

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
June 22, 2006

v

RONNIE GARRETT,

Defendant-Appellee.

No. 260931
Wayne Circuit Court
LC No. 97-003229

Before: Whitbeck, C.J., and Zahra and Donofrio, JJ.

PER CURIAM.

The prosecution appeals by leave granted from the trial court's order granting defendant Ronnie Garrett's motion to suppress a witness's identification testimony. We reverse.

I. Basic Facts And Procedural History

Seventy-three-year-old Mayrose Hall was found dead in her Detroit home on February 5, 1997. It was determined that Hall died on February 4, 1997, as a result of cranial cerebral injuries. Garrett, an African-American male, was arrested in connection with Halls' death and charged with first-degree felony murder,¹ and first-degree home invasion.² Hall's neighbor, Jeffrey Palicz, testified that he came home from work after 8:00 a.m. on February 4 and noticed an Oldsmobile Cutlass Calais parked in front of Hall's house. He also noticed, and looked at briefly, an unfamiliar man walking with a clipboard up to Hall's house. Palicz testified that the same car had been parked across the street a few nights earlier. Palicz described the man he saw as "an Arab, Chaldean . . . dark colored" but specified that the man was not "black." Garrett gave a statement to police admitting that he was in the neighborhood at that time delivering flyers, but he denied doing anything wrong. Garrett's wife also made a statement to police, in which she stated that Garrett told her that he entered a home when he was passing out flyers and that, while he was in the home, he pushed a woman and then fled.

¹ MCL 750.316(1)(b).

² MCL 750.110a(2). Garrett was also originally charged with armed robbery, MCL 750.529, but the prosecutor voluntarily withdrew the armed robbery charge at the preliminary examination hearing.

Garrett's first trial ended in a hung jury. Following a second trial, the jury found Garrett guilty as charged. Judge George W. Crockett, III, sentenced Garrett to life imprisonment for his first-degree murder conviction and 10 to 20 years' imprisonment for his first-degree home invasion conviction. Garrett appealed his convictions to this Court.

While his appeal (Docket No. 221184) was pending, Garrett moved the trial court for a judgment of acquittal or a new trial, arguing, in pertinent part, that he was deprived of his right to effective assistance of counsel in numerous respects. He alternatively asked that the trial court conduct an evidentiary hearing on the issue of ineffective assistance of counsel. After extensive arguments from the attorneys, the trial court held the motion in abeyance pending a *Ginther*³ hearing.

Garrett argued, in pertinent part, that his trial counsel was ineffective by failing to move to suppress the in-court identification made by Palicz. Palicz testified at the *Ginther* hearing that he saw Garrett walking up Hall's driveway on one occasion. Palicz was walking up his own driveway when he saw Garrett, from about 30 feet away, look directly at him. When Palicz described the man he saw to police, he described the man as appearing to be of Arabic descent. Palicz had attended both photographic and live lineups; each time he identified a person different from Garrett. He also admitted that he had told the police that the man was not black. The first time that Palicz identified Garrett as the man he saw at Hall's house was when he identified Garrett at the preliminary examination hearing before Garrett's first trial. On cross-examination, Palicz testified that when he described the man as being of Arabic descent, he meant to refer to skin tone, not ancestry. He stated that he realized African-Americans could have lighter or darker colored skin than Garrett.

The trial court granted Garrett's motion for a new trial, ruling that his counsel provided ineffective representation. The trial court found Garrett's attorney's performance deficient in six respects, including his failure to move to suppress Palicz's identification testimony. The prosecution appealed the trial court's order to this Court. This Court consolidated Garrett's appeal (Docket No. 221184) with the prosecution's appeal (Docket No. 228653). On appeal, this Court stated that "[t]he trial court's ruling . . . is not entirely clear and does not fully analyze the issues raised by defendant as required by the case law . . ."⁴ Accordingly, this Court remanded the matter to the trial court for "a more complete ruling on the motion for new trial," and decided to "hold defendant's appeal in abeyance and retain jurisdiction pending the trial court's further ruling."⁵ This Court directed the trial court on remand to address each of the alleged instances of ineffective assistance of counsel, including the failure to move to suppress the in-court identification.⁶ Regarding that issue, this Court agreed with the trial court that defense counsel's "failure to attempt to suppress the identification testimony was 'ineffective on its face[.]'" This Court could "conceive of no valid strategy for failing to seek suppression of the only positive

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁴ *People v Garrett (Garrett I)*, unpublished opinion per curiam of the Court of Appeals, issued January 11, 2002 (Docket Nos. 221184 and 228653), slip op p 3.

⁵ *Id.* at slip op p 1.

⁶ *Id.* at slip op pp 3-4.

identification of defendant at trial where there is at least an arguable basis to do so.” But this Court found the trial court’s ruling incomplete because it failed to “reach the crucial issue of whether the failure of counsel to attempt suppression of the identification testimony might have made a difference in the outcome[.]” In a footnote, this Court opined,

We acknowledge that the case law in this area focuses on suggestive pretrial identification procedures. However, on the facts of this case, where the witness was given numerous opportunities to identify defendant before trial and failed on each occasion, it seems obvious that the circumstances of identifying defendant in the courtroom are fraught with suggestive potential and should have been challenged.⁷

On remand, the trial court adopted Garrett’s proposed findings of fact and found that defense counsel’s failure to move to suppress Palicz’s identification testimony was “highly prejudicial” because (1) Palicz failed to identify Garrett in both the photographic and corporeal lineups, identifying someone else each time; (2) an in-court identification, with Garrett sitting with defense counsel, was highly suggestive and conducive to misidentification; (3) there was no independent basis for an in-court identification; and (4) the evidence at trial against Garrett was not overwhelming. On appeal after remand, this Court affirmed the trial court’s order granting Garrett a new trial based on ineffective assistance of counsel.⁸

Judge Edward F. Ewell, Jr. presided over the new trial. During trial, Garrett moved to suppress Palicz’s in-court identification as unduly suggestive. After hearing arguments on the motion, Judge Ewell ruled that the few moments that Garrett glanced at Palicz while walking up Hall’s driveway was an independent basis for Palicz’s in-court identification of Garrett. Judge Ewell also concluded that Judge Crockett’s and this Court’s previous rulings were made “in terms of the ineffective assistance of counsel . . . [;] they did not make a ruling on [the]

⁷ *Id.* at slip op p 4 n 6.

⁸ *People v Garrett (Garrett II)*, unpublished order of the Court of Appeals, entered April 29, 2002 (Docket Nos. 221184 and 228653). The prosecution then filed an application for leave to appeal to the Supreme Court in Docket No. 228653. The Supreme Court, in lieu of granting leave to appeal, remanded the matter to this Court for further explanation of why defense counsel was ineffective for failing to demand an all-Detroit jury. *People v Garrett (Garrett III)*, 467 Mich 922; 656 NW2d 520 (2002). This Court ordered that Docket Nos. 221184 and 228653 be deconsolidated, to allow the prosecutor’s appeal in Docket No. 228653 to proceed on remand from the Supreme Court. *People v Garrett (Garrett IV)*, unpublished order of the Court of Appeals, entered February 5, 2003 (Docket Nos. 221184 and 228653). This Court then rationalized and confirmed its prior ruling with respect to defense counsel’s ineffective assistance for failing to demand an all-Detroit jury. *People v Garrett (Garrett V)*, unpublished opinion per curiam of the Court of Appeals, issued February 7, 2003 (Docket No. 228653). This Court also noted that even if that omission did not deny Garrett a fair trial, “the cumulative effect of errors in this case, given five other instances of ineffective assistance [(including failure to move to suppress the in-court identification)], warrants reversal.” *Id.* at slip op p 3, n 5. The Supreme Court denied the prosecution’s subsequent application for leave to appeal but rejected this Court’s analysis regarding the all-Detroit jury request. *People v Garrett (Garrett VI)*, 469 Mich 941; 674 NW2d 152 (2003).

evidentiary issue.” Judge Ewell confirmed that he was using Palicz’s testimony at the *Ginther* hearing as support for his ruling. However, Judge Ewell ultimately vacated his ruling, explaining that the case was going to be assigned to another judge and that the new judge should have the opportunity to decide the identification issue.

The new judge, Judge Vonda Evans, heard arguments regarding the suppression issue. The prosecution took the position that neither Judge Crockett nor this Court ever specifically ruled that Palicz’s testimony should be suppressed. The prosecution also contended that, even to the extent that Judge Crockett did rule on the issue, Judge Evans was not bound by that evidentiary ruling. The prosecutor further argued that the focus of the *Ginther* hearing was different (i.e., effectiveness of counsel), as opposed to a *Wade* hearing, where the focus is on the identification of a witness, and, therefore, this was a new legal issue before the trial court that warranted an evidentiary hearing to allow the prosecution to show that there was an independent basis for Palicz’s identification of Garrett. Garrett continued to maintain that there had already been a ruling on this issue when Judge Crockett and this Court ruled that Garrett’s attorney had been ineffective by failing to raise the suppression argument at trial. Garrett argued that a *Wade* hearing was unnecessary because Palicz had already provided all the essential identification testimony at the *Ginther* hearing.

In ruling on the motion, Judge Evans stated that proving actual prejudice in a *Ginther* hearing was a greater burden than the clear and convincing evidence standard required to determine an independent basis for an identification. After reviewing the *Ginther* hearing transcript, Judge Evans concluded that the questioning of Palicz at the *Ginther* hearing “was, in essence, a *Wade* hearing.” Judge Evans pointed out that all of the factors used to evaluate an independent basis for an identification were addressed in the *Ginther* hearing; therefore, she concluded, a *Wade* hearing would simply produce cumulative evidence. Accordingly, Judge Evans denied the prosecution’s request for a *Wade* hearing and granted Garrett’s motion to suppress Palicz’s in-court identification. The prosecution filed an application for leave to appeal the order, which this Court granted. Additionally, this Court stayed any further proceedings pending resolution of this appeal.

II. Law Of The Case

A. Standard Of Review

The prosecution argues that the trial court erred by making a determination with regard to the suppression of Jeffrey Palicz’s in-court identification of Garrett by relying on the transcript from the *Ginther* hearing without the parties’ unanimous consent and denying the prosecution’s request for a *Wade* hearing. Garrett argues that it is not necessary to reach the issue because it was decided against the prosecution in the context of the *Ginther* hearing and that determination is binding on the trial court and this Court under the law of the case doctrine.

We review de novo whether the law of the case doctrine is applicable.⁹

⁹ *Ashker v Ford Motor Co*, 245 Mich App 9, 13; 627 NW2d 1 (2001).

B. Legal Principles

The law of the case doctrine dispenses with the need for this Court to consider legal questions determined in a previous decision and necessary to reach that decision.¹⁰

The law of the case doctrine holds that a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals with respect to that issue. Thus, a question of law decided by an appellate court will not be decided differently on remand or in a subsequent appeal in the same case.^[11]

In *Grievance Administrator v Lopatin*, the Michigan Supreme Court described the nature of the law of the case doctrine:

Under the law of the case doctrine, “if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.” *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The appellate court’s decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. *Sokel v Nickoli*, 356 Mich 460, 465; 97 NW2d 1 (1959). Thus, as a general rule, an appellate court’s determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997); see, generally, 5 Am Jur 2d, Appellate Review, § 605, p 300.^[12]

The purpose of the law of the case doctrine is to “maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.”¹³ The law of the case doctrine normally applies regardless of the correctness of the prior determination,¹⁴ because an appellate court lacks jurisdiction to modify its own judgments except on rehearing.¹⁵ Indeed, where “a litigant claims error in the first pronouncement, the right of redress rests in a higher tribunal.”¹⁶

¹⁰ *Int’l Union v Michigan*, 211 Mich App 20, 24; 535 NW2d 210 (1995).

¹¹ *Ashker*, *supra* at 13 (citations omitted).

¹² *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000).

¹³ *Locricchio v Evening News Ass’n*, 438 Mich 84, 109; 476 NW2d 112 (1991), quoting Wright, Miller & Cooper, *Federal Practice & Procedure*, § 4478, p 788.

¹⁴ *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997).

¹⁵ *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988).

¹⁶ *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996).

C. The Ineffective Representation Ruling

In deciding the prosecution's prior appeal (Docket No. 228653), this Court ruled that Garrett's attorney was ineffective for numerous reasons, one of which was failing to move to suppress Palicz's identification testimony.¹⁷ Therefore, it is the law of the case that Garrett's attorney provided ineffective representation during Garrett's second trial by failing to move to suppress the in-court identification. The trial court was bound by this ruling, and this Court is similarly bound by that previous ruling on subsequent appeals. Accordingly, the parties cannot relitigate whether Garrett is entitled to a new trial based on ineffective assistance of counsel. However, although this Court noted, as part of its ineffective assistance of counsel analysis, that Garrett's attorney *should have moved* to exclude Palicz's identification testimony,¹⁸ this Court did not rule on the admissibility of Palicz's testimony. To make that ruling, this Court would have been required to decide whether Palicz's testimony was tainted by an impermissibly suggestive identification procedure and that there was no independent basis for his identification testimony. Although stating in dicta that Palicz "was given numerous opportunities to identify [Garrett] before trial and failed on each occasion, it seems obvious that the circumstances of identifying [Garrett] in the courtroom are fraught with suggestive potential[.]" this Court did not make an affirmative ruling that the in-court identification was inadmissible. Further, the law of the case doctrine "does not require a trial court to follow another trial court's previous evidentiary rulings,"¹⁹ so any previous ruling by the trial court did not bind Judge Evans.

Accordingly, we conclude that because Judge Evans was not bound by her predecessor's evidentiary rulings and, regardless, neither the trial court nor this Court ever definitively ruled whether Palicz's in-court identification should be suppressed,²⁰ Judge Evans was not precluded from independently deciding Garrett's motion to suppress.

III. *Ginther* Hearing Transcript

A. Standard Of Review

Although the prosecution contends that a *Wade* hearing is necessary to determine whether there was an independent basis for Palicz's identification testimony under the facts enumerated in *People v Gray*,²¹ the issue to be resolved is whether the trial court erred by exclusively relying on the transcript from the *Ginther* hearing to decide the suppression issue. A trial court's decision whether to hold an evidentiary hearing is reviewed for an abuse of discretion.²²

¹⁷ *Garrett II, supra; Garrett V, supra* at slip op p 3 n 5.

¹⁸ *Garrett I, supra* at slip op p 4 n 6.

¹⁹ *People v Bradshaw*, 165 Mich App 562, 568; 419 NW2d 33 (1988).

²⁰ Although Judge Ewell ruled on the issue, he later vacated that ruling, deferring resolution of the motion to Judge Evans.

²¹ *People v Gray*, 457 Mich 107; 577 NW2d 92 (1998).

²² *People v Mischley*, 164 Mich App 478, 482; 417 NW2d 537 (1987).

B. Stipulation Exception

1. The Law

Where a defendant challenges a pretrial identification procedure on due process grounds, the trial court is generally required to hold an evidentiary hearing.²³ A hearing is not required if “there is a total absence of factual substantiation of the alleged improprieties.”²⁴ If the trial court determines that the identification procedure was improper, it must hold an evidentiary hearing to determine if there was an independent basis for the witness’s identification testimony.²⁵

In *People v Futrell*, the defendant moved to suppress certain evidence on facts adduced from preliminary examination testimony.²⁶ The prosecution did not dispute the facts; therefore, the trial court relied on the preliminary examination transcript in deciding the motion.²⁷ On appeal, the *Futrell* Court distinguished its case from *People v Talley*,²⁸ where the Michigan Supreme Court prohibited the practice of relying exclusively on the preliminary hearing transcript in deciding a motion to suppress.²⁹ The *Futrell* Court wrote:

In *Talley*, the Court declined the opportunity to consider whether opposing counsel may stipulate to the trial court’s sole reliance on the preliminary examination transcript in deciding a suppression motion.

* * *

We do not believe the Supreme Court, in *Talley*, meant to impose an absolute requirement that an independent hearing be held on every motion to suppress. Where a sufficiently complete stipulation of facts is made, the trial court may decide the motion based on the stipulation. In *Talley*, the Court pointed to two problems which can arise if sole reliance is placed on a review of the preliminary examination transcript: the need for determinations of credibility and the inadequate exposition of constitutionally significant facts,^[30]

This Court then concluded that “[a] stipulation of facts eliminates the problem of determining credibility,” but even with stipulation of the parties, reliance on the transcript is improper if the record from the prior hearing is “insufficiently detailed to inform the court of all that is

²³ *People v Reynolds*, 93 Mich App 516, 519; 286 NW2d 898 (1979).

²⁴ *People v Johnson*, 202 Mich App 281, 286; 508 NW2d 509 (1993).

²⁵ *Gray*, *supra* at 114-115.

²⁶ *People v Futrell*, 125 Mich App 568, 571; 336 NW2d 834 (1983).

²⁷ *Id.*

²⁸ *People v Talley*, 410 Mich 378, 390 n 3; 301 NW2d 809 (1981).

²⁹ *Futrell*, *supra* at 571.

³⁰ *Id.* at 571-572 (citations omitted).

constitutionally significant.”³¹ On the basis of this principle, this Court declined to reverse because “the people have failed to point to any area in which further elucidation of the facts might advance their position.”³² Therefore, this Court concluded that “[u]nder the circumstances, it was not error to decide the suppression question without an independent hearing.”³³ Therefore, under *Futrell*, a trial court could decide a suppression issue exclusively on the testimony from another hearing if two elements are satisfied: (1) the parties stipulate to its use or the facts are otherwise undisputed, and (2) the facts or testimony are sufficiently detailed to inform the trial court of all that is constitutionally significant.

In *People v Kaufman*, the Michigan Supreme Court noted that the *Tally* Court specifically reserved the question “whether parties may stipulate to the use of a preliminary examination transcript to resolve a motion to suppress.”³⁴ The Court then explained that the question had been answered by MCR 6.110(D).³⁵ The Court found significant the court rule’s specific authorization “that a ruling on a motion to exclude evidence may be premised on the record of a prior evidentiary hearing.”³⁶ Accordingly, the Court overruled *Talley* “insofar as it has been understood to mean that counsel cannot agree to have a motion to suppress decided on the basis of the record of the preliminary examination.”³⁷

2. Applying The Law

Although the “stipulation exception” to the general rule—that the trial court may not rely solely on the preliminary examination transcripts in deciding a defendant’s motion to suppress the evidence—was set forth by *Futrell* and *Kaufman* Courts in relation to use of a preliminary examination transcript, we conclude that the exception also reasonably permits counsel to agree to have the motion decided on the basis of some other prior evidentiary hearing, such as a *Ginther* hearing.³⁸

³¹ *Id.* at 572.

³² *Id.* Compare *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995) (concluding that a remand for an evidentiary hearing was not necessary because the defendant did not indicate how or why a certain fact would have advanced his position, nor did he point to any area in which further elucidation of the facts might have advanced his position), with *People v Turner*, 181 Mich App 680, 684 n 8; 449 NW2d 680 (1989) (concluding that a remand for an evidentiary hearing was necessary because “the prosecution has pointed to at least one area in which further elucidation of the facts might advance their position.”).

³³ *Futrell*, *supra* at 572.

³⁴ *People v Kaufman*, 457 Mich 266, 275; 577 NW2d 466 (1998), overruling *Talley*, *supra*.

³⁵ *Id.*

³⁶ *Id.* at 275, 276.

³⁷ *Id.* at 276.

³⁸ See MCR 6.110(D)(1) (“The decision to admit or exclude evidence, with or without an evidentiary hearing, does not preclude a party from moving for and obtaining a determination of the question in the trial court on the basis of . . . a prior evidentiary hearing” [emphasis added]).

Here, it is undisputed that the prosecutor did not stipulate to the use of the *Ginther* hearing testimony to determine whether Palicz had an independent basis for his identification of Garrett as the man that he saw walking in Hall's driveway, but, instead, requested a full evidentiary hearing. Without this stipulation, Judge Evans erred by relying exclusively on the *Ginther* hearing transcript in deciding the suppression issue.³⁹ Accordingly, we conclude that the prosecution is entitled to a *Wade* hearing.

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

/s/ William C. Whitbeck

/s/ Pat M. Donofrio

I concur in result only.

/s/ Brian K. Zahra

³⁹ *Id.* at 571-572.