

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

STEVEN SHAYA,

Defendant-Appellee.

UNPUBLISHED

May 18, 2004

No. 245877

Wayne Circuit Court

LC No. 01-008591

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant was convicted of false pretenses over \$20,000, MCL 750.218(5)(a). Defendant was sentenced to five years' probation and ordered to pay \$80,500 in restitution. Defendant moved for a new trial based on ineffective assistance of counsel and prosecutorial misconduct, and the trial court granted a new trial on both bases. We reverse and remand.

The prosecution's first issue on appeal is that the trial court erred in granting defendant's motion for a new trial based on ineffective assistance of counsel without first conducting an evidentiary hearing. We agree.

We review a trial court's decision regarding a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). In order to determine whether the trial court abused its discretion, we are required to examine the reasons given by the trial court for granting a new trial. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). We will find an abuse of discretion if the reasons given by the trial court do not provide a legally recognized basis for relief. *Id.*

Defendant filed a motion for a new trial arguing ineffective assistance of counsel and prosecutorial misconduct. Defendant claims that his trial counsel was ineffective because his trial counsel possessed a letter written by the supervising building inspector which refutes the fact that defendant obtained a Certificate of Acceptance by false pretenses, but failed to present the letter at trial. The trial court granted defendant's motion on the basis of ineffective assistance of counsel without holding an evidentiary hearing.

To establish a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456

Mich 543, 556; 581 NW2d 654 (1998), citing *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); see also *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). “The defendant must overcome a strong presumption that counsel’s assistance constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.” *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), citing *Strickland, supra*, at 689-695. A defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel, and to the extent that his claim depends of facts not of record, it is incumbent on him to make a testimonial record at the trial court level. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

It is apparent from a reading of the record that defense counsel’s theory was not that the certificate was in fact valid, but, rather, that defendant was not the party responsible for the fraud. Furthermore, the prosecution argued to the jury that it was not critical whether the certificate was forged because defendant had verbally misrepresented that the job was complete, when in fact it was not, and that this misrepresentation was enough to meet the requirements of false pretenses.

In any event, we find that it remains unclear why the inspector wrote the letter. One theory presented on appeal was that the letter was written as a safe guard to cancel the certificate in the event that one had been legitimately issued. If this is the case, defense counsel may have chosen not to inquire about the letter because he was aware of how the inspector would have responded. Because it is unclear from the record whether defense counsel was ineffective, the trial court, at the very least, should have conducted an evidentiary hearing to determine the facts behind the allegations before granting defendant’s motion for a new trial. In the absence of an evidentiary hearing, to clarify the circumstances surrounding the letter in question and to determine whether the performance of defendant’s trial counsel fell below an objective standard of reasonableness, *Smith, supra* at 556, in a manner that was prejudicial to the extent there is a reasonable probability it changed the outcome of the proceedings, *Stanaway, supra* at 687, we find that the trial court abused its discretion in granting defendant’s motion for a new trial. See *Cress, supra* at 691; *Jones, supra* at 404.

The prosecutor next argues that the trial court erred in granting defendant’s motion for a new trial based on prosecutorial misconduct. We agree.

A criminal defendant has a due process right of access to certain information possessed by the prosecution. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998), citing *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963). “In order to establish a *Brady* violation, a defendant must prove (1) that the state possessed evidence favorable to the defendant, (2) that the defendant did not possess the evidence and could not have obtained it with the exercise of reasonable diligence, (3) that the prosecution suppressed the favorable evidence, and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.” *Lester, supra*, at 281.

The trial court’s finding of prosecutorial misconduct was based on the premise that the prosecution knew of evidence, the letter written by the inspector, suggesting that the certificate was authentic and did not present that evidence to the jury. The prosecutor, however, noted at the hearing on defendant’s motion for a new trial, that both he and defense counsel had a copy of

this letter, and defendant did not refute this assertion. Furthermore, the letter was addressed to defendant and defendant made no indication that he did not receive the letter. Nonetheless, it is questionable whether the outcome of the proceedings would have been different had the letter been introduced, as the purpose of the letter was never ascertained. The letter could have been written merely as a safeguard to cancel the certificate in the event that one had been issued. But, without further explanation, we can only speculate regarding why the letter was written. Because defendant has failed to meet the necessary requirements set forth in *Brady, supra*, he has failed to show that the prosecutor committed misconduct. Again, without an evidentiary hearing to clarify the circumstances surrounding the letter, the trial court abused its discretion in granting defendant's motion for a new trial on the basis that the prosecution committed misconduct in failing to present the letter to the jury.

Reversed and remanded to the trial court for an evidentiary hearing regarding defendant's motion for a new trial.

/s/ E. Thomas Fitzgerald

/s/ Kathleen Jansen

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Wayne Circuit Court

LC No. 01-245877

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

TALBOT, J., Dissenting.

This Court's peremptory reversal in this case was vacated by order of our Supreme Court on the apparent basis that the trial court withheld a supplemental ruling from the parties and this Court. For some inexplicable reason, the Supreme Court concluded that it would best serve "administrative efficiency" to have this Court evaluate the lower court's previously secret ruling. I would again reverse because neither the trial court nor defendant have provided any worthwhile reason for continued proceedings in this case and an evidentiary hearing would be a further waste of judicial resources.

The letter at issue here included discussion of a "Certificate of Acceptance." The prosecutor argued at trial that the only copy of the purported certificate was "a faxed copy," and that there was no original certificate or supporting documentation in the City's files. The prosecutor told the jury that there was no proof that defendant forged the certificate but that it was the People's theory that the certificate was "bogus" because of the anomaly in the official records. The prosecutor alternatively argued to the jury that any question regarding the certificate was irrelevant to this case because "the bottom line" was that defendant claimed to have completed a job, and there was evidence that he had not. As the prosecutor later noted at the hearing on defendant's motion for new trial, "any contractor in his right mind, so to speak, would know that the job was not done." Indeed, the majority acknowledges that the letter, which was written to defendant by the building inspector, was also irrelevant to defendant's theory at trial that he was not responsible for the fraud.

The trial court's ex parte inference that the prosecutor withheld the letter, which was addressed to defendant himself, is entirely unsupported by the record. Defense counsel was present when the prosecutor informed the court that both counsel had copies of the letter in their possession. Further, the basis for defendant's motion for new trial because of ineffective assistance was that his attorney had the letter and did not use it to his advantage. While

defendant argues that the letter was evidence that he did not obtain a Certificate of Acceptance by false pretenses, the letter also contains language suggesting that defendant was not in compliance and was in danger of having his license suspended. Counsel's decision not to introduce the letter at trial was clearly a matter of trial strategy that should not be second-guessed by this Court. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). The fact that counsel's strategy may not have worked does not constitute ineffective assistance. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Remand for additional proceedings on either the question of ineffective assistance of counsel or prosecutorial misconduct would be a further waste of time, and I would reverse.

/s/ Michael J. Talbot