Order

Michigan Supreme Court
Lansing, Michigan

April 25, 2019

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

158323

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 158323
COA: 341748
Wayne CC: 99-012250-FC

NICHOLAS V. HUDSON,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the July 3, 2018 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

s0418

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.

April 25, 2019

Clerk

Exhibit A

Court of Appeals, State of Michigan

ORDER

People of MI v Nicholas V Hudson

Docket No. 341748

LC No. 99-012250-01-FC

Douglas B. Shapiro
Presiding Judge

William B. Murphy

Joel P. Hoekstra
Judges

The Court orders that the delayed application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred in denying the motion for relief from judgment.

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JUL - 3 2018
Date

Chief Clerk

Exhibit B

STATE OF MICHIGAN
IN THE THIRD CIRCUIT COURT OF MICHIGAN-CRIMINAL DIVISION
FOR THE COUNTY OF WAYNE

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

vs.

Case No. 99-012250-01-FC
Hon. Vonda R. Evans

NICHOLAS HUDSON
Defendant,
_____/

ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

At a session of said Court held in the Frank Murphy Hall of Justice on DEC 01 2016

PRESENT: HON. Hon. Vonda R. Evans
Circuit Court Judge

On April 18, 2000, following a jury trial, defendant, Nicholas V. Hudson, was convicted of **First-Degree Premeditated Murder**, contrary to **MCL 750.316**, and **Possession of a Firearm During the Commission of a Felony (Felony-Firearm)**, contrary to **MCL 750.227b**. Defendant was sentenced to life in prison for the murder conviction, preceded by a consecutive two year term of imprisonment for felony-firearm. On November 22, 2002, Michigan's Court of Appeals (Docket Nos. 228030) affirmed defendant's conviction and sentence. On August 23, 2003, Michigan's Supreme Court (Docket No. 123297) denied Defendant's application for leave to appeal. Defendant now submits a Motion for Relief from Judgment. The Prosecutor has filed a response, to which Defendant has filed a response.

Defendant urges this Court to grant relief from judgment in the form of an evidentiary hearing for the following reasons: (1) the trial court improperly restricted Defense Counsel's

Exhibit C

cross-examination of witnesses; (2) the trial court's lack of due diligence locating certain witnesses for trial denied Defendant a fair trial; (3) the trial court abused its discretion by refusing to give the standard addict-informer instruction; (4) the Prosecutor's arguments shifted the burden of proof onto Defendant; (5) the Prosecutor's argument misstating the testimony of Witness Mario Collier was improper; (6) the Prosecutor's remarks on rebuttal closing argument were improper; (7) appellate counsel also rendered ineffective assistance on appeal; and (8) newly discovered evidence warrants a new trial.

Nevertheless, Defendant bears the burden to establish his entitlement to relief under **MCR 6.508(D)**. **MCR 6.508(D)(3)** provides, in pertinent part:

> The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion . . . (3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates (a) good cause for failure to raise such grounds on appeal or in the prior motion, and (b) actual prejudice from the alleged irregularities that support the claim for relief....

The ineffective assistance of appellate counsel may constitute "good cause" for the apparent failure to raise the aforementioned grounds in a prior appeal or motion.[1] Thus, this Court shall consider Defendant's claim that appellate counsel rendered ineffective assistance as a pre-requisite to Defendant's substantive arguments. U.S. Supreme Court precedent held "that to receive collateral relief on the basis of ineffective assistance of [] counsel[2], the defendant must meet a two-pronged test of both cause and prejudice." *Reed, supra* at 383-384. Thus, the

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[1] *People v Reed*, 449 Mich 375, 381; 535 NW2d 496 (1995); ("Where a procedural default is the result of ineffective assistance of counsel, the Sixth Amendment mandates that the state bear the risk of the constitutionally deficient performance").

[2] "[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); citing *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

ineffective assistance of appellate counsel, if established, is but one prong of the *Strickland* test, discussed below.

Defendant insists that appellate counsel was ineffective for failing to raise the issues in this motion on appeal. "[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), citing *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). In order to prove that counsel's assistance was ineffective, defendant must satisfy a two-part test, developed in *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984)." *People v Frazier*, 478 Mich 231, 242; 733 NW2d 713 (2007). "Under this test, counsel is presumed effective, and the defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *Frazier, supra* at 242. "Appellate counsel may legitimately winnow out weaker arguments in order to focus on those arguments that are more likely to prevail." *Uphaus, supra* at 187, citing *People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995).

Defendant argues in the alternative that newly discovered evidence in the form of the affidavit of Jimmie Blue warrants a new trial. Unfortunately, the 2013 affidavit of Jimmie Blue does little to exonerate Defendant. Thus, because there is no exculpatory connection between this proffered newly discovered evidence (the affidavit) and significantly important trial

evidence (the trial testimony of Inge and Blue), Defendant's argument must fail for lack of support to substantiate his claim. *Inter alia*, Blue avers:

> ...in August of 1999 I was questioned by Detroit Police in connection with the killing of Ivory Harris, who was known as Chips or "C" and I testified in the trial of Nicholas Hudson, who was known to me as "Bill." Ivory Harris was shot on the street not far from my home on Stout in Detroit. The day Ivory Harris was shot, at the time Ivory Harris was shot, I was inside my house with my common-law wife, Janet Inge, who is now deceased. The first we knew that Ivory Harris had been shot was after we heard a gunshot and someone came to our door and told us there had been a shooting. I am aware that Janet Inge testified that she saw Nicholas Hudson, or "Bill," shoot Ivory Harris, but this could not be true because she was with me in the house when the shooting happened. At the time she testified, Janet Inge was a heavy drug user and often said things that weren't true. **At Nicholas Hudson's trial I testified that Janet Inge said "I think I seen Bill shoot somebody," but I was never asked if this was possible. If I had been asked, I would have testified that it was not possible for her to have seen the shooting and I would have testified that Janet Inge often said things that I knew could not be true.** Over time, I had learned to disregard these untrue statements. I do not know why Janet Inge testified falsely. After trial, I did not want to discuss these matters with anyone, and I avoided any discussions and attempts by people to ask questions about these matters. I always refused until recently approached and reminded that a man has been behind bars for over a decade based on what Janet Inge said she saw during one of her drug induced stupors. I have provided this information of my own free will and have not been promised anything in return for my truthful affidavit. [Affidavit of Jimmie Blue, dated January 18, 2013; Emphasis added.]

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), citing *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996); MCR 6.508(D). Where newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as

suspect and untrustworthy. *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). "[I]mpeachment evidence may be grounds for a new trial if it satisfies the four-part test set forth in *Cress*. More specifically, newly discovered impeachment evidence satisfies *Cress* when (1) there is an exculpatory connection on a material matter between a witness's testimony at trial and the new evidence and (2) a different result is probable on retrial." *People v Grissom*, 492 Mich 296, 312-13; 821 NW2d 50 (2012).

Defendant contends the averments presented by way of Blue's affidavit were not available during trial, or reasonably attainable with due diligence. Nevertheless, "the key to deciding whether evidence is 'newly discovered' or only 'newly available' is to ascertain when the defendant found out about the information at issue. A witness's shifting desire to testify truthfully does not make that witness's testimony 'newly discovered' evidence." *People v Terrell*, 289 Mich App 553, 564; 797 NW2d 684 (2010). Consequently, this Court opines that Defendant's argument fails with regard to the first prong of the *Cress* test, as the record plainly reveals that Blue's proposed testimony is not newly discovered. Moreover, the averments in Blue's affidavit would not have made a different result probable on retrial, as the inconsistencies in Inge's testimony were glaringly apparent to the jury at trial, and Blue's testimony would have at best been cumulative evidence that might have been used to impeach Inge's already specious credibility.

Moreover, Defendant has failed to establish a threshold showing of "good cause" for his failure to raise the aforementioned claims in a prior appeal, or "actual prejudice" from the

alleged irregularities that support his claim for relief, pursuant to **MCR 6.508(D)(3)**. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). Consequently, the balance of Defendant's motion is procedurally barred by **MCR 6.508(D)(3)**. Therefore, **IT IS HEREBY ORDERED** that Defendant's Motion for Relief from Judgment is **DENIED**.

Circuit Court Judge

PROOF OF SERVICE

I certify that a copy of the above instrument was served upon the attorneys of record and/or self-represented parties in the above case by mailing it to the attorneys and/or parties at the business address as disclosed by the pleadings of record, with prepaid postage on DEC 01 2016

Name

STATE OF MICHIGAN

IN THE THIRD CIRCUIT COURT FOR THE COUNTY OF WAYNE

CRIMINAL DIVISION

PEOPLE OF THE STATE MICHIGAN
Plaintiff,

V

Circuit No. 99-012250-01-FC
HON. VONDA R. EVANS

NICHOLAS HUDSON

_____/

ORDER

At a session of said Court held in the City of Detroit, County of Wayne,

State of Michigan on: June 30, 2017

PRESENT: **HON. VONDA R. EVANS**
Circuit Court Judge

Upon review of the facts and law of this case, in the above-entitled cause, there is no new issue of law presented; therefore, **IT IS HEREBY ORDERED** that the defendant's pleading for reconsideration of motion of relief from judgment is **DENIED.**

Dated: June 30, 2017

HONORABLE VONDA R. EVANS
Third Circuit Court Judge – Criminal Division

Exhibit D