

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HERBERT DUNNINGS,

Defendant-Appellant.

UNPUBLISHED

March 31, 2000

No. 189107

Wayne Circuit Court - Criminal

Division

LC No. 93-007934

AFTER REMAND

Before: Griffin, P.J., and Neff and Saad, JJ.

PER CURIAM.

This case returns to us after remand to the trial court. We originally affirmed defendant's conviction after appeal. However, our Supreme Court ordered the case remanded to the trial court for a *Ginther* hearing.¹ The trial court held a *Ginther* hearing and issued its findings of fact and conclusions of law. Following remand, we now review the trial court's post-*Ginther* findings and conclusions. We conclude that defendant was not denied the effective assistance of counsel, and we affirm his conviction.

I. FACTS AND PROCEEDINGS

Defendant shot and killed a customer during a bank robbery. He later admitted the offense when questioned by police Sgt. Harvel, but he maintained that the shooting was accidental. A jury subsequently convicted him of first-degree felony murder and felony firearm.² In his appeal of right, defendant contended that his trial counsel was ineffective because he failed to call two expert witnesses, a psychiatrist and a psychologist, who would have testified at defendant's *Walker* hearing³ that defendant's psychological debilities rendered him helpless during police interrogation and rendered him unable to make a meaningful waiver of his right to remain silent. We affirmed defendant's conviction and declined his request to remand for a *Ginther* hearing. Subsequently, our Supreme Court ruled that defendant should have been granted a *Ginther* hearing to enable him to establish a record that his trial counsel was ineffective.⁴ A motion for rehearing was denied by an evenly divided court.⁵ On the Supreme Court's order, we remanded to the trial court with instructions to hold the *Ginther* hearing.

At the *Ginther* hearing, psychologist Helen Goodall and psychiatrist Craig Essex testified that they treated defendant in the Wayne County Jail two or three days after he made the confession. They testified that he was shaking, tearful, and otherwise showing signs of agitation. Both observed that he was shaking much of the time. They stated that he was unable to communicate effectively. Essex testified that it was his “impression” that defendant was psychotic. When asked whether defendant would have been able to “resist intense interrogation”, Essex replied that “it would be difficult to imagine him being able to be interrogated at all.” Essex believed that defendant’s attorney should have had defendant evaluated to determine whether he was competent to stand trial; however, Essex expressed no opinion with respect to whether he believed defendant was incompetent. Defendant also presented evidence that he has a history of mental illness going back to at least 1992. There was no expert, however, who could describe defendant’s mental condition at the time he made the confession.

Defendant’s trial counsel, Karri Mitchell, testified that he did not recall, one way or the other, if defendant had trouble communicating with him. Defendant’s appellate counsel questioned Mitchell about the affidavit defendant executed for his motion for a *Ginther* hearing. In this affidavit, defendant swore that he informed Mitchell of the severity of his psychological problems, which should have alerted Mitchell to pursue various competency and diminished capacity theories of defense. Mitchell testified that he did not recall if defendant really did tell him the statements in the affidavit about defendant’s mental problems. However, Mitchell testified that he had at least some awareness of defendant’s mental debilities. Mitchell explained that his strategy at the *Walker* hearing was to use Sgt. Harvel’s own testimony to prove that Harvel coerced defendant into making the statement. Mitchell believed that Harvel had, in effect, admitted to coercing defendant (because Harvel said that he “convinced” defendant he should make a statement). Mitchell felt that Harvel’s testimony would make suppression of the statement a foregone conclusion, and that there was no need to pursue the matter of defendant’s competency to waive his right. Mitchell also believed that if the confession were admitted, defendant would certainly be convicted.

The trial judge⁶ prepared a Findings of Fact and Opinion In re *Ginther* hearing. In the opinion, she gave credence to the experts’ testimony that defendant’s mental problems precluded him from making a competent decision to waive his rights during interrogation. The trial judge concluded that Mitchell was ineffective because he failed this theory at the *Walker* hearing. She also found that Mitchell was ineffective because he did not investigate the possibilities of having defendant declared incompetent to stand trial or of raising a diminished capacity defense. Finally, she found that Mitchell should have introduced evidence of defendant’s chronic shaking to bolster his position that the shooting was accidental. The trial judge concluded that she would grant defendant a new *Walker* hearing and a new trial.

Because we retained jurisdiction when we remanded this to the trial court, we now review the trial court’s findings of fact and conclusions of law.

II. ANALYSIS

To establish ineffective assistance of counsel, a defendant must show that (1) trial counsel's performance was below an objective standard of reasonableness according to prevailing professional norms, and (2) that there is a reasonable probability that absent counsel's errors, the outcome of the particular proceedings would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994); *People v Graham*, 219 Mich App 707, 711; 558 NW2d 2 (1996). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *Stanaway, supra*, 446 Mich 687. The defendant must overcome the strong presumption that counsel used sound trial strategy. *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Sawyer*, 221 Mich App 1, 3; 564 NW2d 62 (1997).

Here, the trial court held an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), so our review is based on the *Ginther* evidence in addition to the facts apparent on the record. We review the trial court's findings of fact for clear error. *People v Howard*, 233 Mich App 52, 54; 595 NW2d 497 (1998). A decision is clearly erroneous if, although there is evidence to support it, this Court is left with a definite and firm conviction that the decision is a mistake. *Id.* We review questions of law de novo. *People v Stevens*, 460 Mich 626, 631; 597 NW2d 53 (1999). Whether the trial court properly applied the law of ineffective assistance of counsel to the facts presented is a mixed question of fact and law, which we review de novo. *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998).

After reviewing the *Ginther* transcripts and the trial court's opinion, we conclude that the trial judge clearly erred in concluding that trial counsel's performance fell below a reasonable standard of advocacy and constituted ineffective assistance of counsel.

After summarizing the testimony of the experts, the trial judge made the following summary of trial counsel's testimony:

Kari Mitchell was the defendant's attorney for all trial court proceedings in state court and federal court. His testimony on Mr. Dunnings' physical and mental condition is in sharp contrast to the testimony of Drs. Goodall and Essex. He testified he had no memory of Mr. Dunnings being in the psychiatric unit of the jail. He knew Mr. Dunnings was on medication but he did not know what the medication was or what condition the medication was treating. Mr. Mitchell did not recall if he had any problems communicating with the defendant or if he had meaningful communications with Mr. Dunnings. He did not dispute the statements in the defendant's affidavit.

Mr. Mitchell testified that he has now come to realize that the defendant does have a physical/emotional problem that causes him to shake and that this would have been relevant to the defense that he presented to the jury. He further stated that he now realizes that he should have called doctors, including Drs. Goodall and Essex, to testify.

This statement does not accurately reflect Mitchell's testimony. Mitchell testified that he was "somewhat aware" of defendant's mental problems, but that he chose not to pursue the matter because he believed it was unnecessary given Harvel's testimony. With respect to defendant's affidavit, Mitchell neither disputed the truth of the statements nor conceded them. Rather, Mitchell testified that he did not remember one way or the other if defendant made such statements to him:

I'm not trying to be evasive. I just can honestly say that this case is five years old and specifics about conversations that I have with a client, if they are not written down in my notes, and I don't have my notes now, I cannot deny that an individual told me these things.

With regard to the trial judge's finding that Mitchell now realized that he should have pursued the incompetence theory, Mitchell actually testified:

Hindsight is 20 - 20. At the time that I tried this case, I indicated that I was aware of him having some difficulties regarding his psychological care.

Because of the – to my Motion for Suppression of that confession did not fly, I had to take a different route. *And I took that route thinking that that was the better route to take at the time. Now to say now I should have called his treating physicians, I can say yeah now because it didn't work.*

Mitchell also testified that he did not call defendant to testify at the *Walker* hearing because in his experience, criminal defendants rarely help themselves by testifying, and because he did not believe defendant's testimony would be helpful given Sgt. Harvel's supposedly damaging testimony.

Mitchell's testimony runs contrary to the trial court's finding that he was unaware of defendant's mental problems and therefore missed a potentially effective strategy. In fact, Mitchell testified that he was aware of defendant's problems, but that he chose to pursue a different strategy he believed had greater potential. This testimony does not establish ineffective assistance of counsel. Mitchell's decision to forego the incompetence theory and emphasize Harvel's testimony does not fall below an objective standard of reasonableness. Rather, it reflects a reasoned selection of strategy that, in hindsight, proved unhelpful. The trial court's conclusion that Mitchell's performance was objectively sub-standard is a substitution of the trial court's own judgment.

The trial court also found that Mitchell was ineffective in failing to pursue incompetence or diminished capacity issues at trial. However, we believe that defendant has failed to show that Mitchell's performance fell below an objective standard of reasonableness or that Mitchell could have achieved a different outcome if he pursued these theories. With respect to the trial judge's finding that Mitchell should have challenged defendant's competence to stand trial, there was no evidence that defendant actually was incompetent to stand trial. With regard to her finding that Mitchell should have raised a diminished capacity defense, there was no evidence that defendant's particular psychological problems or psychological state during the robbery actually fit a diminished capacity theory. Neither witness had any specific information to support these theories; neither discussed the legal requirements

to establish incompetence or diminished capacity or how defendant's mental problems fit these requirements. Indeed, Essex specifically stated that he was not giving an opinion with respect to competence or diminished capacity. Essex merely stated that he thought that Mitchell ought to have sought a psychiatric evaluation of defendant. On this record, it would be pure speculation to say that a psychological evaluation of defendant would have led to a viable defense strategy.

Finally, the trial judge also found that Mitchell was ineffective in failing to argue at trial that defendant's nervous shaking problem caused him to accidentally fire the gun during the robbery. The trial judge believed that if Goodall and Essex had testified about defendant's shaking problem, the jury might have been persuaded that he fired the gun by accident. This reasoning does not comport with the law on ineffective assistance of counsel. There already was evidence presented to support an accidental shooting theory. When Sgt. Harvel testified regarding defendant's statement, he quoted defendant as saying "I had my hand on the trigger, and *it just went off.*" When Sgt. Harvel asked defendant if he cocked the hammer, defendant replied "*I didn't do anything to it.*" On cross-examination, Mitchell elicited this testimony from Sgt. Harvel:

Q. What was your opinion, after he told you that he walked into the bank and the gun just went off, Sergeant?

A. I could accept that.

Q. You could—pardon?

A. I could have accepted that as the truth, yes.

Q. Okay. So, you—you—did you—did you also form the opinion that this was an accident by him?

A. *I believe it was possibly an accident, yes.*

Other witnesses testified that defendant was shaking during the robbery. Nevertheless, the jury rejected the accidental shooting theory. It is purely speculative that Goodall's and Essex's testimony that defendant was trembling during his jail incarceration would have convinced the jurors of the accident theory when the trial evidence did not.

Affirmed.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Henry William Saad

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² Respectively, MCL 750.316; MSA 28.548, and MCL 750.227b; MSA 28.424(2).

³ *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

⁴ 459 Mich 874 (1998).

⁵ 590 NW2d 574 (1999).

⁶ Defendant was originally tried before Detroit Recorders Court Judge Helen Brown. After remand, his case was reassigned to Judge Carole Youngblood, Wayne Circuit Court Criminal division, because Judge Brown now serves as a judge in the Family Court division.