

Court of Appeals, State of Michigan

ORDER

People of MI v Timothy L Dixon

Docket No. 317219

LC No. 2012-000718-FC

Mark T. Boonstra
Presiding Judge

Pat M. Donofrio

Elizabeth L. Gleicher
Judges

The Court orders that this case is REMANDED to the Kalamazoo Circuit Court for further proceedings not inconsistent with this order. The circuit court shall provide funds sufficient to permit defendant to obtain independent DNA testing. Plaintiff also may obtain repeat testing if it so chooses. Testing shall proceed forthwith, and the results shall be provided to both parties as soon as reasonably possible. Within 56 days of receiving the test results, defendant may seek further relief, if appropriate, in the circuit court.

We retain jurisdiction. On remand, however, any party may request that this Court relinquish its jurisdiction if circumstances in the proceedings before the circuit court so warrant.

Gleicher, J. (*concurring*).

I concur in the order remanding this case to the circuit court for provision of the funds needed to enable defendant to obtain independent DNA testing. I write separately to highlight the reasons that this relief is required.

A jury convicted defendant of first-degree criminal sexual conduct (CSC-I) under either MCL 750.520b(1)(g) (sexual penetration causing personal injury to the victim where the actor knew that the victim was mentally incapable, mentally incapacitated, or physically helpless) or MCL 750.520b(1)(h)(i) (sexual penetration of a mentally incapable, mentally disabled, mentally incapacitated, or physically helpless victim where the actor is related to the victim by blood or affinity to the fourth degree). The victim is unable to identify the person who engaged in sexual relations with her. Defendant's conviction rests entirely on DNA evidence.

Defendant denied having sexual relations with the victim. According to DNA testing performed by the Michigan State Police crime laboratory, defendant likely fathered the victim's aborted fetus.¹ The State Police laboratory report of the DNA testing revealed two unusual features: fewer than the standard number of loci were tested,² and "DNA genetic activity and types were noted in the known extraction reagent blank[.]"

Defense counsel's strategy originally focused on a consent defense. As trial approached, defense counsel shifted her focus to the DNA report. Shortly before trial was scheduled to commence, defense counsel moved for funds to retain a DNA expert. The trial court denied the motion, reasoning:

In this Court's view in conducting that analysis and in essence the sincerity of it when the request is made, particularly on the eve of trial in a case that has been going on now for almost a year, it is very hard to reach the level of finding anything beyond the mere possibility that there might be some kind of assistance provided if the Court appointed an expert.

So this Court is very focused on the timeliness of the request, noting there have been two attorneys involved in the case. Neither of them have pursued this question until now when the question is so obvious. This is not something on which an ineffective assistance of counsel claim could be built. It appears to have been a matter of thought through strategy not to pursue this topic.

* * *

Now, I recognize DNA can be important evidence and apparently in this case [it] is a significant factor in the People's case, but what I have in front of me is basically a generalized request that an expert about DNA could be helpful. Nothing specific as it relates to this particular case and there's really no explanation why this was left until the last minute in a case that's been adjourned at least twice before.

The request, in the Court's view, is summarized in Paragraph 9. Here Defendant asserts he cannot proceed safely to trial without the benefit of consultation—so it's not even a request for somebody to testify—with a DNA expert who can educate trial counsel about DNA evidence and who can review the DNA evidence for accuracy and reliability. That leads to nothing but a mere possibility that this might be of assistance.

On appeal, defendant challenged this ruling, contending alternatively that the trial court abused its discretion in denying the funds, or that defense counsel was ineffective for failing to have timely requested the necessary fees.

In my view, the trial court abused its discretion by refusing to grant the motion requesting funds for a DNA expert. A clear nexus existed between the DNA evidence and the facts of the case. Given the irregularities in the State Police DNA report and the absence of any other evidence that defendant

¹ The report provides in relevant part: "It is 10.83 million times more likely that [defendant] is the father than a randomly selected individual in the African American population."

² Generally, 13 core loci are tested. See *People v Watson*, 965 NE2d 474, 477 n 1 (Ill App, 2012). Here, 10 loci were examined.

impregnated the complainant, it was fundamentally unfair to deny defendant access to a DNA expert. See *Ake v Oklahoma*, 470 US 68, 77; 105 S Ct 1087; 84 L Ed 2d 53 (1985) (“[A] criminal trial is fundamentally unfair if the State proceeds against an indigent defendant without making certain that he has access to the raw materials integral to the building of an effective defense.”).

I submit that the trial court also erred by dismissing defense counsel’s neglect to raise the DNA issue earlier as “strategic.” Whether deliberate or negligent, defense counsel’s failure to seek DNA consultation early in the case qualifies as ineffective assistance of counsel. A constitutionally effective attorney would have explored the DNA irregularities in addition to investigating a consent defense. “A purportedly strategic decision is not objectively reasonable when the attorney has failed to investigate his options and make a reasonable choice between them.” *Towns v Smith*, 395 F3d 251, 258 (CA 6, 2005) (quotation marks and citation omitted). Labeling counsel’s theory-election as “strategic” bypasses the real issue: whether the choice to pursue one defense alone was reasonable. In my view, it was not.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC 15 2014

Date


Chief Clerk