

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

--VS--

ROBERT LEE SHIPP,

Defendant-Appellant.

No. 53616  
Application for  
Delayed Appeal

TO: Judges  
FROM: John H. Stenger  
DATE: January 28, 1981; for submission February 10, 1981

COMMISSIONER'S REPORT

FACTS:

Defendant, a Marquette Prison inmate proceeding in pro per, seeks a delayed appeal of his December 3, 1975 conviction by Genesee County Circuit Court jury of armed robbery and the 40-50 year sentence imposed thereon by Judge Ollie B. Bivins, Jr., on January 8, 1976.

In an appeal as of right, this Court affirmed the conviction, but modified defendant's minimum sentence to 33 years, 4 months in compliance with People v Tanner, 387 Mich 683 (1972). People v Shipp, Docket No. 27821 (unpublished per curiam rel. 6/14/77). The Supreme Court denied leave to appeal. 405 Mich 837. Thereafter, on May 28, 1980, defendant filed delayed motion for new trial or evidentiary hearing in circuit court. The motion was denied by Judge Bivins by order entered July 17, 1980. Defendant filed the present application September 12, 1980. An answer in opposition has been filed.

ISSUES:

- I. "WAS APPELLANT DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO PRESENT AN ALIBI DEFENSE WHERE ALIBI WAS THE ONLY DEFENSE AVAILABLE?"
- II. "WAS APPELLANT DENIED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO DETERMINE THE BLOOD-TYPE OF THE BLOOD LEFT AT THE SCENE OF THE CRIME WHICH THE PROSECUTION CLAIMS WAS HIS?"

- III. "WAS APPELLANT DENIED DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHERE THE PROSECUTOR SUPPRESSED THE BLOOD-TYPE OF THE BLOOD FOUND AT THE CRIME SCENE WHEN SHE KNEW THAT THE BLOOD FOUND AT THE CRIME SCENE WAS NOT THAT OF THE APPELLANT'S?"
- IV. "DID THE PROSECUTORIAL MISCONDUCT IN INTRODUCING REBUTTAL EVIDENCE OF ALIBI IN ITS CASE-IN-CHIEF DENY APPELLANT A FAIR TRIAL WHERE NO ALIBI DEFENSE WAS PRESENTED BY DEFENSE COUNSEL?"
- V. "DID THE PROSECUTION'S INFERENCE UPON INFERENCE, NOT SUPPORTED BY COMPETENT EVIDENCE, DENY APPELLANT A FAIR TRIAL?"
- VI. "DID THE TRIAL COURT UNDULY PREJUDICE APPELLANT'S TRIAL WHEN IT ERRONEOUSLY INSTRUCTED ON ALIBI SUA SPONTE WHEN APPELLANT DID NOT PUT ON ANY DEFENSE?"

FINDINGS:

I. Defendant contends that he was denied the effective assistance of counsel by his attorney's failure to assert an alibi defense.

The contention is not meritorious. First of all, the issue was raised in the prior appeal (Issue III) and found to be without merit by this Court when, in its unpublished per curiam opinion, the Court said, "We have closely examined the issues raised by defendant and find that they do not require discussion." Slip Opinion, p 1.

Second, the contention is not meritorious because an alibi defense was asserted. Defendant's girlfriend, Linda Prewitt, was listed on defendant's pretrial notice of alibi and was also endorsed by the prosecution as a res gestae witness. At trial, the prosecutor called Ms. Prewitt for purposes of cross-examination only. Defense counsel cross-examined her and elicited alibi testimony to the effect that she was with defendant in her residence at 1:00 on the afternoon of the date of the armed robbery and that they left for Saginaw at about 1:15 that afternoon and remained in Saginaw that day. (Tr, p 234, et seq). Complainant testified that he was the clerk in a Flint area motel and that he was armed at the motel office about 2:15 that afternoon. (Tr, p 93). Hence, it is clear that an alibi defense was presented.

It is understandable that the alibi defense was not more vigorously presented by defense counsel because Ms. Prewitt had been convicted on her plea of guilty of attempting to obtain perjured testimony in the case. (Tr, p 244). In light of that, she was not an ideal alibi witness.

II. The motel clerk identified defendant as the robber. The clerk testified that defendant apparently shot himself with his own gun and bled heavily in the motel lobby and in the parking area outside. No testimony as to blood type was introduced at trial.

In his second issue, defendant contends that he was denied effective assistance of counsel by his attorney's failure to type his blood and blood samples from the motel to establish whether the two samples matched. That investigation was critical, defendant argues, because "The people's case hinged upon the alleged accidentally shooting by appellant." (Tr, p 3).

The contention is not meritorious. The people's case did not hinge upon the evidence of the accidental shooting. It depended more importantly on complainant's identification of defendant as the armed robber. In addition, counsel might have decided from investigation or other evidence available to him that the blood samples matched and further blood typing or evidence relating to it might have been damaging to his client. Hence, as a matter of strategy, defense counsel might very well have decided not to pursue blood typing.

Finally, even if blood tests had been conducted, there is no assurance that the results would have been exculpatory.

III. Defendant contends that the prosecution deliberately suppressed tests of the blood found at the scene "which conclusively demonstrated that the blood found at the crime scene was not that of appellant's." (Tr, p 4).

The contention is not persuasive because defendant merely asserts but does not support his contentions that blood tests were performed and that they tended to exonerate him. There is no evidence in the trial transcript that blood tests were performed. Hence,

there is nothing to support defendant's contention that the prosecution deliberately suppressed material evidence.

IV. Defendant contends that the prosecutor improperly elicited from Ms. Prewitt evidence tending to rebut an alibi which had never been presented.

The contention is not meritorious. Ms. Prewitt was an endorsed res gestae witness. The prosecution called her merely to make her available to defendant for cross-examination. Defense counsel did cross-examine her and during that cross-examination elicited what amounted to alibi testimony. At that point, the prosecution was free, on redirect examination, to inquire further into the alibi defense and, in effect, to rebut it by showing that Ms. Prewitt had been convicted of attempting to obtain perjured testimony in the case. There was no error.

V. The evidence showed that the motel robber shot himself during the robbery in Flint and that defendant was arrested several hours later in Saginaw where he had gone to a hospital to receive medical treatment for a gunshot wound to his hand. Defense counsel argued that it was unlikely for defendant to have shot himself and bled profusely at the scene and then drive to Saginaw for medical treatment where the car in which he arrived at the hospital was clear of blood stains. In answer, the prosecutor argued, in part:

"\* \* \*. We don't know if any car, what car, if at all, was involved. We don't know about the car in Saginaw. Maybe it was Linda Prewitt's car. Maybe it was a borrowed car. It could have been cleaned up by an hour and a half later. \* \* \*." (Tr, p 264.) (Emphasis added.)

In this issue, defendant contends that the emphasized portion of the above argument was improper because there was no evidence to support the prosecutor's statements and because the statements were based on inferences stacked on inferences.

The contention is not meritorious for several reasons. First of all, no objection to the argument was made. Second, the argument was legitimate rebuttal to defense counsel's closing argument that defendant could not have been the robber because the car

in which he arrived at the hospital was blood free. (Tr, p 260). Finally, the prosecutor's statements were reasonable inferences: The car in which defendant was driven to the hospital could very well have been a different car than was used at the robbery and could have been the same car with the blood cleaned up. There was no testimony establishing that the same car used in the robbery was also used to transport defendant to the hospital.

V. Defendant contends that he was prejudiced by the trial court's sua sponte instruction to the jury on alibi. The contention is not meritorious because, as noted in the discussion of the first issue, alibi evidence was presented by defense counsel on cross-examination of Ms. Prewitt.

RECOMMENDATION:

It is recommended that application for delayed appeal be denied for lack of merit in the grounds presented.