

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee/Cross-Appellant,

v

KATHERINE SUE DENDEL, a/k/a KATHERINE
SUE BURLEY,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

July 18, 2006

No. 247391

Jackson Circuit Court

LC No. 02-002915-FC

Before: Borrello, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant appeals her bench trial conviction for second-degree murder. On March 11, 2005, this Court remanded this case to the trial court for a *Ginther*¹ hearing to determine if defendant was denied the effective assistance of counsel. After the hearing, the trial court ruled that defendant received effective assistance from her defense attorney. We reverse and remand for further proceedings consistent with this opinion.

I. Facts and Procedural History

¹ In *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973), our Supreme Court held that “[w]hen a defendant asserts that his assigned lawyer is not adequate or diligent or asserts . . . that his lawyer is disinterested, the judge should hear his claim and, if there is a factual dispute, take testimony and state his findings and conclusion.” As the *Ginther* Court further explained:

A defendant who wishes to advance claims that depend on matters not of record can properly be required to seek at the trial court level an evidentiary hearing for the purpose of establishing his claims with evidence as a precondition to invoking the processes of the appellate courts except in the rare case where the record manifestly shows that the judge would refuse a hearing; in such a case the defendant should seek on appeal, not a reversal of his conviction, but an order directing the trial court to conduct the needed hearing. [*Id.* at 443-444.]

At trial, the prosecutor maintained that defendant killed her live-in partner of nearly thirty years, Paul Michael Burley, by injecting him with insulin. Defendant denied killing Burley, and posited that Burley either took his own life or died from the side effects of some or all of the numerous medications he was taking for his various ailments.² The prosecutor charged defendant with first-degree murder and the trial court convicted defendant on the lesser included offense of second-degree murder.

Defendant claims that defense counsel deprived her of a fair trial because he did not undertake a reasonable investigation into the cause of Burley's death so that he could effectively cross-examine the prosecutor's witnesses or present expert testimony to challenge the prosecutor's theory of the cause of Burley's death. We agree.

Before trial, defense counsel successfully moved for the appointment of an expert. Defense counsel argued that he needed an expert to properly prepare a defense because the allegations against defendant were of a medical nature and beyond his expertise. Though the trial court granted the motion, defense counsel did not retain the services of an expert for trial preparation and, importantly, failed to call an expert to testify at trial. At the *Ginther* hearing, defense counsel conceded that he stopped investigating Burley's cause of death and did not consult a forensic pathologist. According to defense counsel, he spoke to his personal physician and to a specialist who, counsel recalled, may have been an endocrinologist. Moreover, defense counsel admitted that he did not show either physician any of Burley's medical records, the autopsy report or the toxicology reports, and that he neither remembered, nor took any notes of his brief conversations with the doctors.

At the *Ginther* hearing, new counsel for defendant also presented the expert testimony of a forensic pathologist who directly refuted the medical examiner's findings and conclusions about Burley's cause of death. The expert testified that the medical examiner's opinion that Burley died of an insulin overdose was not significantly supported by the available pathological and toxicological findings and that Burley likely died of a multiple drug overdose as a result of the combined effect of numerous medications he was taking at the time of his death, including morphine, which was present in his system at lethal levels.

The trial court concluded that, because defense counsel spoke with two physicians who did not refute the medical examiner's conclusions, his conduct met the objective standard of reasonableness. The trial court acknowledged that expert testimony of the kind offered by defendant at the *Ginther* hearing clearly would have assisted the defense and would have made the defense case stronger. However, the court concluded that even if counsel's performance had been deficient in not retaining an expert, defendant had not established that, but for her counsel's alleged errors, there was a reasonable probability that the outcome of her trial would have been different. Therefore, the trial court concluded that defendant was not deprived of the effective

² Burley suffered from a number of serious illnesses, including hepatitis B and C, HIV, ataxia, neuropathy, chronic obstructed pulmonary disease, impaired vision, dementia, and throat cancer, which was in remission.

assistance of counsel by defense counsel's failure to consult with and retain an expert to analyze and testify about Burley's cause of death.

II. Analysis

A. Summary of Holding

We hold that the trial court erred when it ruled that (1) defense counsel's performance was objectively reasonable and (2) that defendant was not prejudiced by defense counsel's errors. Defense counsel's failure to consult with and present the testimony of appropriate medical experts to address the central issue in this case, the cause of Burley's death, was clearly deficient in light of prevailing professional norms and, but for that deficiency, there is a reasonable probability that the outcome of defendant's trial would have been different.

B. Objective Standard of Reasonableness

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). As our Supreme Court further explained in *LeBlanc*, "[a] judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* We review the trial court's factual findings for clear error and its constitutional determination de novo. *Id.* To establish a claim of ineffective assistance of counsel, defendant must show that her attorney's representation fell below an objective standard of reasonableness and that, but for her counsel's errors, there is a reasonable probability that the results of her trial would have been different. *People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2006).

We hold that the trial court erred when it ruled that defense counsel's error was not objectively unreasonable. Here, the central issue is the cause of Burley's death and this issue hinges on scientific medical testimony. Indeed, the medical examiner originally determined that Burley died of natural causes, but the cause was later changed to hypoglycemic shock with complications due to the administration of insulin. The medical examiner concluded that Burley died from the insulin, after he excluded other causes, and determined that the cause was consistent with, though not proved by, the pathology and toxicology findings. At one point, defense counsel, quite understandably, told the trial court that, under these circumstances, he could not properly defend the case without an expert, and the trial court agreed. Yet, inexplicably, defense counsel failed to consult a forensic pathologist regarding Burley's cause of death, and neglected to talk to any of Burley's treating physicians.

Instead, and apparently based only on the very limited conversations he had with two doctors, defense counsel abandoned the development of any substantive medical basis for refuting the prosecutor's theory about the cause of Burley's death. In light of the particularly pivotal nature of the medical evidence and, because defense counsel admittedly failed to provide either physician with any documentation about Burley's preexisting medical condition, the medications Burley was taking, the toxicology reports or the medical examiner's conclusions, we can conceive of no basis to find that counsel's perfunctory investigation into the cause of death was supported by any reasonable professional judgment. Rather, counsel's failure deprived defendant of the most important defense when he failed to consult with an *informed* expert who

could address and then testify about the medical examiner's conclusions. Indeed, counsel's inaction essentially amounted to a concession of the cause of death, much to the benefit of the prosecutor, and to the very real detriment of his client. Accordingly, the trial court erred when it ruled that defense counsel's conduct met the objective standard of reasonableness. Under these circumstances, in which medical and scientific evidence was essential to the outcome of the case, we find no justification for defense counsel's failure to adequately investigate the cause of Burley's death and present expert testimony on this dispositive issue.

C. Prejudice

The trial court also erred when it found that defendant failed to establish a reasonable probability that the outcome of her trial would have been different had the expert testimony been presented at trial. The trial court noted that such expert testimony certainly would have assisted the defense and would have made the defense case better. In the absence of the expert testimony, there was no substantial basis offered to allow the trial court to determine that Burley's death resulted from anything other than the administration of insulin. Thus, the trial court was left with only two possibilities: that defendant administered insulin to Burley, or that Burley took the insulin himself which, in light of his physical limitations, was unlikely. Indeed, to refute the prosecution's claim that defendant killed Burley, it was crucial to present testimony from a qualified pathologist that (1) the medical examiner's conclusions were not supported by the pathology and toxicology results, nor by Burley's normal insulin levels, (2) the combination of medications Burley was taking, including morphine, could have combined to suppress respiration in a catastrophic manner even at therapeutic levels, and (3) that death caused by respiratory suppression was consistent with the autopsy findings. Such testimony also would have offered the trial court an alternative cause of death that did not implicate defendant and that was supported by the autopsy and toxicology results.

Expert testimony presented at the *Ginther* hearing establishes that had defense counsel consulted such an expert, he would have been able to submit evidence that (1) refuted the medical examiner's conclusions that Burley died as a result of an insulin overdose and (2) provided an alternative, non-criminal explanation for Burley's death. Trial counsel's failure deprived defendant of a substantial defense, and there is a reasonable probability that this would have made a difference in the outcome of the trial. Therefore, under *Strickland v Washington*, 466 US 668; 104 S Ct 2052, 80 L Ed 2d 674 (1984) and *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000), defendant is entitled to a new trial.

We respectfully disagree with our dissenting colleague's conclusion that defendant failed to establish that she was prejudiced by her attorney's failure to consult with or present the testimony of a medical expert. Particularly where, as here, the determination of the victim's cause of death is entirely dependant on the scientific expertise and testimony of a forensic pathologist, and where the defendant's guilt or innocence is inextricably linked to the victim's cause of death, the failure to consult with or present the testimony of a forensic pathologist constitutes overwhelming evidence of prejudice.

Because we hold that defendant received ineffective assistance at trial, we need not address the remainder of the issues presented by defendant's appeal or by the prosecutor's cross-appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen J. Borrello
/s/ Henry William Saad