STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 2, 2014
v	No. 315982 Oakland Circuit Court
GILBERT LEE POOLE, JR., Defendant-Appellant.	LC No. 1989-090203-FC

Before: MURPHY, C.J., and WHITBECK and TALBOT, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court's order denying defendant's petition to compel a search for and DNA testing of certain biological material pursuant to MCL 770.16. We affirm on the basis of the law of the case doctrine and not on the merits or substance of the arguments presented under MCL 770.16.

Defendant was convicted of first-degree murder, MCL 750.316, in 1989 with respect to the slaying of Robert Mejia, whose body was found in a field in Pontiac on June 7, 1988. There was blood covering Mejia's shirt and pants. An autopsy revealed that he sustained eight stab wounds to the face, neck, and upper chest area. The depth of the wounds ranged from one-half inch to four inches. Mejia also sustained multiple superficial cuts and incised wounds, and he had abrasions and contusions on his arms and back, indicating that there had been a struggle. There was also a bite mark to his right arm. The coroner opined that Mejia had died approximately 48 hours before his body was discovered, plus or minus 12 hours.

Witnesses identified defendant as leaving a bar with Mejia on the night of June 5, 1988. The case went unsolved for five months until defendant's then-girlfriend reported to authorities that he had confessed the killing to her. According to the girlfriend, on a Sunday evening in early June 1988, she and defendant had a fight about money, after which defendant said he was "going out to get some money" and then left. Defendant did not return until between 1:00 and 4:00 a.m. At that time, she noticed that defendant was "all scratched up and red in the face." When his girlfriend asked defendant what happened, he told her that he had been in a fight. At some point, defendant randomly stated to his girlfriend, "I killed somebody." He then explained that he had gone to the bar where witnesses had placed defendant and Mejia together. Defendant told his girlfriend that he talked with "a guy" in the bar and eventually left with him. According to the girlfriend, defendant recounted how he and the man went for a walk in the woods, where

defendant "pulled a knife on the guy and told him to give him all of his money." A fight ensued "with a lot of biting and scratching, and pulling of hair." The girlfriend testified that defendant informed her that he then "held [the other man] down with his left hand and slit his throat and watched him drown in his own blood." Defendant's girlfriend did not initially believe defendant, but he "proved it" to her by retrieving a watch from his vehicle that was covered in dried blood.

At trial, Melinda Jackson, an expert in forensic serology, testified that blood found on Mejia's clothing was type O, which matched Mejia's blood type. There was also evidence that some blood found on stones and grass connected to the crime scene was type O blood. Further, there was testimony presented at trial reflecting that defendant's blood type was AB, a type shared with only three percent of the population, and that none of the testable blood samples collected in relationship to the offense matched defendant's blood type. Additionally, a stone found in Mejia's pants had type A blood on it, which blood type matched neither Mejia nor defendant's blood.

Defendant appealed the conviction as of right, and this Court affirmed. *People v Poole*, unpublished opinion per curiam of the Court of Appeals, issued January 21, 1993 (Docket No. 120955). Our Supreme Court thereafter denied defendant's application for leave to appeal. *People v Poole*, 442 Mich 933 (1993).

On November 21, 2005, defendant filed a motion for new trial in the circuit court, relying, in part, on MCL 770.16. He also filed an accompanying motion for DNA testing pursuant to MCL 770.16. In the motions, defendant requested the DNA testing of biological material. The appeal currently before the panel also concerns DNA testing under MCL 770.16, which provided back in 2005 and still provides today that "a defendant convicted of a felony at trial before January 8, 2001 who is serving a prison sentence for the felony conviction may petition the circuit court to order DNA testing of biological material identified during the investigation leading to his or her conviction[.]" MCL 770.16(1); 2005 PA 4; 2008 PA 410; 2011 PA 212.

In response to the 2005 motions filed by defendant in the circuit court, the prosecutor argued that the request for DNA testing did not satisfy the statutory requirements of MCL 770.16. MCL 770.16(3)(a) required a defendant to "[p]resent[] prima facie proof that the evidence sought to be tested is material to the issue of the convicted person's identity as the perpetrator of, or accomplice to, the crime that resulted in the conviction." The language today is identical, except that it is found instead in MCL 770.16(4)(a) as a result of an amendment enacted pursuant to 2008 PA 410. MCL 770.16(3)(b)(*i*) provided that a defendant also had to establish, by clear and convincing evidence, that a "sample of identified biological material . . . is available for testing." The identical language is currently found in MCL 770.16(4)(b)(*i*). See 2008 PA 410. The prosecutor argued that defendant failed to establish that biological material was available for testing and that, even if available, defendant could not show that such evidence was material to defendant's identity as the perpetrator, as the blood-typing evidence presented at trial already established that defendant's blood was not found in connection with the criminal investigation. In a supplement to the prosecutor's response brief to defendant's 2005 motions, the prosecution stated that it had now been "informed by Ms. Melinda Jackson of the Michigan State Police that some blood sample evidence involved in the Defendant's case has been preserved. The People instructed Ms. Jackson to continue to preserve those samples." The

prosecution, however, still maintained that defendant was not entitled to relief under MCL 770.16.

On August 1, 2006, the circuit court, the Honorable Edward Sosnick presiding, treated defendant's motions as motions brought under MCR 6.501 *et seq.* (post-appeal relief), denied defendant's DNA-related requests, and found that defendant failed to establish that biological material was available for testing. Moreover, the circuit court ruled:

> Even if the defendant established that such biological material existed, the defendant could not meet the requirements of MCL 770.16(3)(a) [now § 16(4)(a)] that such evidence was material to the defendant's identity as the perpetrator of the murder of Robert Mejia. Evidence presented during this defendant's trial already established that the defendant's blood [type] was not found on the victim. There is no other suspect to attempt to match with DNA testing. The defendant has not, therefore, satisfied the requirements of MCL 770.16(3).

Defendant then filed with this Court in Docket No. 276973 a delayed application for leave to appeal, along with an accompanying motion to remand for DNA testing pursuant to MCL 770.16. In the application, defendant argued that, as acknowledged by the prosecutor below, biological material was available for DNA testing. Defendant also argued to this Court that, pursuant to MCL 770.16, he was entitled to DNA testing of all biological evidence presented at the trial, given that DNA testing could significantly undermine the prosecutor's theory relative to defendant's guilt. In the motion to remand for DNA testing, defendant referenced the following evidence collected by police: blood on the victim's fingernails; blood from a sample of the shirt worn by the victim; blood on a stone recovered from the victim's clothing; loose hair found on the victim; and blood on the console of defendant's car. The motion stated, "The Cooley Law School has discovered that there is DNA biological material available for testing. Exhibit G."

This Court denied defendant's delayed application "for failure to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v Poole*, unpublished order of the Court of Appeals, entered October 23, 2007 (Docket No. 276973). In that same order, the panel denied defendant's motion to remand for DNA testing. *Id.* The Michigan Supreme Court then denied defendant's application for leave to appeal, ruling that "defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D)." *People v Poole*, 480 Mich 1186 (2008). The Court also denied the motion for DNA testing. *Id.* On July 10, 2008, defendant filed a petition for a writ of *habeas corpus* in federal court, seeking in part DNA testing pursuant to 18 USC 3600. The petition was denied. *Poole v Woods*, unreported opinion of the United States District Court for the Eastern District of Michigan, issued September 28, 2011 (Docket No. 08-12955). The case was then unsuccessfully appealed to the Sixth Circuit and eventually to the United States Supreme Court, which denied certiorari. *Poole v Mackie*, __ US __; 134 S Ct 945; 187 L Ed 2d 811 (2014).

While the federal effort was pending in the Sixth Circuit, defendant, on November 2, 2012, filed the instant petition in the circuit court, seeking an order, once again, to test for biological evidence pursuant to MCL 770.16. In the petition, defendant stated that the police had confirmed that they held "bloody stones and known samples from the victim and [defendant]."

We note that documents in the record dating back to 1988 reflected that stones bearing suspected blood had been collected from the crime scene. Defendant asserted that while the stones and other samples were subjected to blood-type testing, they had not been subjected to DNA testing. Defendant also maintained that the evidence was material to establishing the identity of the perpetrator. Further, defendant requested DNA testing of other biological evidence previously collected by police. There is no indication that the facts had changed or that any new evidence had been located or discovered since the earlier failed attempt to obtain an order for DNA testing. The circuit court, the Honorable Rae Lee Chabot presiding, rejected the petition, finding, much like Judge Sosnick had several years earlier, that the jury had been fully aware that defendant was not the source of any crime-scene blood, given the blood-type evidence, yet the jury still convicted defendant. DNA testing excluding defendant as a donor would therefore add nothing of relevance if a new trial took place. This Court then granted defendant's application for leave to appeal. *People v Poole*, unpublished order of the Court of Appeals, entered November 25, 2013 (Docket No. 315982).

An issue not raised by the parties or the circuit court, but which we raised sua sponte,[1] is whether defendant was entitled to simply file a new petition under MCL 770.16, where, effectively, the same claims had previously been presented to and rejected by the circuit court, this Court, and our Supreme Court. The circumstances beg the question whether defendant could, had we affirmed here on the merits, simply proceed and file yet another petition in the circuit court under MCL 770.16. We hold that the law of the case doctrine precludes defendant from obtaining the requested relief. In *Grace v Grace*, 253 Mich App 357, 362-363; 655 NW2d 595 (2002), this Court explained the doctrine, observing:

> The law of the case doctrine provides that if an appellate court has decided a legal issue and remanded the case for further proceedings, the legal issue determined by the appellate court will not be differently decided on a subsequent appeal in the same case where the facts remain materially the same. Therefore, generally, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. The rationale behind the doctrine includes the need for finality of judgments and the lack of jurisdiction of an appellate court to modify its judgments except on rehearing. Further, the law of the case doctrine applies without regard to the correctness of the prior determination, so that a conclusion that a prior appellate decision was erroneous is not sufficient in itself to justify ignoring the law of the case doctrine.

[1] Prior to oral argument, we entered an order directing, in part, that the parties be prepared to address the law of the case doctrine at argument. *People v Poole*, unpublished order of the Court of Appeals, entered August 7, 2014 (Docket No. 315982). The parties were prepared and presented their respective arguments, which we have taken into consideration in crafting this opinion.

> [The] doctrine will not be applied if the facts do not remain materially or substantially the same or if there has been a change in the law. [Citations omitted.]

"Law of the case applies . . . only to issues actually decided, either implicitly or explicitly, in the prior appeal." *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). The doctrine is only triggered when an appellate decision is rendered on the merits. *Id.* An order that resolves a particular issue on the merits implicates the law of the case doctrine and has preclusive effect. *People v Hayden*, 132 Mich App 273, 297; 348 NW2d 672 (1984) (earlier order of denial "'for lack of merit in the ground presented'. . . precluded [current panel] from reaching the merits of th[e] issue by the law of the case doctrine") (citation omitted); *People v Douglas*, 122 Mich App 526, 529-530; 332 NW2d 521 (1983) (previous panel's order of denial for "'lack of merit in the grounds presented'. . . is the law of the case, barring further review of the issue in this Court") (citation omitted); *People v Wiley*, 112 Mich App 344, 346; 315 NW2d 540 (1981).

With respect to the proceeding commenced by defendant in 2005 that entailed a request for DNA testing under MCL 770.16, this Court and our Supreme Court, as stated above, proclaimed that defendant had not established entitlement to relief and rejected the request for DNA testing. We view the orders as determinations on the merits, thereby implicating the law of the case doctrine. With respect to the doctrine's exception for a change in the law, this Court's opinion in *People v Barrera*, 278 Mich App 730; 752 NW2d 485 (2008), merely construed MCL 770.16 and did not mark or signify a change in the law. Moreover, there has been no pertinent intervening change in the facts that would justify disregard of the law of the case doctrine.

Finally, we recognize that this Court has indicated that the doctrine is discretionary and that, "[p]articularly in criminal cases, the law of the case doctrine is not inflexible and need not be applied if it will create an injustice." *People v Phillips (After Second Remand)*, 227 Mich App 28, 33-34; 575 NW2d 784 (1997). We cannot conclude that application of the doctrine here would create an injustice, given that the same issue was examined and rejected previously by *two* appellate bodies, that there was strong circumstantial evidence of defendant's guilt (see above), and that the jury had been fully aware that a particular blood sample could not be linked to either defendant or the victim and that defendant's blood could in no way be connected to the crime. Accordingly, in regard to the petition now at issue, the circuit court was precluded from granting the relief requested by defendant, as is this Court, under the law of the case doctrine.

Affirmed.

/s/ William B. Murphy
/s/ William C. Whitbeck
/s/ Michael J. Talbot