

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWIN CARL CRISWELL,

Defendant-Appellant.

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UNPUBLISHED

August 16, 2007

No. 270505

Wayne Circuit Court

LC No. 93-002833-01

Before: Smolenski, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as on leave granted from a circuit court order denying his motion for a new trial made as part of a motion for relief from judgment. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), for engaging in sexual penetration with a seven-year-old girl. A bench trial was conducted in 1993, and the evidence at trial showed that the girl had a ruptured hymen and also tested positive for chlamydia, a sexually transmitted disease (STD). The trial court found defendant guilty of both counts. This Court affirmed defendant's convictions in an unpublished opinion per curiam, issued June 16, 1995 (Docket No. 169389). Approximately one year after he was sentenced, defendant was tested for chlamydia and the test results were negative. Approximately ten years later, defendant filed a motion for a new trial, asserting that trial counsel was ineffective for failing to have him tested for chlamydia before trial, and that appellate counsel was ineffective for failing to raise the issue on appeal. The trial court denied defendant's motion.

In reviewing a trial court's ruling on a motion for relief from judgment, the trial court's factual findings are reviewed for clear error while its ultimate decision is reviewed for an abuse of discretion. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003).

Under MCR 6.500 *et seq.*, a defendant may seek relief from a conviction and sentence that is no longer subject to appellate review. MCR 6.501. MCR 6.508(D)(3) bars relief "if the criminal defendant's motion alleges a ground for relief, other than jurisdictional defects, that could have been raised on appeal from the conviction and sentence . . . ." *McSwain, supra* at 685-686. However, a defendant can avoid the application of this bar if he demonstrates both good cause and actual prejudice. *Id.* at 686; MCR 6.508(D)(3).

Ineffective assistance of counsel can satisfy the good cause element of MCR 6.508(D)(3), *People v Reed*, 449 Mich 375, 378-379; 535 NW2d 496 (1995), and the prosecutor concedes that defendant “has most probably established cause for the failure to raise the issue previously[.]” If good cause is established, the defendant must also show actual prejudice from the error, i.e., that but for the error, defendant would have had a reasonably likely chance of acquittal. MCR 6.508(D)(3)(b)(i). As noted, the alleged error is trial counsel’s failure to investigate whether defendant was infected with chlamydia and present the test results at trial.

To prevail on a claim of ineffective assistance of counsel, defendant must show that his counsel’s performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel’s error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel’s conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001) (citations omitted).]

It is counsel’s duty to make an independent examination of the facts, laws, pleadings and circumstances involved in the matter, and to pursue all leads relevant to the issues. *People v Grant*, 470 Mich 477, 486-487 (Kelly, J.), 498-499 (Taylor, J.); 684 NW2d 686 (2004). A sound trial strategy is one based on investigation and supported by reasonable professional judgments. *Id.* Counsel may be ineffective for failing to make a reasonable investigation of the case. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Nevertheless, decisions regarding what evidence to present are presumed to be matters of trial strategy. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). “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.” *Id.* at 76-77.

Defendant has not shown that trial counsel was ineffective for failing to have defendant tested for chlamydia. Even if trial counsel was aware before trial that the prosecutor would present evidence that the victim had chlamydia, the evidence submitted in support of defendant’s motion showed that most people infected with chlamydia are asymptomatic. Therefore, the fact that defendant may have been asymptomatic at the time of the offenses, or at the time of trial, would not mean that he did not have Chlamydia. He could have had the disease without exhibiting any symptoms. If defendant had been tested before trial, tested positive, and the prosecutor obtained that information, it would have been extremely damaging to defendant’s case at trial. Without testing, however, it could not be confirmed that defendant had ever been infected and thus trial counsel could maintain plausible deniability as she did at trial. Indeed, the prosecutor presented no evidence that defendant had chlamydia and thus could not prove that defendant was the source of the victim’s infection. In light of the circumstances, together with the inconsistencies between the witnesses’ testimony and their prior statements, defendant’s denial of wrongdoing, and the victim’s mother’s support of defendant, counsel reasonably may have concluded that it was strategically better not to know whether defendant did in fact have chlamydia and argue that the evidence did not prove guilt beyond a reasonable doubt. “The fact that defense counsel’s strategy may not have worked does not constitute ineffective assistance of counsel.” *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Because defendant failed to rebut the strong presumption that his trial counsel's decision fell within the wide range of reasonable professional assistance, *Watkins, supra* at 30, we cannot conclude that defendant's trial counsel was ineffective. Further, because defendant's appellate counsel was not required to advocate a meritless position, see *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000), we cannot conclude that defendant's appellate counsel was ineffective for failing to raise a claim of ineffective assistance of counsel on appeal. Absent evidence that either attorney was ineffective, defendant cannot establish the prejudice element necessary for relief from judgment. MCR 6.508(D)(3)(b). Therefore, the trial court did not abuse its discretion in denying defendant's motion.

Affirmed.

/s/ Michael R. Smolenski  
/s/ E. Thomas Fitzgerald  
/s/ Kirsten Frank Kelly