Court of Appeals, State of Michigan

ORDER

People of MI v Jerome William Borthwell

Docket No. 346757

LC No. 02-000276-01-FC

Karen M. Fort Hood
Presiding Judge

Christopher M. Murray

Michael J. Riordan
Judges

The Court orders that the motion to waive fees is GRANTED for this case only.

The delayed application for leave to appeal is considered after the trial court conducted an evidentiary hearing regarding defendant's claims for relief as ordered in *People v Borthwell*, 500 Mich 988 (May 12, 2017). The application is DENIED because defendant has failed to establish that the trial court erred in denying the motion for relief from judgment.

MURRAY, C.J. (*concurring*). The trial court committed no errors nor abused its discretion in denying defendant's motion for relief from judgment. Indeed, I would venture to say that in light of the trial court's findings and conclusions, there is no merit to any of defendant's arguments. A couple of points need to be made in that regard. First, defendant argues that the trial court abused its discretion by not considering *People v Johnson*, 502 Mich 541; 918 NW2d 676 (2018), but it was *impossible* for it to do so since the trial court's opinion was issued weeks *before Johnson* was issued. Nevertheless, the trial court applied controlling law from *People v Cress*, 468 Mich 678; 664 NW2d 174 (2003), and in doing so it did just what the Court in *Cress* and *Johnson* said it should, that is, it ultimately concluded whether the two new witnesses' perjured testimony was inherently incredible and would "make a different result probable on retrial." *Johnson*, 502 Mich at 566. On this record, it is impossible to conclude the trial court clearly erred in finding this testimony incredible and worthy of disbelief. Second, defendant makes much of the fact that the trial court utilized text from the prosecutor's brief in part of its opinion (pp 3-7). To that I say, so what? The trial court in no way abdicated its judicial function. For decades trial courts-in civil and criminal cases-have adopted parties' arguments as part of, or completely for, its decision. By doing so a court is making that party's position its own, i.e., it is making its required concise findings, MCR 6.508(E), and the trial court did so here in an opinion that included the court's summation of the evidence. It may not be the preferred method of fact-finding, but defendant cites no Michigan law that precludes this, and the Supreme Court has allowed its use. See *People v Gatiss*, 486 Mich 960 (2010) ("In adjudicating the relevant portions of the motion, the court must 'include a concise statement of the reasons for the denial,' MCR 6.504(B)(2), or 'set forth in the record its findings of fact

and its conclusions of law, and enter an appropriate order disposing of the motion,' MCR 6.508(E). *Although the court's reasoning may again incorporate the prosecutor's response by reference*, we note that the prosecutor did not respond to all of the defendant's arguments for relief; accordingly, the court must dispose of the defendant's remaining relevant arguments, if any, without merely referring to the prosecutor's response.").

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

JUN 10 2019

Date

Chief Clerk