STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 4, 2013
v	No. 308076 Wayne Circuit Court
CAROL JEAN WILSON, Defendant-Appellant.	LC No. 11-006915-FH

Before: WILDER, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of uttering and publishing false or forged instruments, MCL 750.249, and larceny from a building, MCL 750.360. She was sentenced to five years' probation. Because defendant was denied the effective assistance of counsel, we reverse and remand for a new trial.

I. BACKGROUND

The prosecution's theory at trial was that defendant stole a check ("Check #730") from the victim's home and then wrote that check payable to defendant's company, while also forging the victim's name on the check. Because whether defendant forged the check was relevant to the prosecution's theory, defense counsel requested that the trial court appoint a handwriting expert for him to use. On September 1, 2011, the trial court granted the request in an order, which also provided that "a report from said expert is to be provided to the prosecution no later than thirty (30) days prior to trial in this case."

Defense counsel thereafter provided the expert with three documents: Check #730, the affidavit of forgery signed by the victim, and a statement to police signed by the victim. After reviewing the items, the expert left a message (the contents of this message is unknown) for defense counsel on September 14, 2011, and then finally spoke with counsel on September 22, 2011, informing him that the results of the handwriting analysis were inconclusive — he could not say one way or the other whether the victim wrote Check #730 because there were some similarities and some differences between the samples. The expert then indicated that in order to be able to come to *any* conclusion, he required additional samples, ideally "historical" samples that were not related to this case. Defense counsel never contacted the expert again.

At the September 26, 2011, pretrial conference, counsel stated to the trial court that in order to get other check samples from the victim's credit union, he needed a "discovery order." However, the trial court instructed him that a simple subpoena issued by an attorney would work. Thereafter, counsel served a subpoena on the victim's credit union to get other check samples. In response, counsel received copies of 10 checks four to five days before trial. However, counsel never provided the copies of the checks to the expert, and the expert never produced any report before trial. In an affidavit, counsel explained that he "had made a strategic decision to no longer use the handwriting expert" and, as a result, "a report would not be submitted by the handwriting expert."

The two-day trial took place on October 13 and October 14, 2011.

After defendant was found guilty, appellate counsel provided the expert with the 10 additional checks to examine. The expert conducted the review on March 8, 2012. After reviewing the 10 extra checks along with the three original items, the expert concluded that "it is highly probable" that the victim's name on Check #730 was "written by the same person" that wrote the other samples. The expert wrote a report on March 9, 2012, detailing his findings.

On April 30, 2012, defendant moved for a new trial on the basis of the ineffective assistance of counsel. At the *Ginther*[1] hearing, defense counsel explained that he did not provide the 10 checks to the expert because he was afraid that if the expert's conclusions were unfavorable after conducting the review, then he would have to provide the prosecution with a report of those unfavorable conclusions.[2] The trial court denied the motion for a new trial, concluding that defense counsel had employed sound trial strategy.

II. ANALYSIS

Defendant argues that her trial counsel was ineffective for failing to fully investigate the authenticity of the signature on Check #730 when he declined to provide the expert with the samples that the expert requested. We agree.

A.

This issue involves the interpretation of a court rule and a trial court's order, both of which are questions of law that we review de novo. *People v Hawkins*, 468 Mich 488, 497; 668 NW2d 602 (2003); *Silverstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008).

The determination of whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether

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

[2] There was no explanation why defense counsel did not have this same concern when he initially provided the three samples to the expert.

those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id.*

B.

Defendants have the guaranteed right to the effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Aceval*, 282 Mich App 379, 386; 764 NW2d 285 (2009). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Generally, to establish an ineffective assistance of counsel claim, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008).

Counsel's failure to reasonably investigate can "constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). The United States Supreme Court in *Strickland*, 466 US at 691, explained that defense

> counsel has a duty to make reasonable investigations or to make *a reasonable decision that makes particular investigations unnecessary*. In any effectiveness case, *a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances*, applying a heavy measure of deference to counsel's judgments. [Emphasis added.]

Thus, whether defense counsel acted within reasonable, professional norms is solely dependent upon whether his basis for not providing the additional writing samples to the expert was reasonable. His purported reason for not providing the samples was that he was concerned that if the expert's results were not favorable (i.e., that the expert concluded that Check #730 was written by someone other than the victim), then that information would have to be provided to the prosecution, pursuant to the trial court's order.

However, this concern is dubious. First, in order for a discovery order to be valid, it must comport with MCR 6.201(A), which governs discovery in a criminal proceeding:

> In addition to disclosures required by provisions of law other than MCL 767.94a, a party upon request must provide all other parties:
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> * * *
>
> (3) the curriculum vitae of an expert *the party may call at trial* and either a report by the expert or a written description of the substance of the proposed testimony of the expert, the expert's opinion, and the underlying basis of that opinion . . . . [Emphasis added.]

Thus, parties are only entitled to discovery from experts *who may be called to testify by the opposing party*. Here, assuming that the expert's analysis produced unfavorable results for

defendant, defense counsel was permitted to decide not to call the expert as a witness, thus making the expert's opinions undiscoverable as outside the purview of MCR 6.201(A).

In sum, for the trial court's discovery order to be legal, it must be construed as requiring disclosure only if defense counsel thought he might use the expert at trial. See *People v Phillips*, 468 Mich 583; 663 NW2d 463 (2003). In *Phillips*, the Court was asked to rule on the validity of an order that *required* an expert to prepare a report. *Id.* at 585. The Court, however, concluded that MCR 6.201(A) did "not permit a trial court to compel creation of a report from either party's expert witnesses where no report exists." *Id.* at 591. Although MCR 6.201(A) in *Phillips* was an earlier version of the court rule,[3] the Court's holding makes it clear that a trial court cannot exceed the boundaries as outlined in the governing court rule. Thus, for the order to be legal, it has to apply only to experts that defense counsel held out as possibly using at trial.[4]

Second, defense counsel's claim, that he thought he would have been forced to reveal any unfavorable conclusions to the prosecution, even if he chose to no longer use the expert, is belied by his own affidavit and actions at the trial court. Defense counsel eventually told the trial court that he was not going to be providing a report to the prosecution because he "had made a strategic decision to no longer use the handwriting expert." This assertion below is in direct conflict, however, with his assertion here that he might have to produce a report regardless of the circumstances. Thus, defense counsel has tacitly admitted that, consistent with MCR 6.201(A), he understood that no "report"[5] needed to be provided as long as he was not going to use the expert at trial. In addition to defense counsel's own words, his actions demonstrated that he possessed this same knowledge because he never presented the expert's initial inconclusive report to the prosecution. Defense counsel's conduct demonstrates his understanding that, once he decided he was not going to use the expert, he had no obligation to give any information to the prosecution. In short, defense counsel's purported belief that he would have had to disclose

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[3] The prior version of MCR 6.201(A) required, *inter alia*, the disclosure of "any report of any kind produced by or for an expert witness whom the party intends to call at trial." *Phillips*, 468 Mich at 590.

[4] We note that even if the order were to be construed as applying to non-testifying experts, defendant would still be entitled to a new trial. Of course, defense counsel would still have been obligated to follow the clearly incorrect order. See *In re Contempt of Henry*, 282 Mich App 656, 680; 765 NW2d 44 (2009). However, in this instance, the illegal order would have negatively implicated defendant's rights to due process by putting restraints on defense counsel's ability to adequately investigate and present a defense. See *California v Trombetta*, 467 US 479, 485; 104 S Ct 2528; 81 L Ed 2d 413 (1984) ("Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense.").

[5] We use the word "report" because that is the word used in the trial court's order, but MCR 6.201(A) allows for the discovery of either a "report" or "a written description of the substance of the proposed testimony . . . ."

any unfavorable conclusions to the prosecution in the future even if he decided to not use the expert anymore is patently unreasonable given that, under similar circumstances before trial, he knew that he did not have to produce a report if he did not use the expert. The trial court's finding that defense counsel acted reasonably in declining to have the expert evaluate the other samples is clearly erroneous. There was no rational basis for failing to provide the appointed expert[6] with the requested samples.

The second prong of the ineffective assistance test, prejudice, is easily met. To establish prejudice, a defendant must show that a reasonable probability exists that, but for the error, the outcome of the proceedings would have been different. *Davenport*, 280 Mich App at 468. The expert testified at the *Ginther* hearing that after he finally was able to review all of the handwriting samples that defense counsel had prior to the trial, he was able to conclude that it was "highly probable" that the same person wrote all of the samples. This evidence is critically important because it was the prosecution's theory that defendant stole Check #730 and forged the victim's signature on the check. Further, the victim did admit that at least some of these other checks that the expert reviewed were indeed written by her. Thus, if the jury had heard from an expert that it was "highly probable" that the same person wrote all of the exhibits, and did not have to rely on its own lay opinions and review of the exhibits, there was a "reasonable probability" that the jury would have selected a different outcome.

Because defendant has successfully rebutted the presumption she was provided effective assistance of counsel, she is entitled to a new trial.

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

/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause

[6] And because the expert was appointed by the court, defense counsel did not have to perform any cost-benefit analysis that may exist when a defendant retains an expert on its own.