STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE MILTON HOLLOWAY,

Defendant-Appellant.

UNPUBLISHED

No. 179866
LC No. 94-050318

Before: Hoekstra, P.J., and M.J. Kelly and J.M. Graves, Jr.,* JJ.

MICHAEL J. KELLY, (concurring in part and dissenting in part.)

I dissent only from the majority's decision that the trial court abused its discretion by precluding defendants former attorney who conducted a partial investigation from testifying regarding his views on the potential viability of an entrapment defense.

The trial court conducted an appropriate *Ginther* hearing and permitted Mr. Whitesmen to testify as to why he believed that an entrapment defense was viable. The court only terminated Whitesmen's testimony when he began to delve into the details of what might have been his trial strategy had he in fact not been terminated as counsel before the preliminary examination. Whitesmen readily admitted that he would have needed to explore the entrapment issue, something he was unable to accomplish because he was removed from the case prior to the preliminary examination. When the trial court indicated that Whitesmen would not be permitted to amplify on "the details of strategy" defendant's counsel did not object and the hearing was ultimately concluded. It was only during closing arguments that defense counsel belatedly voiced his objection. Besides being untimely, see *People v Furman*, 158 Mich App 302, 329-330, 404 NW2d 246 (1987), no showing had been made that entrapment was in fact a viable defense. Whitesmen's testimony supported the exploration of an entrapment defense contingent on what evidence could be produced at the preliminary examination. On the other hand trial counsel's testimony was based on his research that he did not believe the defense was viable in light of the fifty-two counts facing defendant. Mr.Karasick testified:

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

"I determined that it was my position that there was no entrapment, especially when your looking at fifty-two counts. I think if this was perhaps one time, maybe, but I don't think he was entrapped fifty-two times.

I believe the trial court properly precluded additional evidence relating to a potential entrapment defense as it was the purpose of the *Ginther* hearing to determine whether trial counsel was ineffective. The court properly concluded that counsel's decision not to pursue the defense was a matter of trial strategy and that further testimony was unnecessary.

/s/ Michael J. Kelly