

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 13, 2011

v

KENNETH TERENCE GAINES,
Defendant-Appellant.

No. 299328
Wayne Circuit Court
LC No. 08-003943-FC

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to 7 to 20 years' imprisonment for the armed robbery conviction, and two years' imprisonment for the felony-firearm conviction, to be served consecutively. We remand for an evidentiary hearing on defendant's allegation of ineffective assistance of counsel.

I. FACTS

The first argument defendant presses on appeal is that the trial court abused its discretion in refusing to hold an evidentiary hearing upon remand. As background, once defendant filed his claim of appeal, he timely moved for a remand to the trial court so that he could file a motion for new trial on the ground of ineffective assistance of counsel. Specifically, defendant attached to his motion the affidavit of Tamasha Davis, who was on the prosecution's witness list, who averred that defendant was with her in her apartment the entire time that the crimes occurred. Defendant argued that his counsel was ineffective for not calling Davis as an alibi witness, and that counsel separately gave him inadequate advice when advising him during plea negotiations of the potential sentences. The prosecution's response agreed that a remand for an evidentiary hearing was necessary. By order entered December 8, 2010, a motion docket panel granted the motion, providing in our standard language that after defendant's motion is filed the trial court "is to hear" the motion and then "the trial court is to make findings of fact and a determination on the record." *People v Gaines*, unpublished order of the Court of Appeals, entered December 8, 2010 (Docket No. 299328).

On remand defendant filed a motion for new trial based on the same grounds posited in the motion to remand, and at the hearing on the motion the prosecution once again agreed with defendant that an evidentiary hearing was necessary to further explore the potential testimony of

Davis. The trial court disagreed, and after obtaining both parties concession that our order did not require an *evidentiary* hearing, ruled that defendant's motion contained "inconsistent" positions and was therefore "disingenuous." It's complete reasoning in denying defendants motion was as follows:

THE COURT: The motion for new trial is denied. I find that the inconsistent issues presented by the defendant can hardly present a complete alibi witness at the same time that he's indicating that he would plead guilty if he knew the sentence was two plus something plus two for the felony firearm.

I find that to be inconsistent. I don't begrudge the lawyers the opportunity to argue inconsistent positions with regard to the ineffective assistance of counsel. However, I find that it's disingenuous. The motion is denied.

II. ANALYSIS

A trial court's decision to hold an evidentiary hearing is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216-217; 749 NW2d 272 (2008). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *Id.* at 217. Also, "[i]nterpreting the meaning of a court order involves questions of law that we review de novo on appeal." *Silberstein v Pro-Golf of America, Inc*, 278 Mich App 446, 460; 750 NW2d 615 (2008). "Whether a trial court followed an appellate court's ruling on remand is a question of law that this Court reviews de novo." *Schumacher v Dep't of Natural Resources*, 275 Mich App 121, 127; 737 NW2d 782 (2007).

Based on this Court's remand order, the trial court theoretically did not abuse its discretion in denying defendant an evidentiary hearing regarding both assertions of ineffective assistance of counsel. Although defendant requested an evidentiary hearing on the motion, and the prosecution also thought one was necessary, the trial court correctly noted that an evidentiary hearing was not explicitly required by the order. A trial court's strict adherence to an order from this Court does not constitute an abuse of discretion, *People v Sobczak-Obetts*, 253 Mich App 97, 107; 654 NW2d 337 (2002), and our remand order neither required nor precluded an evidentiary hearing. But, as discussed below, it certainly did at a minimum require that the trial court analyze the issues and evidence and make findings of fact and a decision on the issues presented.

Consequently, the trial court did abuse its discretion when it failed to make "findings of fact" on defendant's motion as it recognized this Court's order required it to do. Although the trial court certainly "decided" the motion, its rationale was based exclusively on how the court *viewed the allegations*, i.e., as inconsistent and disingenuous, as opposed to making *findings of fact* on the assertion of ineffective assistance of counsel.¹ Clearly if the issue presented by

¹ In order to establish a claim for ineffective assistance of counsel, defendant must first demonstrate that "counsel's representation fell below an objective standard of reasonableness[.]" which requires a showing "that counsel's performance was deficient." *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Second, "the defendant must

defendant could be decided based on whether the allegations underlying the claim of ineffective assistance of counsel were inconsistent and disingenuous, we could have initially made that decision without the need for a remand.² But because of the issues raised by the pleadings and affidavit, a remand was necessary for findings of fact. The trial court was required to make “findings of *fact*” on the issues presented by defendant, and having failed to do so, we once again remand the issues back to the trial court for it to “make findings of fact and a determination on the record” on defendant’s claim of ineffective assistance of counsel. An evidentiary hearing is the best means to accomplish this task, to allow the parties to present the relevant witnesses at the hearing.

Remanded to the trial court for a decision on defendant’s motion for new trial. The court shall submit its findings and decision to the clerk of this Court within 35 days of the issuance of this opinion. We retain jurisdiction.

/s/ Peter D. O’Connell

/s/ Christopher M. Murray

/s/ Pat M. Donofrio

show that the deficient performance prejudiced the defense[.]” which “requires a showing that counsel’s errors were so serious as to deprive the defendant of a fair trial[.]” *Id.* at 687. The Court has held that this second prong can be understood to ask whether “there was a reasonable probability that the outcome of the trial would have been different had defense counsel” adequately performed. *People v Grant*, 470 Mich 477, 496; 684 NW2d 686 (2004).

² The allegations are not inconsistent, but that is beside the point.

Court of Appeals, State of Michigan

ORDER

People v Kenneth Terence Gaines

Docket No. 299328

LC No. 08-003943-FC

Peter D. O'Connell
Presiding Judge

Christopher M. Murray

Pat M. Donofrio
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for an evidentiary hearing on defendant's allegation of ineffective assistance of counsel. We retain jurisdiction.

Proceedings on remand shall commence within 35 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded. The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

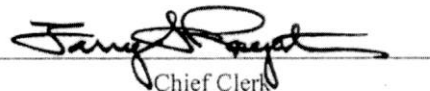
The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings. All proceedings shall be completed within 56 days of the clerk's certification of this order. The parties may file any supplemental briefs, not to exceed ten pages, within 14 days from the filing of the transcripts with this Court.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

DEC 13 2011

Date


Chief Clerk