

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY DEAN COURON,

Defendant-Appellant.

UNPUBLISHED

September 21, 2006

No. 256952

Berrien Circuit Court

LC No. 2003-411956-FC

Before: Bandstra, P.J., and White and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). Defendant contends the trial court erred by denying his motion for a new trial without a *Ginther*¹ hearing. We remand to the trial court for the purposes of holding a *Ginther* hearing and addressing the claim of ineffective assistance of counsel.

Defendant presents several claimed errors by trial counsel that he contends warrant a remand to the trial court for a *Ginther* hearing. We agree. A trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion. See *People v Mischley*, 164 Mich App 478, 481-482; 417 NW2d 537 (1987). Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). A trial court's findings of fact are reviewed for clear error and questions of constitutional law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Defendant must show that counsel's performance was unreasonable under prevailing norms and that the challenged action was not sound strategy. *People v Pickens*, 446 Mich 298, 330, 338; 521 NW2d 797 (1994). A defendant may be granted an evidentiary hearing if the record has not been sufficiently developed, and defendant can show evidence of a factual dispute which might, if further developed, possibly be resolved in his favor. See *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995). The purpose of a *Ginther*

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

hearing is to allow the court to determine the adequacy of trial counsel from the facts on the record.

Defendant's claims of ineffective assistance of counsel warrant remand for a *Ginther* hearing. The complainant in this case, defendant's niece, testified that she was sexually assaulted by defendant while she was a visitor to his home. However, these allegations were not raised in proximity to the time of the incidents, but many years after the incidents had occurred. Moreover, these incidents were not revealed until after the complainant was hospitalized and following multiple suicide attempts apparently precipitated by her break up with a boyfriend. Specifically, the complainant's boyfriend impregnated another female and notified the complainant that he was planning to marry the other woman. The complainant was hospitalized and ultimately diagnosed with bipolar disorder. However, the allegations did not surface at this time, but arose later in therapy. Despite this time delay in the report of the assaults, there is no indication that defense counsel sought to examine the psychological records and have an expert evaluate the claims.

Review of the material submitted with the motion for new trial indicates that the complainant had knowledge that defendant had been accused of impropriety by another. Nonetheless, despite this knowledge, the complainant did not come forward and raise her own allegations. With the motion for new trial, defendant submitted materials from experts expressing concern that the complainant's allegations were the result of "false" memories. The record is devoid of any detail regarding why trial counsel did not explore the possibility of presenting expert testimony based on the complainant's psychological and medical records.

Moreover, defendant and his wife presented offer of proofs to indicate that trial counsel failed to explore their claimed defense. During trial, defense counsel presented character witnesses on behalf of defendant. Defendant and his wife alleged that they implored defense counsel to explore the testimony that animosity existed between defendant and the complainant's family members after his divorce from his first wife and subsequent remarriage. It further alleged that his first wife had assisted in the fabrication of the claims and that defendant's son could testify regarding the complainant's mental state based on communications that he had received from her. However, defendant's son was never called to testify at trial. Defendant asserted that trial counsel told him that his son could not testify because he lived at home with defendant. It was alleged that trial counsel advised defendant that he would be acquitted because of the age of the allegations.

Despite the claims raised by defendant and his wife, there is no indication in the billing records to indicate that trial counsel undertook efforts to explore their defense. Indeed, discovery was provided just prior to trial, and defense counsel declined the opportunity to have an adjournment. Further, just prior to trial, defense counsel could not articulate whether he was defending the allegations based on the fact that they did not occur or impossibility because the victim had never been to defendant's home. Under the circumstances, the trial court abused its discretion in failing to grant defendant's request for a *Ginther* hearing. Particularly in light of the medical record issue, defendant should be given the opportunity to demonstrate whether the actions of trial counsel constituted sound trial strategy.

Remanded for the purposes of holding a *Ginther* hearing. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Helene N. White

/s/ Karen M. Fort Hood