

Court of Appeals, State of Michigan

ORDER

People of MI v Jeffrey Paul Gioglio

Docket No. 293629

LC No. 2008-001640-FH

Michael J. Kelly
Presiding Judge

Kirsten Frank Kelly

Stephen L. Borrello
Judges

For the reasons stated below, the Court VACATES the trial court's March 22, 2010 opinion and order denying defendant's motion for a new trial premised on ineffective assistance of counsel and REMANDS the case to the trial court to render an opinion (written or oral) with more definite findings and issue a new order resolving defendant's ineffective assistance of counsel claim.

On April 5, 2011, this Court issued a published opinion in the above-captioned matter. A majority of the panel determined that defendant's trial lawyer did not subject the prosecutor's case to meaningful adversarial testing. See *People v Gioglio*, ___ Mich App ___, at ___, slip op at 12-16 (2011). Because his trial lawyer did not subject the prosecutor's case to meaningful adversarial testing, the majority presumed that defendant suffered prejudice as provided under *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). *Gioglio*, ___ Mich App at ___, slip op at 16. The dissent disagreed with the majority's conclusion that prejudice should be presumed under *Cronin*. Instead, the dissent would have analyzed defendant's claim under the test stated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *Gioglio*, ___ Mich App at ___, dissenting op at 11.

On September 21, 2011, in lieu of granting leave to appeal, our Supreme Court determined that, for the reasons stated in the dissent, the majority erred when it concluded that prejudice should be presumed under *Cronin*. See *People v Gioglio*, ___ Mich ___ (2011). Accordingly, it remanded this case to "the Court of Appeals for consideration of whether defense counsel's performance was ineffective under *Strickland*" in addition to consideration of the remaining issue raised by defendant. *Id.*

However, as the majority of the panel explained, the trial court did not resolve the conflicts between the prosecutor's version of events and the version provided by defendant's trial lawyer. See *Gioglio*, ___ Mich App at ___, slip op at 16-17, 19. The trial court also did not make specific findings as to several key issues. The trial court did not make a specific finding as to whether defendant's trial lawyer chose not to cross-examine the complainant for a legitimate strategic reason or because she thought the complainant "was truthful and, for that reason, did not deserve to be put through a cross-examination on behalf of her guilty client." *Id.* at 17. The trial court also did not make specific findings as to whether defendant's trial lawyer (1) told the prosecutor that she believed that her client was guilty, (2) had a bias against defendant and acted on that bias, or (3) expressed enthusiasm for defendant's lengthy sentence. See *id.* at 17. The trial court also did not address a series of other actions that defendant's trial counsel took or might have failed to take. See, e.g., *id.* at 16 n 7. Because the trial

court did not make specific findings of fact on these issues, this Court is left with an incomplete record upon which to evaluate defendant's claim that he did not receive the effective assistance of counsel.

Given that this Court is ill-equipped to assess credibility and resolve factual disputes, we REMAND this case to the trial court for more definite findings on the factual questions identified in this order and a determination whether defendant was denied the effective assistance of counsel under *Strickland*. See MCR 7.216(A)(5), (7). The trial court may resolve the credibility issues and make its findings and conclusions on the basis of the existing record or—at its discretion—it may conduct another evidentiary hearing. If the trial court elects to make its findings and conclusions on the existing record, it shall issue a new opinion and order within 56 days of the Clerk's certification of this order. If the trial court elects to hold an evidentiary hearing, it shall conduct the hearing within 91 days of the date this order is certified by the Clerk and may issue its findings either on the record or in a written opinion and shall enter an order resolving defendant's ineffective assistance of counsel claim within 21 days of the hearing. The trial court shall also cause a transcript of the hearing to be prepared and filed within 35 days after the completion of the hearing.


We retain jurisdiction in this matter. The parties may file supplemental briefs with this Court within 21 days after (1) the trial court issues its opinion and order if no evidentiary hearing was conducted, or (2) the date the hearing transcript is filed with the trial court if an evidentiary hearing was conducted.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

NOV 15 2011

Date


Chief Clerk