STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELVIN ANTWAN MAGETT,

Defendant-Appellant.

UNPUBLISHED
August 27, 1996

No. 178838
LC No. 93—049483-FC

Before: MacKenzie, P.J., and Saad and C.F. Youngblood*, JJ.

YOUNGBLOOD, J. (dissenting.)

I concur with the majority as to all issues except defendant's claim of ineffective assistance of counsel. As to the majority's holding that the defendant was afforded effective assistance of counsel, I respectfully dissent.

At trial defendant took the stand in his own defense. On direct examination defense counsel asked defendant if he had ever been convicted of a crime. Defendant testified that, as a minor, he had two convictions, a drug conviction by guilty plea at age fifteen, and a theft charge at age seventeen. The prosecution objected to the relevance of defendant's testimony of prior convictions. Defense counsel explained that, because he "knew" that the prosecution was entitled to bring out these convictions on cross-examination, he was entitled to bring these facts out on direct examination. The majority concludes that defense counsel's actions were "trial strategy" which this Court will not second-guess; however, if defense counsel's actions were strategy, his "strategy" arose out of his lack of understanding of the rule of evidence relating to the admission of evidence regarding a defendant's prior conviction.

Before defense counsel could have reasonably anticipated that the prosecution would seek to introduce evidence of defendant's prior convictions at trial, the trial court would have been required to articulate, on the record and outside the presence of the jury, the analysis of each factor enunciated in MRE 609(b). Since no motion was filed by the prosecution notifying the court and defendant of an intent to seek introduction of defendant's prior conviction(s), and no such determination was made by

* Circuit judge, sitting on the Court of Appeals by assignment.

the trial court on the record and outside the presence of the jury, defense counsel could have, and certainly would have, been successful in precluding introduction of any evidence of defendant's prior record at trial. *People v Jackson*, 391 Mich 323; 217 NW2d 22 (1974); *People v Cherry*, 393 Mich 261; 224 NW2d 286 (1974). For defense counsel to state, on the record and in the presence of the jury, that the reason for eliciting testimony from his own witness about prior convictions was because "the court rule permits inquiry into certain types of offenses as they relate to honesty and truthfulness" and that the prosecution "doesn't have to make a motion to get into [the defendant's prior convictions]" shows without a doubt defense counsel's unfamiliarity with MRE 609. Defense counsel's decision to bring out defendant's prior convictions irreparably tainted defendant's credibility and clearly fell below the standard of reasonableness under prevailing norms set forth in *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994); that is, as any attorney of ordinary learning, judgment, or skill under the same or similar circumstances. Counsel's actions, coupled with his failure to challenge the legality of defendant's arrest, in all likelihood changed the result of the proceedings, and deprived defendant of his right to effective assistance of counsel. *People v Dalessandro*, 165 Mich App 569; 419 NW2d 609 (1988); *In re Hunt*, 407 Mich 918 (1979); *People v Warren*, 23 Mich App 20; 178 NW2d 127 (1970). Accordingly, I would remand for a new trial.

/s/ Carole F. Youngblood