidence of innocence and (2) her claim of ineffective assistance of appellate counsel regarding the exhaustion of her state appellate remedies. The trial court granted defendant's motion to supplement and scheduled an evidentiary hearing to address defendant's additional and remaining claims for relief from judgment. The trial court declined to decide plaintiff's motion to reinstate defendant's convictions and revoke bond "until the matters before the Court [were] fully resolved; perhaps even resolved by further appellate proceedings." Plaintiff now appeals the trial court's decision.

II

Plaintiff argues that the trial court abused its discretion for two reasons when it granted defendant's motion to supplement her March 2009 motion for relief from judgment and scheduled an evidentiary hearing. First, plaintiff asserts that defendant's *Brady* claim is futile because defendant cannot establish both a *Brady* violation and the new evidence requirement for a successive motion for judgment relief under MCR 6.502(G) where defendant knew Book at the time of trial. Second, plaintiff asserts that the law of the case doctrine precludes defendant's claim relating to Book and "all similar issues," i.e., defendant's claims regarding the victim's brother's recantation and ineffective assistance of appellate counsel as to exhaustion of appellate remedies.

We review the trial court's decision to allow defendant to supplement her motion for relief from judgment for an abuse of discretion. See MCR 6.502(F) ("The court *may* permit the defendant to amend or supplement the motion at any time.") (emphasis added); *People v Seeburger*, 225 Mich App 385, 392; 571 NW2d 724 (1997) (stating that a statute's use of the word "may" indicates that a trial court has discretion to act); see also *Backus v Kauffman*, 238 Mich App 402, 405; 605 NW2d 690 (1999) ("We review a trial court's decision regarding a motion to amend pleadings for an abuse of discretion."). A trial court abuses its discretion when it reaches a decision that falls outside the principled range of outcomes. *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009). We also review for an abuse of discretion the trial court's decision to hold an evidentiary hearing. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). "Whether law of the case applies is a question of law subject to review de novo." See *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

¹ Picketts died in November 2010.

² *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

MCR 6.502(G)(2) provides that “defendant may file a second or subsequent motion [for relief from judgment] based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion.” MCR 6.502(F) provides that a trial court “may permit the defendant to amend or supplement the motion [for relief from judgment] at any time.”

The law of the case doctrine provides that the decision of an appellate court is controlling at all subsequent stages of litigation. *Johnson v White*, 430 Mich 47, 52-53; 420 NW2d 87 (1988). Thus, “an appellate court’s determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals.” *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). However, “[l]aw of the case applies . . . only to issues actually decided, either implicitly or explicitly, in the prior appeal.” *Id.*

We conclude that the trial court did not abuse its discretion when it granted defendant’s motion to supplement her March 2009 motion for relief from judgment and scheduled an evidentiary hearing. With respect to defendant’s claims involving the brother’s recantation and the alleged ineffective assistance of appellate counsel regarding the exhaustion of state appellate remedies, the trial court never decided these issues. Moreover, these claims were not subject to the previous appeal and, thus, neither explicitly nor implicitly decided by this Court. *Id.*; *People v Swain*, 288 Mich App 609, 612-646; 794 NW2d 92 (2010). Therefore, the law of the case does not bar consideration of these issues at an evidentiary hearing. *Grievance Administrator*, 462 Mich at 260; *Ashker*, 245 Mich App at 13.

With respect to defendant’s supplemental *Brady* claim, we conclude that the law of the case does not apply because this issue was not previously decided by this Court. *Grievance Administrator*, 462 Mich at 260; *Ashker*, 245 Mich App at 13. While plaintiff argues that the *Brady* claim is futile, plaintiff does not present this Court with any legal authority for the proposition that a trial court abuses its discretion by permitting a defendant to supplement a motion for relief from judgment with a futile claim. “An appellant may not merely announce [its] position . . . with little or no citation of supporting authority.” *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Therefore, plaintiff has abandoned this argument. *Id.* But, notwithstanding plaintiff’s abandonment, we conclude that the trial court’s decision to both grant defendant’s request to supplement her motion for judgment relief with the *Brady* claim and schedule an evidentiary hearing to address it did not fall outside the range of principled outcomes. MCR 6.502(F); *People v Swain*, 288 Mich App 609, 632; 794 NW2d 92 (2010) (explaining that a trial court may proceed in any lawful manner when determining whether a successive motion for relief from judgment falls within the exceptions of MCR 6.502(G)(2)).

Accordingly, we remand this case to the trial court for an evidentiary hearing so that it may consider under MCR 6.502(G) defendant’s claims regarding the brother’s recantation, ineffective assistance of appellate counsel, and the alleged *Brady* violation.

III

Plaintiff argues that the trial court should have remanded defendant to the department of corrections. We review the continuance of bond until final disposition and the grant of bond pending appeal for an abuse of discretion. MCR 7.209(B)(2); *People v Tate*, 134 Mich App 682, 693; 352 NW2d 297 (1984); see also *Brandimore v Eaton Rapids Justice of the Peace*, 15 Mich App 676, 681-682; 167 NW2d 360 (1969). In this case, the trial court clearly articulated on the record at the May 16, 2011, hearing that “there is absolutely nothing in the record in this Court to suggest any violation of the conditions of bond since the defendant was first released, or to indicate any substantial risk of non-appearance.” Plaintiff does not dispute the trial court’s finding. Therefore, we conclude that the trial court had discretion to defer the motion to reinstate defendant’s convictions and revoke bond until the subsequent proceedings (including appellate proceedings) were finished; the trial court did not abuse that discretion. MCR 7.209(B)(2); *Tate*, 134 Mich App at 693; *Brandimore*, 15 Mich App at 681-682.

IV

Plaintiff argues that this Court should remand this case to a different trial court judge. Plaintiff asserts that it is unreasonable to expect the trial court judge to put his previously expressed finding, that there is a significant possibility that defendant is innocent of the crimes, out of his mind. In addition, plaintiff notes that the trial court previously erred when it concluded that there is a third exception to the bar to successive motions for relief from judgment. Plaintiff also notes that the trial court refused to revoke bond and remand defendant to the department of corrections until after further proceedings were finished.

“A case should be assigned to a different judge if it would be unreasonable to expect the trial judge, given [the judge’s] handling of the matter, to be able to put previously expressed findings out of mind without substantial difficulty.” *People v Pillar*, 233 Mich App 267, 270-271; 590 NW2d 622 (1998). Thus, we “may remand to a different judge if the original judge would have difficulty in putting aside previously expressed views or findings, if reassignment is advisable to preserve the appearance of justice, and if reassignment will not entail excessive waste or duplication.” See *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004).

Although plaintiff argues that the trial court previously made an erroneous conclusion that there is a third exception to the bar to successive motions for relief from judgment, we “will not remand to a different judge merely because the judge came to the wrong legal conclusion.” *Id.* at 603; see also *People v Houston*, 179 Mich App 753, 759; 446 NW2d 543 (1989) (stating that erroneous rulings against a litigant are not a basis for disqualification). Moreover, as noted above, the trial court did not abuse its discretion by allowing defendant to remain on bond. MCR 7.209(B)(2); *Tate*, 134 Mich App at 693. In addition, the trial court indicated that it was considering plaintiff’s motion to supplement her motion for relief from judgment within the confines of MCR 6.502(G). Plaintiff has not demonstrated that the trial court will not “be able to put previously expressed findings” or rulings out of mind without substantial difficulty or that the appearance of justice will be served by remanding to a different judge. *Pillar*, 233 Mich App 270; *Bayati*, 264 Mich App at 602-603. Furthermore, we are confident that the trial court will follow the protocol of the Michigan Court Rules governing postappeal relief with due appreciation of the importance of finality in our justice system. See generally MCR 6.500 *et*

seq.; *Blackledge v Allison*, 431 US 63, 83-84; 97 S Ct 1621; 52 L Ed 2d 136 (1977) (Powell, J., concurring); *People v Maxson*, 482 Mich 385, 398; 759 NW2d 817 (2008). Accordingly, we decline plaintiff's request to remand to a different trial judge.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Henry William Saad
/s/ Jane M. Beckering