

STATE OF MICHIGAN
IN THE SUPREME COURT

*PROS

PEOPLE OF THE STATE OF MICHIGAN,
PLAINTIFF-APPELLANT,
v
KATHERINE SUE DENDEL,
DEFENDANT-APPELLEE.

SUPREME COURT NO.
COURT OF APPEALS NO. 247391 *of 7/18/06*
LOWER COURT NO. 02-002915-FC

Jackson
C Schmucker

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APPLICATION FOR LEAVE TO APPEAL

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FILED

SEP 11 2006

CORBIN R. DAVIS
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MICHIGAN SUPREME COURT

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STATEMENT OF THE QUESTION PRESENTED

Where (1) defendant's desired defense did not call for challenging the medical examiner's cause of death conclusion, (2) defense counsel in fact talked to two doctors about it anyway, (3) counsel had dealt with the prosecutor's experts in the past, and (4) the trial court (fact finder) said that the result would be the same even if the proffered witness had testified, is defendant entitled to a new trial for the ineffective assistance of counsel for not presenting an expert witness on cause of death?

STATEMENT OF FACTS

On February 5, 2003, Jackson County Circuit Court Judge Chad Schmucker, following a bench trial, found defendant guilty of second-degree murder. MCL 750.317. Subsequently, on March 12, 2003, he sentenced defendant as a third-felony offender, MCL 769.11, to 7 ½ - 15 years. Defendant then appealed by right. Following an evidentiary hearing, Judge Schmucker denied the motion for a new trial on September 7, 2005. On July 18, 2006, in a 2-1 opinion, the Court of Appeals reversed and remanded for a new trial.

The Court of Appeals' majority opinion accurately describes the case's general facts:

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

²Burley 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.

The prosecutor charged defendant with first-degree murder and the trial court convicted defendant on the lesser included offense of second-degree murder. (P 2).

On April 2, 2002, paramedic Bobby Ackley, Jr., responded to a call at defendant's home in Jackson. (First February 3, 2003, Transcript [Tr I A], pp 54-55). Rex Burley was dead; defendant was hysterical. (Tr I A, p 58). Eventually, defendant told Ackley that she did not want an autopsy, that she wanted the body cremated, and that she

did not want his family contacted. (Tr I A, pp 61-62). He considered her statements to be a bit unusual. (Tr I A, p 66).

Oakland County Medical Examiner Bernardino Pacris testified that he conducted the autopsy the next day. (Tr I A, pp 72, 75). He concluded that Burley had been comatose for twelve hours before he died through hypoglycemic complication. (Tr I A, p 87). Accordingly, he concluded that defendant's story that Burley had still been alive at 4 a.m. "doesn't jive." (Tr I A, p 90).

Toxicologist Michael Evans testified that Burley having no glucose was in fact consistent with an insulin injection. (Tr II, February 3, 2003, Transcript [Tr I B], p 6).

Neurologist Daniel Freeman, who had treated defendant Burley, testified that Burley had no medications that would have caused his zero glucose level. (February 4, 2003, Trial Transcript [Tr II A], pp 142, 147, 153). Further, Burley's physical condition was so bad that it would have been either extremely difficult or impossible for him to have used a syringe. (Tr II A, p 153).

Defendant and Burley had been companions for about twenty-five years and had lived together over twenty years. (Tr II A, pp 62, 109). At least toward the end, defendant was his main caregiver. (Tr II A, p 114). Defendant herself had physical problems. She is a type-2 diabetic who takes insulin (two injections per day) and pills. (Tr II A, p 12; February 5, 2003, Trial Transcript [Tr III], p 67).

Because of the victim's great physical needs, defendant received an "exceptional" amount, \$730 per month. (Tr IIA, pp 217-218).¹ As it turned out, the Family

¹Actually, anything over \$333 is an exceptional amount. (Tr IIA, p 218).

Independence Agency gave her a number of suggestions on how to deal with the victim, who was becoming a bigger problem. (Tr IIA, p 221). FIA suggested a respite or hospice program, something that defendant had rejected in the past. (Tr IIA, p 221). FIA also suggested Lifeways (community mental health) and the adult protective services worker made the referral herself. (Tr IIA, p 224). Lifeways followed up on the referral. (Tr IIA, p 224).

Pauline Toves, the victim's sister, testified that defendant had not wanted to put the victim in a nursing home. (Tr IIA, p 124). If Burley were placed there, then the nursing home, not defendant, would receive the check. (Tr IIA, p 124). Therefore, she was looking for in-home health care. (Tr IIA, p 136).

Outreach worker Linda Rudolph testified that she had offered services to defendant. Defendant did not follow up. (Tr IIA, p 166).

Daline Sierminski testified that, a few weeks before the death, defendant told her that she felt "like giving him a shot of insulin." (Tr IIA, p 92). She also said "if something happens to your brother, your family won't know what hit you." (Tr IIA, p 93).

The parties held an evidentiary hearing for the Motion for New Trial on August 26, 2005. At that hearing, defendant's defense counsel, now Twelfth District Court Judge Joseph Filip, testified that defendant had wanted a suicide defense. (Evidentiary Hearing Transcript [ETr], p 24). Such a defense is consistent with Pacris' and Evans' conclusions about how Burley died. (ETr, pp 26, 32). The defense did not require counsel to show that either doctor was incorrect. (ETr, p 25). Defense counsel had dealt with both Doctors Pacris and Evans before. (ETr, pp 18-19). Both were qualified expert witnesses in toxicology. (ETr, p 20).

As it was, counsel in fact did try to investigate the cause of death. He first went to a local general practitioner, a Doctor Michael Burgess. (ETr, p 23). Dr. Burgess told him that he was just a general practitioner and referred him to a Doctor Halsey. (ETr, p 35). Dr. Halsey was unable to give counsel anything that would amount to a viable defense. (ETr, p 24).

Defendant also presented forensic pathologist Laurence Simson as a witness. He concluded that, although it could not be ruled out, Burley having died of an insulin overdose is not significantly supported by the findings. (ETr, p 60). He also stated that a multiple drug overdose could not be ruled out and that Burley could have been alive four hours before he died. (ETr, pp 71, 91, 96).

In rebuttal, Dr. Pacris testified that nothing in Dr. Simson's analysis changed his mind that Burley died from hypoglycemic shock. (ETr, pp 104-105). He also explained that medical textbooks state that the victim had to be in a coma for twelve hours to explain the changes that he observed. (ETr, p 108).

In the end, Judge Schmucker denied defendant's motion for a new trial. He first found that trial counsel's testimony was credible. (ETr, p 141). He specifically found that counsel's investigation was reasonable, even though he could have found someone else "in hindsight." (ETr, p 142).

Judge Schmucker then pointed out that defendant had not shown a reasonable probability of an acquittal even though her case would have been stronger with Dr. Simson's testimony. (ETr, pp 142-143). He pointed to the other evidence in the case. (ETr, p 143).

On appeal, however, the majority disagreed:

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 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 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. (Pp 3-4).

The majority then also disagreed with Judge Schmucker's conclusion that defendant had not been sufficiently prejudiced:

Particularly where, as here, the determination of the victim's cause of death is entirely dependent 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. (P 4).

On the other hand, in dissenting, Judge Kurtis Wilder pointed out that "[t]he trial judge conducting the *Ginther* hearing was also the finder of fact in the non-jury trial."

(P 2). (Footnote omitted). He concluded:

The fact-finder himself concluded the opposite by expressly stating on the record that had the expert testimony that decedent died of a multiple drug overdose and not of insulin shock been offered at trial, he nevertheless, given the weight of the contrary evidence, both direct and circumstantial, would have still found defendant guilty of second-degree murder.⁵

⁵The finding by the trial judge, that the medical examiner's testimony, together with other circumstantial evidence, was so persuasive as to outweigh beyond a reasonable doubt the forensic pathologist's testimony on cause of death, is at the heart of my respectful disagreement with the majority. . . . Nothing in the record, however, establishing that the forensic pathologist's testimony was more believable or more credible than the testimony of the medical examiner, such that its mere presentation at trial makes it "reasonably probable" that the trial would have resulted in another outcome, i.e.,] acquittal. In fact, during the *Ginther* hearing, the forensic pathologist presented by the defendant acknowledged on cross-examination that while he disagreed with the medical examiner's conclusion that insulin shock was the cause of death, he could not rule out insulin shock as the cause of death. Thus, because the impact of the expert testimony was dependent upon the fact-finder's evaluation of credibility, in my judgment, the record supports the trial judge's finding that there was not a reasonable probability that the outcome would have been different. (Pp 2-3). (Footnote omitted).

ARGUMENT

Because (1) defendant's desired defense did not call for challenging the medical examiner's cause of death conclusion, (2) defense counsel in fact talked to two doctors about it anyway, (3) counsel had dealt with the prosecutor's experts in the past, and (4) the trial court (fact finder) said that the result would be the same even if the proffered witness had testified, defendant is not entitled to a new trial for the ineffective assistance of counsel for not presenting an expert witness on cause of death.

The Court of Appeals' majority decision not only erred in both of its conclusions, but its decision contradicts opinions from Michigan and the Sixth Circuit. First, as Judge Schmucker correctly found, counsel's decision not to further investigate is reasonable. He had in fact talked to two doctors about the matter even though his client had wanted a different defense. The majority's decision to the contrary comes to precisely the opposite conclusion that Judge Eric Clay's opinion in Lundgren v Mitchell, 440 F3d 754 (CA 6, 2006), came to. Second, as both Judge Schmucker and Judge Wilder concluded, defendant has not shown prejudice. This was a bench trial. Judge Schmucker, the judge who had found defendant guilty in the first place, concluded that his decision would have been the same anyway. He is in a better position to assess the doctors' credibility than anyone else it. The majority's decision to the contrary contradicts this Court's unanimous decision in People v Carbin, 463 Mich 590; 623 NW2d 884 (2001), and the Court of Appeals' decision in People v Jackson, docket no. 241751, released 12/18/03, lv den 471 Mich 865; 683 NW2d 673 (2004). Therefore, under MCR 7.302(B)(3) or (5), this Court should grant leave to appeal, reverse, and remand with instructions to consider the parties' other issues.

As all agree, ineffective assistance claims have two components. First, a defendant must prove deficient performance. Second, he must prove a reasonable probability of an acquittal. Strickland v Washington, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). As pointed out in People v Noble, 238 Mich App 647; 608 NW2d 123, 131 (1999), lv den 463 Mich 886; 618 NW2d 596 (2000), “[e]ffective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” This Court reviews ineffective assistance of counsel claims *de novo*. People v LeBlanc, 465 Mich 575, 579; 640 NW2d 246 (2002).

First, defendant has not shown deficient performance. Trial counsel raised the suicide defense, to a large extent, because defendant wanted it. (ETr, p 24). Such a defense did not require him to show either Dr. Pacris or Dr. Evans to be incorrect. (ETr, pp 25, 32).²

Counsel, however, did not just stop at following what his client wanted. Instead, he specifically went to two doctors to see what he could find. First, a general practitioner referred him to someone else who would be able to help him. (ETr, p 23). That second person was unable to give anything that would give a viable defense. (ETr, p 24). He also did not refer the lawyer on to anyone else. (ETr, p 35).

Additionally, as the trial court pointed out in its September 7, 2005, supplemental opinion, “[d]efense counsel had some prior contact with these expert witnesses and he had no specific reason to question their credentials, credibility or bias.” (P 2).

²Incidentally, Dr. Evans is the same defense expert used by one of the defendants in People v Derror, 475 Mich 316; 715 NW2d 822 (2006).

In other words, in the end, defendant is faulting her lawyer merely because her lawyer did not find “the right” expert. No case, however, requires a trial lawyer to keep going until he finds an expert who is willing to say whatever it is that helps the defendant.

Also, in other words, all that defendant has shown is that “attorneys can always do more in preparation for a trial.” Mason v Mitchell, 320 F3d 604, 618 (CA 6, 2003). Defendant’s and the majority’s analysis, very heavily relying on hindsight, is wrong.³ A lawyer is not required to pursue “every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant.” Johnson v Bell, 344 F3d 567, 574 (CA 6, 2003), cert den 541 US 1010; 124 S Ct 2074; 158 L Ed 2d 621 (2004). After all, even though his client had wanted a defense that did not in the least require challenging the medical examiner’s conclusions, defense counsel still investigated anyway. He found someone who, as it turned out, could not help him. Under the circumstances, his not looking further is sufficiently reasonable. The trial court did not err in so concluding. (ETr, pp 141-142).

As pointed out above, the majority’s conclusion cannot be reconciled with Sixth Circuit Judge Eric Clay’s opinion in Lundgren, supra. In Lundgren, defendant had even more to complain about than does defendant in the present case. In Lundgren, the criminal defendant had been a cult leader in a community east of Cleveland. Because God had told him to, he killed five of his followers. On appeal, he claimed (among other things) the ineffective assistance of counsel for not presenting an insanity defense. Even though

³The majority’s constantly stating that the victim’s death is “the central issue” cannot possibly come from anything but hindsight. As even defendant admits, Burley’s cause of death did not rise as any major issue until the appeal. It became a concern only after defendant produced Simson’s report.

Judge Clay's majority decision never disputes dissenting Judge Gilbert Merritt's assertion that the defendant had no other conceivable defense, it found no ineffective assistance - simply because counsel had spoken to two clinical psychologists who had each concluded that the defendant was sane. Judge Clay's opinion did not require the lawyer to look for another expert: "Given counsel's information at the time of trial, there is no evidence to support the conclusion that counsel's decision was unreasonable." 440 F3d 773. Of course, finding an expert to claim that a person who had killed five cult followers because God had told him to would not have been particularly difficult (far less difficult than finding an expert who would dispute cause of death in the present case). Lundgren cannot be distinguished. Yet, even though the Court of Appeals granted plaintiff's motion to cite it, it completely ignored this case in its opinion.

In addition, as it is, the majority also ignored defendant's own wishes. Although, in one area (finding litigation evidence at a death penalty hearing) counsel must investigate no matter what the client wants, Rompilla v Beard, 545 US 374; 125 S Ct 2456, 2466; 162 L Ed 2d 360 (2005), the client's desires should not be completely ignored. As stated in Keith v Mitchell, 455 F3d 662, ___ (CA 6, 2006), "an otherwise constitutionally ineffective strategy is not grounds for . . . relief if the client knowingly directed the strategy."

In the end, the majority decision (1) relies very heavily on hindsight, (2) ignores Judge Clay's opinion in Lundgren, and (3) ignores defendant's own wishes. At the very least, this Court should grant leave to appeal to sort out this problem.

Second, the majority also incorrectly found prejudice. As dissenting Judge Wilder correctly pointed out, this is a bench trial. The same judge who conducted the evidentiary hearing, had found defendant guilty. As Judge Wilder wrote: "Thus, because

the impact of the expert testimony was dependent upon the fact-finder's evaluation of credibility, . . . the record supports the trial judge's finding that there was not a reasonable probability that the outcome would have been different." (P 3, n 5).

In Carbin, 463 Mich 604-605, while pointing out that the defendant had not shown prejudice, this Court specifically pointed out that the case was a bench trial:

Although the trial court did not expressly rule that the outcome at trial would have been the same had [the missing witnesses] been called to testify, it did state that their additional testimony was "for the most part, cumulative" and that the victim's testimony that defendant was one of her attackers was "very believable." Accordingly, on this record we cannot say that a reasonable probability exists that, but for counsel's failure to call [these witnesses] to testify at trial, the result of the proceeding would have been different.

This analysis, of course, is very similar to Judge Wilder's analysis. Yet, the majority essentially ignored this being a bench trial.

As it is, the Court of Appeals' unpublished opinion in Jackson, supra. is also closer to Judge Wilder's dissent than it is to the majority's opinion. Jackson specifically stated:

Had Jackson testified that he did not return to the party or shoot [the victim], it would only have required the trial court to weigh Jackson's credibility against the strength of the contradictory evidence. Given the trial court's observation that Jackson was "not at all that credible as a witness," as well as its statement that nothing at the *Ginther* hearing caused him "to reconsider in any way the conclusions I reached at the end of the bench trial," we are unconvinced that Jackson suffered actual prejudice by being dissuaded from testifying. (P 6).

Once again, at the very least, this Court should grant leave to appeal. Very few cases in Michigan have dealt with ineffective assistance of counsel claims in bench trial situations (especially where the judge who presided over the trial also conducted the

evidentiary hearing). The Court of Appeals' 2-1 decision does not give enough guidance to the parties. In addition, it was wrong, contradicting both the Sixth Circuit's decision in Lundgren and this Court's unanimous decision in Carbin.

RELIEF

ACCORDINGLY, plaintiff asks this Court to grant leave to appeal, reverse, and remand with instructions to consider the remaining issues.

Respectfully submitted,

September 7, 2006


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