

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARY M. FOLEY,

Defendant-Appellant.

UNPUBLISHED

January 17, 1997

No. 167104

Oakland Circuit Court

LC Nos. 93-122703 FH;

93-122704 FH

Before: Markman, P.J., and O'Connell and D. J. Kelly,* JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of health care fraud, false claim and false statement. MCL 752.1003(1); MSA 28.547(103). The court sentenced her to serve 254 days in jail (time served), two years' probation, and ordered her to pay \$13,023.17 in restitution to Blue Cross/Blue Shield of Michigan (hereinafter BCBS). Defendant now appeals as of right. We affirm.

On May 18, 1992, defendant went to see a doctor for treatment of an abdominal infection. On her patient registration form, defendant listed her name as Mary F. Foley, the name of her sister-in-law, and gave her sister-in-law's BCBS insurance numbers. She continued to use Mary F. Foley's name and insurance numbers during subsequent visits to her doctor, and on two separate occasions when she was treated at William Beaumont Hospital in Royal Oak. After she received a bill in the name of Gerard Foley, who is defendant's brother and Mary F. Foley's husband, defendant went to speak with a patient representative at Beaumont hospital. She ultimately told the patient representative that her name was Mary M. Foley and she did not have insurance. Mary F. Foley contacted BCBS after having received an explanation of benefits statement that listed treatment at Beaumont Hospital, and BCBS assigned a fraud investigator to the case.

Before her trial, defendant was referred to the Center for Forensic Psychiatry for an evaluation of her competency to stand trial. A report from the center recommended that she be found incompetent, but suggested that she could return to competency within the statutory time frame permitted. Defendant was ultimately adjudicated competent to stand trial. After her convictions, this

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

Court remanded the case so that defendant could file a motion for a new trial pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). The trial court ruled that defendant was not denied her right to effective assistance of counsel.

First, defendant argues that she was denied the effective assistance of counsel when her trial counsel failed to reassert the competency issue and failed to assert defenses of insanity or diminished capacity. Trial counsel is presumed to be effective. To prove ineffective assistance of counsel, defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. Defendant must overcome the presumption that counsel's action might be considered sound trial strategy. Finally, defendant must show that the deficiency was prejudicial. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). As relevant to the particular defense raised by defendant, a criminal defendant is denied effective assistance of counsel by his attorney's failure to investigate and develop a meritorious insanity defense. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988); *People v Parker*, 133 Mich App 358, 363; 349 NW2d 514 (1984). A defendant is entitled to a new trial if counsel's error deprives him of a reasonably likely chance of acquittal. *Hunt, supra* at 17.

Defendant has not overcome the presumption that trial counsel's decisions not to reassert the issue of competency and not to raise a defense of insanity or diminished capacity were sound trial strategy. Trial counsel testified at the *Ginther* hearing that he had discussed with defendant the possibility of raising a defense of insanity or diminished capacity, and that defendant was adamantly opposed and continued to assert her innocence. He testified that he believed that there was evidence to support defendant's assertion that she did not intend to defraud BCBS. He also stated that, in his experience as a criminal defense attorney, he found that a defense of insanity or diminished capacity was rarely successful, particularly in cases such as this involving "sophistication and planning" on the part of the defendant. From this testimony, the trial court could reasonably have concluded that trial counsel's failure to investigate and pursue an insanity or diminished capacity defense was a sound trial strategy. Furthermore, defendant has not shown that trial counsel's failure to raise such defenses was prejudicial to her, as she has not presented any evidence to support a defense of insanity or diminished capacity. Therefore, trial counsel's failure to investigate and develop a defense of insanity or diminished capacity did not deny defendant a fair trial.

Defendant also argues that she was denied effective assistance of counsel by trial counsel's failure to reassert the issue of incompetency to stand trial. She argues that under the state and federal constitutions, both the trial court and trial counsel must remain vigilant on the issue of competency to stand trial, especially so when she had been declared incompetent to stand trial in another proceeding prior to her trial in the instant case.

Whether or not defendant is competent to stand trial is an ongoing concern of the trial court. *People v Garfield*, 166 Mich App 66, 74; 420 NW2d 124 (1988). The trial court has a duty to raise the issue of incompetence where facts are brought to its attention which raise a bona fide doubt as to the defendant's competence. *People v Harris* 185 Mich App 100; 460 NW2d 239 (1990); *People v Hamm*, 79 Mich App 281; 261 NW2d 288 (1977). Neither the case law nor the Mental Health Code

specifically impose a duty on trial counsel to raise the issue of competency, beyond the standard for effective assistance of counsel. See *Harris, supra*; *People v Bryant*, 77 Mich App 108; 258 NW2d 162 (1977).

At the *Ginther* hearing, trial counsel testified that defendant wanted to stand trial and she specifically requested that he subpoena the social worker from the county jail to testify at her competency hearing. Trial counsel testified that he exercised his judgment in weighing the findings of the Center for Forensic Psychiatry, which indicated that defendant could be found competent to stand trial within the statutory period and did not indicate that her present incompetence was gross or extreme, against defendant's express desire to be found competent to stand trial. He decided that it was in his client's best interest to advocate for a finding of competency. He testified that he did not know of an incompetency order that was issued by the district court in an unrelated case pending against defendant.

In this case, defendant was found competent to stand trial, and trial counsel believed that defendant was competent based on his own interaction with defendant. Contrary to defendant's assertion that a reasonably competent attorney should have been aware of an order of incompetency entered in an unrelated case in a different court, trial counsel did not have a duty to search for evidence and does not have an ongoing duty of vigilance on the issue of competency as defendant argues. *Harris, supra*; see also *People v Newton (On Rehearing)*, 179 Mich App 484, 487; 446 NW2d 487 (1989). Therefore, the trial court did not abuse its discretion in finding that trial counsel's failure to reassert the issue of competency did not deny defendant the effective assistance of counsel.

Defendant next argues that trial counsel's proffer and the trial court's consideration of an unqualified social worker's opinion on the issue of mental competency constituted both ineffective assistance of counsel and an abuse of discretion, respectively. We disagree.

Before expert testimony may be admitted, it must be established that the witness is an expert, there are facts in evidence that require or are subject to examination and analysis by a competent expert, there is knowledge in a particular area that belongs more to an expert than an ordinary person, and the testimony will aid the factfinder in making the ultimate decision in the case. *People v Ray*, 191 Mich App 706, 707; 479 NW2d 1 (1991). In the present case, the parties stipulated to social worker Ruth Hayes-Barba's qualification as an expert in the field of mental health. Furthermore, the facts regarding defendant's mental competency required examination and analysis by an expert, knowledge in the area of mental health belongs to experts more than an ordinary person, and the expert testimony was helpful to the trier of fact on the issue of defendant's mental competency. Because the parties stipulated to Hayes-Barba's qualifications, there is no evidence on the record to support whether she is specifically qualified to determine whether defendant was incapable of understanding the nature and object of the proceedings against her. See *People v Parney*, 74 Mich App 173; 253 NW2d 698 (1977). However, defendant's stipulation to Hayes-Barba's qualifications as an expert and her failure to object to the admission of her testimony at the competency hearing preclude her from objecting to the expert's qualifications on appeal. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995); *People v Alexander*, 56 Mich App 400, 402; 223 NW2d 750 (1974). Therefore, the trial court did

not abuse its discretion in admitting the testimony of social worker Ruth Hayes-Barba on the issue of defendant's competency.

Defendant also argues that trial counsel's offer of an unqualified expert witness denied her the effective assistance of counsel. At the hearing on defendant's motion for a new trial, trial counsel testified that he called Hayes-Barba to testify at defendant's competency hearing because defendant herself had requested it, and because Hayes-Barba's finding that defendant did not require psychiatric treatment in jail was relevant evidence on the issue of defendant's competency. He also testified that he had questions about the finding of report of the Center for Forensic Psychiatry that defendant was incompetent.

As discussed above, to prove ineffective assistance of counsel, defendant must prove that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that counsel's error was prejudicial to defendant. In this case, defendant herself requested the testimony of Hayes-Barba at her competency hearing. Furthermore, the trial court heard testimony from Dr. Farley and defendant as well as Hayes-Barba on the issue of competency, and there is no evidence on the record that the trial court relied on Hayes-Barba's testimony in determining that defendant was competent to stand trial. On these facts, defendant has not shown that trial counsel's performance fell below an objectively reasonable standard, nor has she shown that she was prejudiced by the alleged error.

Finally, defendant argues that the imposition of restitution to BCBS for investigative costs was unlawful because it was not authorized by statute. Under Michigan law, a court's authority to impose a particular sentence is derived from the relevant statutes. *People v Neil*, 99 Mich App 677, 680; 299 NW2d 23 (1980). Contrary to defendant's assertion, restitution is specifically authorized by the statute under which defendant was convicted. The Health Care False Claim Act, MCL 752.1010; MSA 28.547(110), provides as follows:

Any person convicted of a violation of section 3, 4, or 5 [MCL 752.1003, 752.1004 or 752.1005] in addition to any fines or sentences imposed, including any order of probation, may be ordered to make restitution to a health care corporation or health care insurer.

Because defendant was convicted under MCL 752.1003; MSA 28.547 (103), the trial court was expressly authorized to order restitution to Blue Cross/Blue Shield, a health care insurer.

Affirmed.

/s/ Stephen J. Markman

/s/ Peter D. O'Connell

/s/ Daniel J. Kelly