

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PONCIETTA ADRIENNE EARLE,

Defendant-Appellant.

UNPUBLISHED  
February 22, 2005

No. 244245  
Wayne Circuit Court  
LC No. 02-001674

AFTER REMAND

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Before: Neff, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

This case is before us after remand to the trial court for factual findings and the reissue of the court's opinion denying defendant's motion for a new trial for ineffective assistance of counsel. See *People v Earle*, unpublished opinion per curiam of the Court of Appeals, issued September 23, 2004 (Docket No. 244245).<sup>1</sup> On December 17, 2004 the trial court reissued its opinion pursuant to our order. In the reissued opinion, the trial court failed to make the findings we requested, but instead chose to reverse its earlier position and grant defendant a new trial. We conclude that the trial court abused its discretion when it granted a new trial without articulating a reason that provided a legally recognized basis for relief. Furthermore, because the trial court did not make the factual findings we requested in our previous remand, we are still unable to effectively evaluate defendant's original claim of error regarding the motion for a new trial. Consequently, we are again compelled to remand this case to the trial court for the issuance of a new opinion that makes the findings necessary for our review.

I.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, and carrying or possessing a firearm during the commission or attempted commission of a felony (felony-firearm), MCL 750.227b. She was sentenced to 8 to 20 years imprisonment for the assault conviction and to a two-year consecutive imprisonment term for the felony-firearm conviction with credit for time served. Defendant appealed her conviction as of right.

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<sup>1</sup> Rather than restate the facts of this case, we adopt the recitation of facts from our opinion of September 23, 2004.

Among the many errors defendant alleged to have deprived her of a fair trial, was the allegation that the trial court erred when it failed to grant her a new trial for ineffective assistance of counsel. After reviewing the record and the trial court's opinion, we determined that we could not effectively review defendant's challenge to the trial court's decision not to grant a new trial without first remanding the case for the issuance of a new opinion addressing certain factual errors and the trial court's use of defendant's polygraphic evidence. See *Earle, supra*. We instructed the trial court to reissue its opinion, "bearing in mind its discretion to consider the polygraphic evidence and the factual errors we have addressed in this opinion." *Id.* Furthermore, we instructed the trial court to: "(1) delineate its findings regarding the five *Barbara* factors;<sup>2</sup> (2) specify whether its decision was made with or without consideration of the polygraphic evidence, and state its reasons for accepting or rejecting that evidence; and (3) make a factual finding whether defendant's trial counsel was in fact approached mid-trial with an offer that a juror was willing to accept a bribe to ensure a hung jury." *Id.* (footnote added).

After remand, the trial court issued a new opinion on December 17, 2004, wherein it reversed its earlier position and granted defendant's motion for a new trial based on ineffective assistance of counsel.<sup>3</sup> It also addressed the erroneous factual findings and the five *Barbara*<sup>4</sup> factors we asked it to address in our opinion of September 23, 2004. However, the trial court neglected to state whether the polygraphic evidence was actually utilized, as well as the reasons for accepting or rejecting it, and did not make a factual finding as to whether defendant's trial counsel was in fact approached with an offer to accept a bribe. Instead, the trial court stated that the rights alleged to have been abridged are fundamental and that it could reverse even without considering whether defendant was prejudiced by her trial counsel's performance.

Plaintiff appealed the trial court's decision to grant a new trial, but we denied that appeal based on our retention of jurisdiction, and instead ordered that the application and answer in that appeal be docketed as supplemental briefs and placed in the current file. See *People v Earle*, unpublished order of the Court of Appeals, entered February 9, 2005 (Docket No. 260168).

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<sup>2</sup> In *People v Barbara*, 400 Mich 352; 255 NW2d 171 (1977), our Supreme Court listed five factors that must be considered before polygraph test results may be considered in deciding a motion for a new trial.

<sup>3</sup> Defendant contends that the trial court implicitly granted the new trial on the alternative grounds provided by MCL 770.1 (permitting a new trial when justice has not been done) and MCR 6.431(B) (permitting a new trial if the trial court believes the verdict has resulted in a miscarriage of justice), and not on the grounds of ineffective assistance of counsel. This contention is simply not supported by the record. The trial court explicitly stated that the issue before it was whether defendant was entitled to a new trial based on ineffective assistance of counsel. Furthermore, the trial court cited the standards applicable to an ineffective assistance of counsel claim and, when discussing the fundamental nature of the rights at stake, stated that the right in question was the Sixth and Fourteenth Amendment right to counsel. In any event, we do not accept that a trial court may simply grant a new trial and foreclose review by asserting that a miscarriage of justice occurred. See *People v Jones*, 236 Mich App 396; 600 NW2d 652 (1999) (reversing the trial court because its reasons for granting a new trial were not based on a legally recognized basis for relief).

<sup>4</sup> *Barbara*, n 2 *supra*.

## II.

A trial court's decision to grant a new trial is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). To determine if the trial court abused its discretion, this Court must examine the reasons given by the court and will find an abuse if those reasons, "do not provide a legally recognized basis for relief." *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). A mere difference in judicial opinion does not establish an abuse of discretion and the trial court's factual findings must be reviewed for clear error. *Cress*, *supra*, 468 Mich at 691.

Michigan follows the standards established by *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), for assessing whether trial counsel was constitutionally effective. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). In *Strickland*, the Court stated that it is not enough that "a person who happens to be a lawyer is present at a trial alongside the accused", but rather that the accused is "entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland*, *supra*, 466 US at 685. The Court held that a convicted defendant's claim of ineffective assistance of counsel must show that: (1) his counsel's representation fell below an objective standard of reasonableness, and (2) the performance was prejudicial to the defense. *Id.* at 688, 692.

When discussing the standard applicable to the showing of prejudice under the second prong, the *Strickland* Court stated that it "is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceedings." *Id.* at 693. But the Court also stated that "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* Instead, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* The Court also noted that in "making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.* at 695.

On appeal, defendant argued that her trial counsel was constitutionally ineffective because he either failed to inform the trial court that a third-party contacted him and solicited a bribe on behalf of a juror in exchange for a hung verdict, or, if he had not in fact been so contacted, that he made a "blatant attempt to get money from her," and, consequently, breached his duty of loyalty and vigorous representation. While either the failure to report the juror request for a bribe or the attempt to obtain money from defendant by false pretenses might constitute performance that falls below an objective standard of reasonableness, the trial court never made the findings necessary to get to the point where it could make that determination.<sup>5</sup>

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<sup>5</sup> At the September 26, 2003 hearing, the trial court did state that it was not convinced that the conversations occurred or that defendant was prejudiced by them, and, thereupon, determined that defendant failed to demonstrate error warranting a new trial. However, this finding was undermined by the trial court's earlier erroneous findings and by its ambiguous statement regarding its ability to utilize the polygraphic evidence. Consequently, we were unsure of the

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In order for the trial court to determine whether the failure to report the juror's request fell below an objective standard of reasonableness, the trial court first needed to find that a third-party actually contacted defendant's trial counsel and told him that a juror was willing to accept a \$10,000 bribe in exchange for ensuring a hung jury. If no such contact ever occurred, then defendant's trial counsel cannot be faulted for failing to bring it to the trial court's attention. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("Trial counsel is not required to advocate a meritless position."). Likewise, the trial court could not determine that defendant's trial counsel acted inappropriately by falsely telling defendant about a request for money in exchange for a hung jury without first finding that defendant's trial counsel actually made the false statement. Because the trial court never made the initial findings necessary to evaluate defendant's trial counsel's performance, it could not properly determine whether that performance fell below an objective standard of reasonableness.

Even if the trial court had found that defendant's trial counsel either failed to inform the court of the improper request for a bribe, or attempted to obtain money from his client on that pretext, and determined such acts or omissions fell below an objective standard of reasonableness, the trial court still needed to determine whether this substandard performance prejudiced defendant before it could order a new trial. *Strickland, supra* at 691-692. In its opinion of December 17, 2004, the trial court stated that it did not need to address the prejudice prong of the ineffective assistance of counsel claim because it believed the mere appearance of impropriety was enough to warrant a new trial. This is not an accurate statement of the law. In *Strickland* the Court held that the "purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution." *Id.* While it is true that prejudice may be presumed in cases where the defendant is actually or constructively denied the assistance of counsel altogether, and that there is a presumption of prejudice when a defendant's trial counsel is burdened by an actual conflict of interest, see *id.*, the trial court neither determined that defendant was actually or constructively denied the assistance of counsel altogether, nor found that defendant's trial counsel was actually burdened by a conflict of interest. Likewise, if the trial court determined that defendant's trial counsel's defective performance deprived defendant of some other fundamental right, such as the right to an impartial jury,<sup>6</sup> the trial court needed to state that reason on the record to satisfy the prejudice prong of the *Strickland* test.

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trial court's findings and asked it to clarify and restate them in a new opinion.

<sup>6</sup> Defendants are guaranteed the right to a fair trial by a panel of impartial jurors. See *Morgan v Illinois*, 504 US 719, 726-727; 112 S Ct 2222; 119 L Ed 2d 492 (1992). The usual remedy for allegations of juror partiality is a hearing in which the defendant is provided an opportunity to prove actual bias. *Smith v Phillips*, 455 US 209, 215; 102 S Ct 940; 71 L Ed 2d 78 (1982). However, in this case the trial court never found that defendant's trial counsel was actually contacted by a third-party regarding an actual juror who was willing to be bribed. Such a finding would be a prerequisite to a determination that defendant was deprived of the opportunity to have an impartial jury by her trial counsel's failure to report the contact to the trial court.

Because the trial court did not make the necessary findings of fact to enable it to evaluate defendant's trial counsel's performance, did not determine whether defendant's trial counsel's performance fell below an objective standard of reasonableness, and did not determine whether defendant suffered any prejudice, the trial court did not provide a legally recognized basis for granting a new trial based on ineffective assistance of counsel. Consequently, the trial court's grant of a new trial was an abuse of discretion. *Jones, supra* at 404. Therefore, we reverse the trial court's December 17, 2004 decision and vacate the order granting defendant a new trial. Likewise, because the trial court did not make the findings, including the finding requested in our September 23, 2004 opinion, necessary to evaluate the original decision on defendant's motion for a new trial, we are compelled to remand this case again.

Therefore, taking under consideration the foregoing discussion, the trial court shall reissue its opinion regarding defendant's motion for a new trial on the grounds of ineffective assistance of counsel within twenty-one days from the issuance of this opinion. The trial court should make findings regarding whether defendant's trial counsel was ever contacted by a third-party regarding an offer to cause the jury to be hung for \$10,000, and, if not, whether defendant's trial counsel attempted to obtain \$10,000 from defendant on that pretext. The trial court should explain its findings, including whether it utilized the polygraphic evidence discussed in the previous opinion of this Court, and its reasons for accepting or rejecting the evidence. Finally, if the trial court finds that defendant's trial counsel was contacted regarding a bribe or attempted to obtain the \$10,000 on that pretext, the court should state with particularity whether defendant's trial counsel's performance fell below an objective standard of reasonableness and prejudiced defendant. If the court chooses to render its opinion on the record, the court reporter shall have 21 days from the rendering of the court's opinion to produce the transcript. Because this issue is potentially dispositive, we again reserve discussion of defendant's other appellate issues to our subsequent opinion in this case.

We reverse the trial court's opinion of December 17, 2004 and vacate its order granting defendant a new trial. We remand for further findings and the reissue of the trial court's opinion consistent with this opinion. We retain jurisdiction.

/s/ Janet T. Neff  
/s/ Michael R. Smolenski  
/s/ Brian K. Zahra