Order

Michigan Supreme Court
Lansing, Michigan

June 28, 2016

152918

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 152918
COA: 320405
Wayne CC: 13-006679-FC

DONTE THOMAS,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the August 4, 2015 judgment of the Court of Appeals is considered and, pursuant to MCR 7.305(H)(1), in lieu of granting leave to appeal, we REMAND this case to the Wayne Circuit Court to determine whether the court would have imposed a materially different sentence under the sentencing procedure described in *People v Lockridge*, 498 Mich 358 (2015). On remand, the trial court shall follow the procedure described in Part VI of our opinion. If the trial court determines that it would have imposed the same sentence absent the unconstitutional constraint on its discretion, it may reaffirm the original sentence. If, however, the trial court determines that it would not have imposed the same sentence absent the unconstitutional constraint on its discretion, it shall resentence the defendant. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining question presented should be reviewed by this Court.

We do not retain jurisdiction.

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I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 28, 2016

Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 4, 2015
v	No. 320405 Wayne Circuit Court
DONTE THOMAS, Defendant-Appellant.	LC No. 13-006679-FC

Before: SAAD, P.J., and M. J. KELLY and SHAPIRO, JJ.

PER CURIAM.

Defendant, Donte Thomas, appeals by right his jury convictions of armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced Thomas to serve 12 to 30 years in prison for the armed robbery conviction, to serve 1 to 5 years in prison for the felon-in-possession conviction, and to serve 5 years in prison for the felony-firearm conviction. Because we conclude there were no errors warranting relief, we affirm.

Thomas first argues that his trial lawyer provided ineffective assistance by failing to present expert testimony regarding the fallibility of eyewitness identifications. This Court reviews de novo whether the defendant's trial lawyer's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms and prejudiced the defendant's trial. *People v Gioglio (On Remand)*, 296 Mich App 12, 19-20; 815 NW2d 589 (2012), vacated not in relevant part 493 Mich 864. However, "[w]hen there has been no hearing on the defendant's ineffective assistance claims," as is the case here, "there are no findings to which this Court must defer; as such, this Court will determine whether the performance of [the] defendant's trial counsel amounted to ineffective assistance of counsel by examining the lower court record alone." *Id.* at 20.

In order to prevail on this claim, Thomas must show that his trial lawyer's representation fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for his trial lawyer's unprofessional errors, the result of the proceeding would have been different. *Id.* at 22. When reviewing a claim of ineffective assistance, there is a strong presumption in favor of the adequacy of counsel and "the defendant bears a heavy burden of proving otherwise." *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012). The "reviewing court must not evaluate counsel's decisions with the benefit

of hindsight." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). "Reviewing courts are not only required to give counsel the benefit of the doubt with this presumption, they are required to 'affirmatively entertain the range of possible' reasons that counsel may have had for proceeding as he or she did." *Gioglio*, 296 Mich App at 22, quoting *Cullen v Pinholster*, 563 US ___; 131 S Ct 1388, 1407; 179 L Ed 2d 557 (2011). "Accordingly, a reviewing court must conclude that the act or omission of the defendant's trial counsel fell within the range of reasonable professional conduct if, after affirmatively entertaining the range of possible reasons for the act or omission under the facts known to the reviewing court, there might have been a legitimate strategic reason for the act or omission." *Gioglio*, 296 Mich App at 22-23.

A trial lawyer's decision whether to secure a witness, including an expert witness, is normally a matter of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). In this case, Thomas' trial lawyer chose not to hire an expert to educate the jury about the limitations that inhere in eyewitness testimony. Instead, his trial lawyer elected to challenge the eye witness testimony on cross-examination. And a review of the record shows that his trial lawyer thoroughly and aggressively challenged both eyewitnesses on cross-examination to impeach their identification of Thomas as one of the perpetrators. On appeal, Thomas cites a great deal of secondary authority to support his contention that eyewitness identifications are intrinsically untrustworthy and authorities that recognize that an expert's testimony on eyewitness testimony may be helpful. But he cites no authority for the proposition that the prevailing professional norms require a trial lawyer to hire an expert under these circumstances. To the contrary, Michigan courts have already recognized that it is reasonable for a lawyer to use cross-examination for impeachment rather than expert testimony; there may, for instance, be a reasonable concern that a jury will "react negatively to perhaps lengthy expert testimony" that the jury perceives as "stating the obvious: memories and perceptions are sometimes inaccurate." See *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999).

In this case, Thomas' lawyer might have had a similar concern; his lawyer might have felt that hiring an expert to lecture the jury on the obvious would have had a negative impact on the jury's assessment of the evidence or appeared desperate. *Id.* Given the deficiencies in the witnesses' testimony, Thomas' trial lawyer might reasonably have concluded that the best way to establish reasonable doubt as to the eyewitnesses' identification would be through cross-examination. Consequently, Thomas has not overcome the strong presumption that his lawyer's decision fell within the range of reasonable professional conduct. *Gioglio*, 296 Mich App at 22-23.

Thomas next argues that, because the trial court lacked statutory authority to impose court costs against him at the time of his sentencing, this Court must vacate his sentence to the extent that it required him to pay $600 in court costs. A legal challenge to the imposition of fees or costs under MCL 769.1k "must be preserved when the trial court imposes the fee. If not challenged at that point, the claim of error will be seen as unpreserved." *People v Jackson*, 483 Mich 271, 292 n 18; 769 NW2d 630 (2009). Because Thomas' lawyer did not object to the costs, this issue is unpreserved. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCL 769.1k did not authorize the trial court to assess court costs at the time of Thomas' sentencing. However, since his sentencing, the Legislature has specifically amended MCL 769.1k to retroactively authorize such assessments. 2014 PA 352. Further, this Court has held that the amendment must be enforced and does not violate a defendant's constitutional rights. See *People v Konopka*, ___ Mich App ___; ___ NW2d ___ (2015). In *Konopka*, the defendant also challenged the reasonableness of the costs assessed; therefore, even though the trial court did not plainly err in assessing court costs, the defendant was nevertheless entitled to a remand for an opportunity to contest the reasonableness of the costs and the factual basis regarding the relation of those costs to the actual costs incurred in the prosecution. *Konopka*, ___ Mich App, slip op at 6-8, 16. Unlike the defendant in *Konopka*, Thomas did not challenge the reasonableness of the court costs or their factual basis. Consequently, he has not identified a plain error warranting relief. *Carines*, 460 Mich at 763.

There were no errors warranting relief.

Affirmed.

/s/ Henry William Saad
/s/ Michael J. Kelly

STATE OF MICHIGAN

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Before: SAAD, P.J., and M. J. KELLY and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

Complainant was assaulted by two men. He testified that, a few days after the crime, he was walking down the street when he saw one of the two men who committed the assault. The individual he identified at that time, and again at trial, was defendant. As there was no circumstantial evidence, the prosecution's case rested wholly on that testimony. Defendant's trial counsel cross-examined complainant, seeking to undermine the reliability of the identification. Counsel did not, however, call an expert witness to testify as to the unreliability of the subject identification or the unreliability of eyewitness identifications in general. Defendant asserts that the failure to do so constituted ineffective assistance of counsel and seeks reversal of his conviction on this basis.

There is now a substantial body of scientific literature demonstrating that eyewitness identifications often lack reliability, even where the witness is subjectively certain of the identification. See *State v Henderson*, 208 NJ 208; 27 A3d 872 (2011).[1] The time has certainly come for criminal defense attorneys to recognize and utilize that science and for our courts to recognize that, in some cases, the failure to offer such expert testimony constitutes ineffective assistance of counsel.

In this case, however, I cannot reach that conclusion. Defendant has neither proffered an affidavit from an eyewitness identification expert nor sought remand to establish the foundation of his claim. As the record stands, we do not know what such an expert would tell a jury, or

[1] See also Trenary, *State v Henderson: A Model for Admitting Eyewitness Identification Testimony*, 84 U Colo L Rev 1257 (2013).

even whether there exists an expert who would offer favorable testimony on the facts of this case. Accordingly, I have no basis to conclude that such testimony could have been properly admitted, let alone whether it could have resulted in a reasonable probability that the outcome of defendant's trial would have been different. See *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). In addition, counsel was able to mount a reasonable challenge to the reliability of the subject identification by cross-examining complainant as to the brief time in which he saw his assailant and the fact that his initial description of the assailant was, in some respects, inconsistent with defendant's appearance. These challenges to reliability did not *necessarily* require expert testimony as they were, at least to some degree, understandable by lay jurors. This case did not involve more subtle issues such as potentially prejudicial lineups or positive police feedback as to which a jury might require expert assistance. See MRE 702. Indeed, no lineups were used in this case and the police were not present at the time complainant initially identified defendant as his assailant.

In sum, I agree with defendant that a trial attorney's failure to present expert testimony concerning eyewitness identifications can constitute ineffective assistance of counsel requiring reversal. However, I am unable to reach that conclusion in this case and so concur.

/s/ Douglas B. Shapiro