

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BERNARD CHAUNCEY MURPHY,

Defendant-Appellant.

UNPUBLISHED

October 12, 2006

No. 258397

Wayne Circuit Court

LC No. 04-001084-01

ON RECONSIDERATION

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Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

In this case involving the right to appellate counsel during an interlocutory appeal, defendant appeals as of right his jury trial convictions for two counts of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to 15 to 30 years in prison for the armed robbery convictions and 2 years in prison for the felony-firearm conviction. We reverse and remand.

**I. FACTS**

On April 23, 2004, the prosecution appealed by leave granted the trial court's order excluding evidence of a shotgun. On April 23, 2004, this Court entered a peremptory order reversing the trial court's order and remanding for further proceedings. *People v Bernard Murphy*, unpublished order of the Court of Appeals, issued April 23, 2004 (Docket No. 255101). The case proceeded to trial and defendant was convicted.

Between 5:30 and 6:15 a.m. on November 27, 2003, Christopher Holman and his fiancée, Tammy Isaac, were traveling in Isaac's car to see the Thanksgiving Day parade. While they were stopped at a traffic light in Detroit, a black Dodge Ram pickup truck struck them from behind. Holman got out of the vehicle and discovered there was no damage. A man, whom Holman identified as defendant, got out of the passenger seat of the pickup truck holding a shotgun and yelled, "get down on the ground now." Holman got down on the ground, and defendant told Holman to give all his money to the driver of the pickup truck. Holman removed all the money from his wallet, \$175, and gave it to the driver.

Meanwhile, defendant tapped on the passenger window with the gun and twice ordered Isaac to get out of the car. Isaac got out of the car and defendant grabbed her and threw her on the ground. Defendant pointed the gun at Isaac, threatened to kill her, and demanded all of her

money. Defendant searched the car and removed two cell phones and Isaac's purse. Isaac's purse contained about \$23, spare keys to Holman's vehicle, and Isaac's driver license, social security card, credit cards, and bankcard. Defendant inquired about whether Holman had given the driver his money. After Holman demonstrated that his wallet was empty, defendant and the driver returned to the pickup truck and drove away. Holman and Isaac drove to the state police department in Taylor where they reported the incident.

On November 28, 2003, Sergeant Ramon Childs received an unrelated carjacking complaint involving a sawed-off shotgun and a black pickup truck. Near the area where the complaint originated, Childs encountered a black Dodge pickup truck and followed it to a gas station. The pickup truck parked adjacent to a gas pump and four men got out. Childs saw two men go into the store, one walk to the side or rear of the station, and one stand near the pickup truck. After Childs saw the men get back into the pickup truck and drive away from the station, he called for backup. More police officers arrived and they stopped the pickup truck on a nearby street. Defendant was the driver of the pickup truck. Childs found live shotgun shells in the pickup truck, and the police searched the gas station, where they found more live shotgun shells in the garbage next to the gas pump where the black pickup had been parked. They also found a sawed-off shotgun in the rear of the gas station. The black pickup truck was registered to Melvin J. Murphy, Sr., who shared an address with defendant.

Defendant argues that he was denied the effective assistance of counsel when his trial counsel failed to file a brief opposing the prosecution's emergency interlocutory appeal. The trial court issued an order suppressing evidence of the shotgun obtained in the gas station dumpster, but the prosecution's appeal of that order was successful in admitting the weapon into evidence. Defense counsel was not served with the prosecution's notice of its application for leave to appeal because she had failed to update her address in the Bar Journal directory, nor was defendant served. Trial counsel's subsequent motion for a stay was granted when she stated her intention to move for reconsideration of the appeal. Neither defense counsel nor defendant's court-appointed appellate counsel so moved, the latter explaining that he did not have sufficient information from the record to seek leave for reconsideration before the period expired. Defendant contends that the prosecution's brief to this Court was misleading in its facts section and that he was effectively denied representation before this Court in the appeal, warranting automatic reversal of his conviction under *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Alternatively, he argues that the resulting admission of the shotgun into evidence sufficiently prejudiced the trial court under the test described in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), to require reversal.

## II. STANDARD OF REVIEW

Our review of the ineffective assistance claim is limited to errors apparent on the record because no *Ginther*<sup>1</sup> hearing was held. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). Although the deprivation of counsel issue was not raised before the trial court, it is an

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

allegation of structural error requiring automatic reversal. *Cronic, supra* at 659-660; *People v Willing*, 267 Mich App 208, 224; 704 NW2d 472 (2005).

### III. DEPRIVATION OF COUNSEL

Defendant argues that his defense counsel was ineffective in failing to oppose the prosecution's application for leave to appeal the trial court order suppressing evidence of the shotgun found at the gas station. We agree.

On April 22, 2004, this case was set for trial and the prosecution asserted that, after seeing the sawed-off shotgun seized from the gas station, Holman and Isaac agreed that it looked like the weapon used during the robbery. No witnesses testified at this time. Holman described the robbers' vehicle as a black Dodge Ram pickup truck. Pursuant to a carjacking allegation the following morning, Childs began following a black Dodge Ram pickup truck in Detroit. The pickup truck entered a gas station, and four individuals got out. One individual went into the store, one went to the rear of the gas station, and two stayed near the trash receptacles and gas pumps.

While Childs called for backup, the four men returned to the pickup truck and drove away from the gas station. The police stopped the pickup truck and arrested all four men. One live shotgun shell was found in the pickup truck, and the police found a sawed-off shotgun in "a trash receptacle dumpster type container behind the gas station" and more live shotgun shells in the trash receptacle near where the two individuals had been standing. All the recovered shotgun shells were consistent with the shotgun found behind the gas station. The prosecution specifically requested admission of the testimony of the police officers who observed the pickup truck at the gas station and retrieved the shotgun and shells from the gas station. The trial court would not permit the officers to testify about the shotgun because Childs did not see anyone carry any weapons or take anything behind the gas station. The prosecution then broadened its request to include the shotgun. Here, there was no testimony that any of the four individuals at the gas station were carrying anything to the location where the shotgun was found; thus, the trial court concluded that the gun was not admissible under *People v Hall*, 433 Mich 573; 447 NW2d 580 (1989).

On April 22, 2004, the trial court entered an order denying the prosecution's motion with respect to the shotgun and granting it with respect to the shotgun shells found in the vehicle and the gas station's trash bin. The trial court also denied the prosecution's motion for stay. The same day, the prosecution filed an emergency application for leave to appeal with this Court, including a motion for immediate consideration, an emergency motion for stay, and a motion to waive production of transcript. The trial was scheduled to begin on April 26, 2004. This Court granted the motion for immediate consideration, waived the transcript requirements, dismissed the motion for stay as moot, and remanded to the trial court for further proceedings. This Court reasoned that the trial court abused its discretion in excluding evidence of the shotgun because it was relevant under *Hall, supra* at 573, and peremptorily reversed the trial court's order. *People v Bernard Murphy* unpublished order of the Court of Appeals, issued April 23, 2004 (Docket No. 255101) ("the 2004 interlocutory order").

On April 26, 2004, trial was scheduled to begin, and the trial court learned of this Court's order. The trial court stated that, in the prosecution's application for leave to appeal with this

Court, the statement of the facts was incomplete and the reason for the trial court's finding was inaccurate. Defense counsel also asserted that there were discrepancies between the police reports and the prosecution's statement of facts. On April 26, 2004, the trial court entered another order regarding the prosecution's motion to admit evidence of the shotgun and shotgun shells. The order stated that the evidence of the shells from the pickup truck and the gas station would be admitted and that the evidence regarding the shotgun would not be admitted. The order further stated:

- 1) there was no testimony that a black Dodge Ram occupant was carrying anything at all to the back or side of the gas station @ McNichols and Wyoming;
- 2) that there was a break in the chain of observation at the gas station before defendant's [sic] Murphy's arrest and therefore [*Hall*] does not apply because there is no nexus between the shotgun and/or any similar object and the Dodge Ram and/or the gas station.<sup>2</sup>

At the April 26, 2004 hearing, the prosecution explained that it served notice of its application for leave to appeal to the address defense counsel had provided in the bar directory. However, defense counsel stated that it was not the current address. Defense counsel moved for a stay because she was anticipating filing a motion for reconsideration and "going to the Supreme Court if necessary." The trial court granted the stay, but defense counsel did not seek reconsideration with this Court or leave to appeal to the Michigan Supreme Court.

Neil Leithauser was appointed to represent defendant "about two weeks" after this Court peremptorily reversed the trial court order regarding the shotgun. Leithauser did not seek reconsideration with this Court, explaining that he "didn't have any information really on the case where [he] could have a handle on it" before the period for reconsideration expired. Leithauser stated, "we don't even have a case," and decided not to seek an application for leave with our Supreme Court because he "didn't think [he] had enough of a record to do that."

The trial in this case was postponed until September 2004 and was assigned to a new judge due to a scheduling conflict. The second trial judge apparently disregarded the April 26, 2004 trial court order and allowed the prosecution to present the shotgun. At trial, Holman testified that the passenger of the pickup truck was holding a shotgun and that he saw the weapon. The prosecution presented Holman with the shotgun recovered from the gas station. Holman agreed that it looked like the weapon used in the robbery, but he could not definitively say that it was the same one. Isaac, who admitted that she did not really know anything about guns, described the gun as a "long handgun." Isaac examined the shotgun recovered from the gas station and stated that she was 50 percent sure it was the same weapon used during the robbery.

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<sup>2</sup> It is unclear why the trial court entered a second order to the same effect after the April 22, 2004 order was reversed. However, at the April 26, 2004 hearing, the trial court expressed extreme displeasure with the prosecution, who drafted the April 22, 2004 order.

This Court has found that “throughout pretrial, trial and sentencing proceedings, trial counsel remains ‘trial counsel’ even though he or she, during the course of a defendant’s representation, is faced with various appellate duties and, thus, wears the hats of both trial and ‘appellate’ counsel.” *People v Johnson*, 144 Mich App 125, 132; 373 NW2d 263 (1985).

The United States Supreme Court requires automatic reversal when there has been an “actual or complete denial of the assistance of counsel altogether, where prejudice is so likely that case-by-case inquiry is not worth the cost.” *Strickland, supra* at 692. The Court later announced “the same is true on appeal.” *Roe v Flores-Ortega*, 528 US 470, 483; 120 S Ct 1029; 145 L Ed 2d 985 (2000). In cases for which prejudice is presumed to be less likely, the Court provided a two-pronged test: “(1) counsel’s conduct fell below basic standards of assistance, and (2) but for counsel’s professional failures, the result of the trial would likely have been different.” *Strickland, supra* at 687-688. The Court of Appeals for the Seventh Circuit has further explained when the *Strickland* test cannot be applied:

Our review of the Court’s opinions in *Strickland* and *Cronic* convinces us that the Court does not intend for the *Strickland* test to control the former class of cases. The crucial premise on which the *Strickland* formula -- rests that counsel was in fact assisting the accused during the proceedings and should be strongly presumed to have made tactical judgments. . . -- is totally inapplicable when counsel was absent from the proceedings . . . Thus, both *Strickland* and *Cronic* expressly treat cases involving the total lack of assistance of counsel as separate and distinct from cases involving ineffective assistance of counsel. [*Siverson v O’Leary*, 764 F2d 1208, 1216 (CA 7, 1985)].

Therefore, the current case turns on whether defense counsel made an objectively reasonable strategic decision, *Strickland, supra* at 688, or was in effect “missing in action” or otherwise absent from the proceeding altogether by failing to file a brief for defendant, depriving him of the protections of the adversary system.

A subsequent appeal in the *Siverson* matter presented a situation similar to that at issue here, and the Court of Appeals for the Seventh Circuit held that the trial counsel’s failure to file an appellate brief amounted to a complete denial of assistance of counsel:

In this case, Thomas’s attorneys’ failure to file a brief on his behalf on the State’s Rule 604(a)(1) appeal from the trial court’s suppression order amounted to a complete denial of assistance of counsel during a critical stage. For purposes of the appeal, no brief meant no representation at all. [*United States ex rel Thomas v O’Leary*, 856 F2d 1011, 1016-1017 (CA 7, 1988)].

Similarly, while purportedly applying the *Strickland* test in *Fields v Bagley*, 275 F3d 478 (CA 6, 2001), the Court of Appeals for the Sixth Circuit automatically assumed that the test’s second criterion (showing sufficient prejudice for the reasonable likelihood of a different result) had already been met by the fact that counsel failed to file a brief. The Court held that because “Fields was not able to present any argument to advocate for affirmation of the suppression order,” that fact was “by itself . . . enough to show prejudice,” and cited *O’Leary* and *Cronic* as support for that conclusion. *Fields, supra* at 485.

*Johnson, supra*, at first seems to contradict this approach. However, although this Court applied the *Strickland* rather than the *Cronic* test, several important factual differences distinguished it from the above cases. The defendant's first counsel declined to file a brief opposing a prosecutorial appeal to this Court. After that appeal succeeded, the first counsel was dismissed by the defendant. Newly appointed counsel promptly and explicitly refused to appeal this Court's decision, concluding that it would be frivolous. *Johnson, supra* at 129. The defendant later requested substitution of counsel for that reason, but the trial court refused, finding that the defense attorney was correct in its assessment. So did this Court in a subsequent appeal: "Both the trial court and his appointed counsel concluded that such an appeal would have been futile and would only serve to unnecessarily delay the defendant's trial and they were right." *Johnson, supra* at 135. These circumstances are vastly different from those in this case. The record in *Johnson* expressly negates an assumption of prejudice, as defense counsel exercised what the trial court and this Court deemed to be deliberate and sound legal judgment. The defense counsel in *Johnson* made a reasonable strategic decision and consciously determined not to appeal, which was deemed sufficiently persuasive by both this Court and the trial court.

In contrast, the facts of this case reveal a complete denial of assistance of counsel. First, defense counsel rendered herself unavailable for prompt service of notice of the prosecution's appeal by failing to inform the prosecution of her correct business address. There was certainly a basis upon which counsel could have responded to the prosecutor's appeal, as pointed out to counsel by the trial court itself. In these circumstances, a supporting brief by defense counsel could not be considered frivolous, nor could failing to file it be considered reasonably strategic. Nonetheless, while defense counsel did move for a stay of the proceedings and represented to the trial court that she would seek further appellate relief, she failed to do so. Neither did replacement counsel.

In short, defendant was denied the effective assistance of counsel at the critical stage of an interlocutory appeal of an order suppressing evidence of the weapon he allegedly used in the commission of the crime for which he was convicted. Although Michigan law does not speak directly to this matter, substantial persuasive authority indicates, and we agree, that defendant was denied the effective assistance of counsel.

Defendant also argues that the trial court erred in admitting Holman's identification of him based on defendant's voice. Our decision on the preceding issue renders the identification issue moot.

#### Response to Prosecutor's Motion for Reconsideration

After we filed an initial opinion in this case, the prosecuting attorney's office, which had not previously briefed the appeal due to its admitted "bureaucratic snafu" and "carelessness," filed a motion for reconsideration. We now briefly turn to the arguments raised therein.

The prosecutor contends that anytime a defendant is represented in whatever nominal manner by an attorney, an ineffective assistance claim can only be validated upon a showing of prejudice. That is incorrect. As already noted, the United States Supreme Court has recognized that there are cases in which, "although counsel is available to assist the accused," no showing of prejudice is required to support an ineffective assistance claim, *Cronic, supra* at 659-660, and

that approach has been used to recognize ineffective assistance claims in cases similar to this one, *O'Leary, supra* at 1016-1017.

We recognize that ineffective assistance claims are usually “subject to a general requirement that the defendant affirmatively prove prejudice.” *Strickland, supra* at 693. Nonetheless, under the compelling facts of this case, we conclude that no such showing is required. As noted above, having failed to respond in any fashion to the prosecutor’s interlocutory appeal regarding the shotgun evidence, defense counsel was informed by the trial court that, in its filings on appeal, the prosecutor had incompletely stated the facts and inaccurately stated the reasons for the trial court’s decision to suppress the evidence. Defense counsel acknowledged those problems and represented to the trial court that she would file a motion for reconsideration to this Court or, if necessary, an appeal to our Supreme Court. She did not do so. Replacement counsel for defendant also failed to do so, claiming, in part, that he did not have time to review the case sufficiently before the period for reconsideration expired. Defendant thus completely lost his opportunity to defend the action of the trial court in suppressing the contested evidence and we conclude that, under the precedents cited herein, no showing of actual prejudice was required.

We reject the prosecutor’s argument that this result will allow the criminal defense bar to regularly fail to file briefs in interlocutory appeals and, should those appeals be lost, defendants will have the automatic opportunity to claim ineffective assistance of counsel without needing to show actual prejudice. In the ordinary case, mere failure to file a brief on appeal would not constitute ineffective assistance requiring relief without a showing of actual prejudice. Unless the facts surrounding the failure to file are as egregious as those here, no relief would be afforded in the absence of such a showing.

We reverse and remand for a new trial. Further, we agree with the prosecutor that defendant should be given “the opportunity . . . to defend the decision of the trial court suppressing evidence.” Accordingly, we direct that, should the suppression or admission of the shotgun evidence again become an issue, the trial court is not bound, by the “law of the case” doctrine or otherwise, to follow the 2004 interlocutory order. As we have described, that order was rendered against defendant when he was without the effective assistance of counsel and it would be manifestly unjust to hold him bound by that decision. The matter should be considered with the full benefits of advocacy on both sides of the issue. See *O'Leary, supra* at 1011 (appropriate remedies included an independent “second . . . review” of an issue previously decided against a defendant without the effective assistance of counsel).

We do not retain jurisdiction.

/s/ Bill Schuette

/s/ Richard A. Bandstra