STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2014
v	No. 313050 Wayne Circuit Court
DALEPHENIA JONES, Defendant-Appellant.	LC No. 93-005485-FC

Before: SERVITTO, P.J., and SAWYER and BOONSTRA, JJ.

PER CURIAM.

Defendant was found guilty in April 1994 of first-degree felony murder, MCL 750.316, following a jury trial. She was sentenced to life in prison without the possibility of parole. Defendant appealed by right, and this Court affirmed her conviction.[1] On March 1, 2011, defendant moved the trial court for relief from judgment. The trial court, without a hearing, denied the motion. Defendant then applied for leave to appeal to this Court, which was granted.[2] We affirm the trial court's denial of the motion.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant killed a woman while trying to steal her money. At trial, she argued that she accidentally stabbed the victim during a struggle. In her previous appeal, she argued that the trial court erred in (1) failing to instruct the jury on the theory of imperfect self defense, (2) failing to provide a verdict form that would allow a conviction for robbery as a separate offense, and (3) stating at sentencing that the offense required a life sentence without possibility of parole. *Jones*, unpub op at 1. This Court found no merit to defendant's arguments and affirmed her conviction. *Id*.

[1] *People v Jones*, unpublished per curiam opinion of the Court of Appeals, issued June 25, 1996 (Docket No. 176526).

[2] *People v Jones*, unpublished order of the Court of Appeals, entered July 8, 2013 (Docket No. 313050).

During trial, Officer Donald Helvey testified that he met with defendant following her arrest, and that she appeared "fine" and in "[g]ood physical condition" to him. Helvey then testified that he used a form to advise defendant of her *Miranda*[3] rights:

> *A.* Okay. First of all, I started off by asking her a couple of questions. I asked her how she felt and she said, okay, and I wrote that up at the very top of the right hand corner. And then I asked her if she was high or intoxicated and she said, no. So, I wrote, not high or intoxicated. I asked her how far she got in school and she said she graduated from Robichaud High School in 1982 and I wrote that down. And I asked her if she could read and write and she said, yes, so I put, could read and write. I signed my name, the time which was 10:55 p.m. and the date which was 4/28/93.
>
> *Q.* I see. Now, up until that point when you covered that ground did you have any trouble understanding her or communicating with her?
>
> *A.* Not at all.
>
> *Q.* Did you understand what she was saying?
>
> *A.* Yes.
>
> *Q.* Were her words slurred or anything?
>
> *A.* No.
>
> *Q.* And did she appear to understand what you were saying?
>
> *A.* Yes.
>
> *Q.* In other words, you didn't have any trouble communicating with each other?
>
> *A.* Not at all.
>
> *Q.* Now, when you saw her did she appear to be injured in any fashion?
>
> *A.* No.
>
> *Q.* Did she appear to be out of it or sleepy or anything of that nature at all?
>
> *A.* No.

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Q. Now then, after determining what you just told us, did you get to the point of telling her what her Constitutional Rights were?

A. Yes.

Q. And how did you go about telling her that?

A. I started out by telling her that I was going to read her Constitutional—her Miranda Rights to her—and that if she didn't understand anything to stop me and ask me and I would try to explain it to her. I told her I was going to read each point to her. There is [sic] six points enumerated on our form and I was going to read each point to her and I did.

Q. Then can you tell us, in other words you just said—you read them all to her?

A. I read them to her. I initialed next to each one after I read them and then after I was done I asked her if she understood them and she said, yes. Then I asked her to read the first one out loud so I know—feel comfortable that she could read and write. And she read the first one out loud to me and she did a fine job. Then she read the rest of them to herself which would be the next five points, and she initialed next to each one after she read them and then she signed right underneath where it says, signature, address and phone. She wrote out her name, address, and city,—no phone number,—and then I signed underneath as a witness. I put the time, 10:57 p.m., April 28, '93, Detective Bureau Taylor Police Department, and I put the case number.

* * *

Q. Now, after she was advised her rights did she have any questions about them?

A. No, not at all.

Q. Did she ask that a lawyer be present before she spoke to you any further?

A. No.

Q. Did you make any promises to her in exchange for having her speak with you?

A. No.

Q. Did you threaten her in any fashion to have her speak with you?

A. No.

Q. Now, after she was advised of her rights did she choose to speak with you?

A. Yes.

Helvey testified that he wrote down a statement based on his discussion with defendant, wherein she claimed a different person had killed the victim. Helvey pointed out inconsistencies in defendant's story and told her she needed to tell the truth. Eventually, defendant gave a statement in which she admitted to killing the victim after the victim discovered that defendant was trying to steal her money.

Helvey testified that defendant was brought food and water during the interview, and that he stopped writing three times because defendant said she was tired. Helvey told defendant each time that she did not have to continue, but each time defendant resumed giving her statement. The interview lasted approximately 5 and one half hours in total.

Defendant testified that she was under the influence of crack cocaine at the time of the interview, that she had not slept for "seven or eight days," that Helvey threatened her, and that she did not tell Helvey that she had killed the victim while stealing money from her.

Prior to trial, defendant moved to suppress her confession, alleging that she "was then and continued to be for some time, under the intoxicating effects of crack cocaine" and that she was "induced and coerced into the giving of confessions against her own free will[.]" Defendant also moved for a forensic examination, alleging that she had a history of suicidal behavior and mental illness since suffering a closed-head injury as a child. The trial court ordered that defendant undergo a forensic examination to determine whether she was competent to stand trial. The trial court ordered a *Walker*[4] hearing to determine the admissibility of defendant's confession.

A clinical psychologist examined defendant and concluded that she was competent to stand trial, finding that defendant "possesses sufficient capacity to comprehend the nature and object of the proceedings, and her position as defendant in relation to those proceedings. . . ." The trial court granted defendant's subsequent motion for an independent competency exam. Dr. Dean L. Shappell, Ph.D., thereafter examined defendant. Shappell's report stated that defendant "did not manifest any blatant signs of cerebral dysfunctioning due to traumatic brain injury or developmental problems, but on the basis of her verbalizations, including syntax and vocabulary, she appears to be functioning in the low borderline range of mental ability with limited school-related skills" and concluded that "defendant has the capacity to understand selected aspects of the criminal process and some of the participants in that process, but she does not have the capacity at this time to assist counsel in preparing and sustaining a defense."

The trial court ordered that defendant receive appropriate medication during trial in order to maintain her competency, and denied defendant's motion to suppress her confession. No

[4] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

transcripts exist of the proceedings regarding defendant's competency or the *Walker* hearing. According to the trial court, "[a]pparently, transcripts of the *Walker* . . . hearing were never ordered, and the court reporter's original notes were destroyed."

Nearly 17 years after her trial, defendant moved the trial court for relief from judgment pursuant to MCR 6.508. Defendant argued that: (1) she was denied the effective assistance of counsel where counsel failed to seek suppression of her statements on the grounds that her mental illness rendered them involuntary; (2) her statements should have been suppressed as involuntary, and (3) that she was denied the effective assistance of appellate counsel where the foregoing issues were not raised in her direct appeal. Defendant supported her motion with a report authored in 2010 by a psychologist, Karen Clark. Clark interviewed defendant in 2010 and reviewed her previous examination records as well as some trial transcripts. Clark concluded as follows:

> Based on all the information available to me at this time, it is my professional opinion that [defendant] was severely compromised by the ingestion of illicit drugs over a three day period, sleep deprivation of 72 hours, a history of severe mental illness, a learning disability, a traumatic brain injury, and she was unable to understand the vicissitudes and ramifications of giving a statement about her crime knowingly and voluntarily at the time of her interrogation. At the time of Ms. Jones' arrest and statement and being tried, her behavior was consistent with a person who was suffering from a severe mental illness that would have impaired her ability to voluntarily and knowingly give a statement about her crime without putting herself in severe jeopardy. Not only because she was impaired by drug use, but more importantly, because of an underlying major mental illness, which was neither identified nor explained at the time of her trial, it is my opinion that her statement was not voluntarily made, but rather was the product of coercive police conduct on a person who was particularly susceptible to that coercion.

The trial court denied defendant's motion on October 9, 2012, finding that under the totality of the circumstances, defendant's statements were voluntarily made. Because the court concluded that defendant's statements were voluntarily made, the court found no merit to defendant's argument that she was denied the effective assistance of trial or appellate counsel. This appeal followed.

II. STANDARD OF REVIEW

Defendant argues that the court erred in denying her motion for relief from judgment predicated on a claim of ineffective assistance of counsel. When considering an appeal from a motion for relief from judgment, this Court reviews a trial court's findings of fact for clear error and its ultimate decision for an abuse of discretion. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). Whether the trial court finds an evidentiary hearing necessary is within its discretion. MCR 6.508(B). The burden is on defendant to establish entitlement to relief from judgment. MCR 6.508(D).

Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008)

(citation omitted). Findings of fact are reviewed for clear error, while determinations of constitutional law are reviewed de novo. *Id*.

III. ANALYSIS

Defendant argues that she received ineffective assistance of both trial and appellate counsel, because her counsel failed to recognize and advance the argument that she was coerced to confess because she suffered from bipolar disorder. Defendant also argues that the trial court should have, at a minimum, held an evidentiary hearing to further develop the factual record in support of defendant's claim. We disagree, because we hold that the trial court did not err in determining, in the totality of the circumstances, that defendant's confession was voluntary.

"The use of an involuntary statement coerced by police conduct offends due process under the Fourteenth Amendment." *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999). In *Colorado v Connelly*, 479 US 157, 167; 107 S Ct 515; 93 L Ed 2d 473 (1986), the United States Supreme Court held that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), our Supreme Court provided the following factors to be considered when determining whether a statement was voluntary:

> [T]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

"The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness," *Cipriano* explained. *Id*. "The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id*. However, "as a threshold, there must be 'a substantial element of coercive police conduct' before these factors are considered." *Wells*, 238 Mich App at 388. See also *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005) ("Whether a statement was voluntary is determined by examining police conduct . . . .").

Because defendant failed to raise this issue in her first appeal, she must first establish good cause for such failure. MCR 6.508(D). Defendant argues that good cause was established because of ineffective assistance rendered by her appellate counsel. Ineffective assistance of appellate counsel may constitute good cause for failure to raise an issue. *People v Swain*, 288 Mich App 609, 631; 794 NW2d 92 (2010). "[A] criminal defendant has a constitutional right to effective assistance of appellate counsel in a first appeal as of right[.]" *People v Caston*, 228 Mich App 291, 304; 579 NW2d 368 (1998). "[T]he test for ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel."

People v Uphaus, 278 Mich App 174, 186; 748 NW2d 899 (2008). Under that test, "defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "'Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.'" *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009), quoting *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

> An appellate attorney's failure to raise an issue may result in counsel's performance falling below an objective standard of reasonableness if that error is sufficiently egregious and prejudicial. However, appellate counsel's failure to raise every conceivable issue does not constitute ineffective assistance of counsel. Counsel must be allowed to exercise reasonable professional judgment in selecting those issues most promising for review. The fact that counsel failed to recognize or failed to raise a claim despite recognizing it does not per se constitute cause for relief from judgment. . . . [*People v Reed*, 198 Mich App 639, 646-47; 499 NW2d 441, 445 (1993) (citation omitted).]

The decision of what arguments to present is necessarily one of strategy, which will not be second-guessed by this Court on appeal. See *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004).

The medical records cited by defendant do refer to a diagnosis of bipolar disorder in 1991, but those records do not include any information that would call into question the court's conclusion that defendant's confession was voluntary. Defendant attempts to circumvent this by stressing the character of bipolar disorder and citing an evaluation done in 2010. Not only would the latter evaluation have been unavailable to appellate counsel on the appeal by right, but it is also speculative, albeit informed speculation. Moreover, the appended medical records do not specify the severity of defendant's illness, whether psychotic features were present, or the level of remission, if any.

The United States Supreme Court's decision in *Connelly* is instructive in considering the relationship between a defendant's mental illness that the voluntariness of his statements. In that case, the defendant approached police officers and admitted that he had murdered someone. 479 US at 160. The officers advised the defendant of his *Miranda* rights, and the defendant told the officers the circumstances of the murder. *Id*. at 160-161. A psychiatrist interviewed the defendant and determined that his statements had been induced by "command hallucinations" in which the defendant was directed by the "voice of God" to confess. *Id*. at 161. The psychiatrist testified that the hallucinations interfered with the defendant's "'volitional abilities; that is, his ability to make free and rational choices.'" *Id*.

Connelly held that "[a]bsent police conduct causally related to the confession, there is simply no basis for concluding that any state actor has deprived a criminal defendant of due process of law." *Id*. at 164. The Court stated that a defendant's mental illness should not "by itself and apart from its relation to official coercion, . . . ever dispose of the inquiry into constitutional 'voluntariness.'" *Id*. Distinguishing a case in which it found that a defendant's confession had been involuntary where police officers were aware of his mental illness and

exploited it to coerce a confession, *id*. at 164-165, the Court concluded that "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Id*. at 167.

In this case, evidence of defendant's mental illness would not have altered the conclusion that the police did not coerce her confession. Absent some evidence that the police were aware of defendant's mental illness and used it to coerce a statement from her, which defendant does not allege, there is nothing to support the conclusion that defendant's statement was coerced. Consistent with the Supreme Court's decision in *Connelly*, defendant's mental illness, standing alone, does not bolster her argument that her confession was involuntary. Thus, her appellate counsel did not render ineffective assistance by failing to raise the issue of defendant's diagnosis of bipolar disorder. For these same reasons, trial counsel did not render ineffective assistance.

Finally, the trial court was not required to hold an evidentiary hearing on defendant's motion. The trial court correctly concluded that even taking defendant's allegations as true, there was no new evidence of police coercion. The trial court had at its disposal all the evidence needed to rule on defendant's motion; defendant does not explain what new evidence in support of her claim would be developed by an evidentiary hearing.

Affirmed.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Mark T. Boonstra