

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ERNESTINE CAMPBELL,

Defendant-Appellee.

UNPUBLISHED

January 14, 1997

No. 187457

Genesee Circuit Court

LC No. 67-021194-FC

Before: MacKenzie, P.J., and Jansen and T.R. Thomas,* JJ.

PER CURIAM.

This is a prosecutor's appeal. The prosecutor appeals by leave granted from a July 14, 1995 order of the Genesee Circuit Court granting defendant's motion for relief from judgment under MCR 6.508(D). The circuit court vacated defendant's conviction of first-degree felony murder, reduced the conviction to second-degree murder, and ordered that defendant be resentenced. We reluctantly reverse, but with further instructions.

The incident occurred on December 12, 1966. While working as a prostitute in Flint, defendant picked up a customer, James Oldacre. The two went to a hotel, and Oldacre paid defendant's fee. The two then went to a restaurant where Oldacre accused defendant of stealing money from him and demanded further sexual services. Defendant declined, a fight ensued, and defendant and Oldacre left the restaurant. Defendant and Oldacre were followed outside the restaurant by defendant's boyfriend, codefendant Harold Nunn, and defendant's friend, codefendant James Henagen. Nunn and Henagen fought with Oldacre, and Henagen eventually stabbed Oldacre to death. Defendant then went through Oldacre's pockets and entered a car with Nunn and Henagen with a large amount of paper money in her hands. There was evidence presented at trial that defendant led the victim to Nunn and Henagen so that they could rob him of money.

A joint jury trial was conducted in June 1967. All three defendants were convicted of felony murder and sentenced to the mandatory terms of life imprisonment without the possibility of parole.

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

Defendant did not pursue a direct appeal from her conviction. In 1992, she filed her first post-conviction motions in the trial court. By that time, Nunn and Henagen had had their life sentences commuted in 1991 by then Governor James Blanchard. Apparently, defendant never petitioned for such clemency because she was unaware of the possibility of having her sentence commuted. In her motion for relief from judgment, defendant raised several issues, including: sufficiency of the evidence, improper denial of a motion for a directed verdict, erroneous instructions concerning the burden of proof, improper instructions regarding first-degree murder, denial of the right to confront witnesses, improperly tried jointly with her codefendants, improper admission of a codefendant's statement without a limiting instruction, denial of the effective assistance of counsel, prosecutorial misconduct, and that the errors taken together denied her a fair trial.

The motion was denied by the trial court on April 9, 1992. This Court then denied defendant's application for leave to appeal, and the Supreme Court denied defendant's delayed application for leave to appeal. 447 Mich 1000 (1994). On April 13, 1995, defendant again moved for relief from judgment in the trial court. In her second motion, defendant raised issues concerning the trial court's instructions. Defendant claimed that the trial court erred in failing to give a second-degree murder instruction, and in failing to give the proper aiding and abetting instruction regarding felony murder. The trial court granted defendant's motion, waived the "good cause" requirement under MCR 6.508(D)(3)(a), and found that defendant had shown actual prejudice because the felony murder instruction was improper under *People v Jenkins*, 395 Mich 440; 236 NW2d 503 (1975) and *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980). The trial court reduced defendant's conviction to second-degree murder and ordered that defendant be resentenced. This Court then granted the prosecutor's application for leave to appeal in an unpublished order dated September 1, 1995. We now reverse.

MCR 6.508(D) provides in relevant part:

Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

* * *

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, "actual prejudice" means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

* * *

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

* * *

The court may waive the “good cause” requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

The court rule clearly provides that both the “good cause” and “actual prejudice” requirements must be met in order to obtain relief. See also, *People v Reed*, 449 Mich 375; 535 NW2d 496 (1995). Here, we agree with the trial court that defendant did not meet the good cause requirement because she could have raised the instructional issues in the prior motion.

However, the trial court set aside the good cause requirement, finding that there was a significant possibility that defendant was innocent of the crime. The trial court also found that the actual prejudice requirement was met because, but for the alleged instructional error, defendant would have had a reasonably likely chance of acquittal. The trial court came to these conclusions by applying the holdings in *Jenkins* and *Aaron* retroactively. Both the decisions in *Jenkins* and *Aaron* significantly changed the law. Before the decision in *Jenkins*, trial courts were not obliged to sua sponte instruct juries on the lesser offense of second-degree murder in cases of felony murder and the decision in *Aaron* abrogated the common law felony murder doctrine in this state where the intent to commit only the underlying felony was sufficient to satisfy the intent element of felony murder.

Defendant’s conviction came before the decisions in *Jenkins* and *Aaron*. However, the Supreme Court has given its decisions in both of these cases prospective application only. See *Jenkins*, *supra*, p 443; *Aaron*, *supra*, p 734. In essence, the trial court applied the holdings in *Jenkins* and *Aaron* retroactively; however, there is no authority that we are aware of allowing the trial court to apply those two cases retroactively where our Supreme Court has ordered that the cases are only to be applied prospectively. The trial court is not free to ignore the Supreme Court’s own mandate. Moreover, the trial court recognized that defendant was not legally entitled to relief, as stated in its opinion:

I also believe that Defendant is not legally entitled to such relief because Jenkins and Aaron were not retroactive and her conviction was valid when her trial occurred. No one is above the law – especially judges. However, after 28 years, continued imprisonment for a murder without malice and without any possibility of parole cries out as manifestly unjust. I don’t think possible commutation by Governor Engler or a successor should be her only hope that she will not die in prison for a crime she did not commit as the law stands today.

Accordingly, we conclude that the trial court erred in setting aside the good cause requirement of MCR 6.508(D)(3)(a) because there is not a significant possibility that defendant is innocent of the crime. There is no legal basis upon which we can conclude that defendant is entitled to relief under MCR 6.508(D)(3)(a).

We also note that the lower court record supports defendant's conviction of felony murder even if we were to apply the current intent standard. The record provides sufficient evidence that defendant could have been convicted of felony murder as an aider and abettor. The record indicates that defendant led Oldacre outside the restaurant while followed by her boyfriend and another friend. The two codefendants intended to rob Oldacre, and after fighting with him, Nunn stabbed Oldacre to death. Defendant then returned and removed money from Oldacre after he had been stabbed. There was also evidence that the robbery was prearranged between the three codefendants. Under these circumstances, there was sufficient evidence to sustain defendant's conviction of felony murder as an aider and abettor. See *People v Turner*, 213 Mich App 558, 568; 565-571; 540 NW2d 728 (1995).

Because it cannot be concluded that defendant is innocent of the crime of felony murder, the trial court erred in setting aside the good cause requirement of MCR 6.508(D)(3)(a). Because defendant cannot establish good cause for failing to raise the instructional issues in her prior post-conviction motion, defendant has not established entitlement to relief under MCR 6.508(D). We, therefore, reverse the trial court's order granting defendant's motion for relief from judgment and order that defendant's conviction and sentence for felony murder be reinstated by the trial court on remand.

Like the trial court we are troubled by this case because the two codefendants, Nunn and Henagen, have had their sentences commuted and they have been released from prison. Although it was actually Nunn who killed Oldacre, and defendant is clearly the least culpable of the three concerning the actual murder, only defendant remains imprisoned. Defendant is now 57 years old and has been imprisoned for almost thirty years. Defendant may request that the Governor exercise his power of commutation under Const 1963, art 5, § 14 and commute defendant's sentence. Further, defendant may utilize this opinion and apply for a reprieve, commutation, or pardon. See MCL 791.244; MSA 28.2314.

The trial court's order granting defendant's motion for relief from judgment is reversed and we remand for the trial court to reinstate defendant's conviction and sentence for felony murder. No further jurisdiction is retained.

/s/ Barbara B. MacKenzie

/s/ Kathleen Jansen

/s/ Terrence R. Thomas