

Court of Appeals, State of Michigan

ORDER

People of MI v Jason Richard Rose

Docket No. 297769

LC No. 2009-229124-FH

Michael J. Talbot
Presiding Judge

Deborah A. Servitto

Michael J. Kelly
Judges

For the reasons stated below, the Court VACATES its January 3, 2011 order denying defendant's motion to remand for an evidentiary hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). The Court further orders that defendant's motion for a *Ginther* hearing is GRANTED in part and REMANDS the case to the trial court to conduct an evidentiary hearing. MCR 7.211(C)(1). The proceedings on remand are limited to the issues more fully described below. The Court retains jurisdiction and the time for proceeding with the appeal in this Court shall begin to run upon issuance of an order in the trial court that disposes of the post-conviction proceedings.

On appeal, defendant argues that his trial lawyer did not provide the effective assistance of counsel. In relevant part, he argues that his trial counsel provided constitutionally deficient representation by requiring him to conduct his own investigations into his defense, by failing to investigate the witnesses that he proposed for his defense, and by failing to file a witness list. A defendant has the right to have his trial lawyer make reasonable investigations or otherwise reasonably determine that no investigation is warranted. See *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (stating that "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigation unnecessary"). Defendant has attached numerous affidavits from potential witnesses as well as other documentary evidence to his brief on appeal. This evidence tends to support defendant's claim that his trial lawyer placed the onus of the investigation on him and that, despite being provided with names and contact information as early as January 2010, defendant's trial lawyer not only failed to investigate the witnesses, she failed to file a witness list. In contrast to this evidence, at trial and in a subsequent hearing, defendant's trial lawyer asserted that she was "having difficulty" getting witness information from defendant and that he only provided her with sufficient information on the day of trial. If defendant provided his trial lawyer with sufficient information to warrant an investigation into the witnesses, his trial lawyer's decision not to investigate the witnesses might have fallen below an objective standard of reasonableness. Similarly, depending on the timing and extent of defendant's trial lawyer's knowledge about these proposed witnesses, her decision to refrain from filing a witnesses list—even if just a preliminary list—might have fallen below an objective standard of reasonableness. On the other hand, if defendant did not provide his trial lawyer with timely and adequate information with which to conduct the investigation before trial, she cannot be faulted for failing to file a witness list or investigate. See *id.* at 690-691 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.").

Given the disputed nature of the evidence before this Court, we conclude that a remand is necessary before we can consider this claim of error on the merits. See MCR 7.211(C)(1)(a). The proceedings on remand are limited to whether defendant's trial lawyer's performance was constitutionally deficient because she failed to investigate potential defense witnesses and failed to timely file a witness list. Specifically, the trial court should make findings concerning whether defendant gave his trial lawyer timely and adequate information with which to investigate each of the proposed witnesses and with which to file a witness list. After making the necessary findings, the trial court should determine whether defendant's trial lawyer's acts or omissions—in light of the findings—fell below an objective standard of reasonableness under prevailing professional norms and, if the acts or omissions did, whether those acts and omissions prejudiced defendant's trial. *Strickland*, 466 US at 687-688, 694.

Defendant shall file with this Court a copy of any motion and supporting brief filed in the trial court within 14 days after the Clerk's certification of this order. Defendant shall also file with the Clerk of this Court copies of all orders entered on remand within 14 days after entry.

The trial court shall hear and decide the matter within 56 days after the Clerk's certification of this order. The trial court shall make the necessary findings of fact and a determination on the record and cause a transcript of any hearing on remand to be prepared and filed within 21 days after completion of the proceedings.

Defendant may file a supplemental brief pertaining to the issues raised on remand within 21 days after entry of the trial court's order deciding the matter or 21 days after the transcript of the hearing is filed, whichever is later. Appellee may file a supplemental brief in response.

The time for proceeding with the appeal shall begin to run 14 days after the date this order is certified if the motion to initiate the post-conviction proceedings is not filed in the trial court within that 14-day period.

Talbot, J., states, I concur in the remand to the extent that this Court is in need of the trial court's evaluation of witness credibility as to the question of ineffective assistance of counsel.



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

JUL 23 2012

Date

A handwritten signature in black ink, appearing to read "Larry S. Royster", is written over a horizontal line.

Chief Clerk