

STATE OF MICHIGAN

IN THE 14th CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

v

HON. TIMOTHY G. HICKS

DOUGLAS WEISSERT, #632314,
Defendant.

File No. 06-053181-FC

Dale J. Hilson (P57726)
Muskegon County Prosecutor
990 Terrace Street, Fifth Floor
Muskegon, MI 49442
(231) 724-6435

Douglas Weissert
In Propria Persona
Lakeland Correctional Facility
141 First Street
Coldwater, MI 49036

OPINION AND ORDER DENYING
MOTION FOR RELIEF FROM JUDGMENT

INTRODUCTION

Defendant, Douglas Weissert, ("Weissert") presents the court with a motion seeking relief from his 2007 conviction and sentence. He alleges several grounds for his request. For the reasons set forth in this opinion and order, the court respectfully denies the motion.

FACTS AND PROCEDURAL HISTORY

On December 20, 2016, Weissert was convicted by a jury of one count of felony murder contrary to MCL 750.316(b), one count of conspiracy to commit armed robbery contrary to MCL 750.529, one count of assault with intent to rob while armed contrary to

APX. A

MLC 750.89, one count of first-degree home invasion contrary to MCL 750.110a(2), and three counts of felony-firearm contrary to MCL 750.227b. He was sentenced to life for the felony murder conviction. The court imposed additional sentences of 17 to 35 years on the conspiracy charge, and three two year terms for the felony-firearm convictions.

Weissert appealed his conviction alleging violations of his Sixth Amendment right of confrontation and Fifth Amendment right to counsel, insufficiency of the evidence, improper use of non-standard jury instructions, deprivation of meaningful cross-examination at his preliminary examination, and double jeopardy violations. The Court of Appeals affirmed the counts of felony murder and conspiracy, and one count of felony-firearms, but remanded back to the trial court with direction to vacate the remaining offenses finding they violated Weissert's double jeopardy protections. *People v Weissert*, unpublished opinion of the court of appeals per curiam issued November 20, 2008 (Docket No. 276150 and 282322).

Weissert now seeks relief from his conviction under MCR 6.500 *et seq.*

DISCUSSION

Motions for relief are governed by MCR 6.500 *et seq.* *People v Swain*, 288 Mich App 609, 629; 794 NW2d 92 (2010). Such motions are the exclusive means for a defendant to challenge a conviction once they have exhausted the normal appellant process. *People v Wartroba*, 193 Mich App 124, 126; 483 NW2d 441 (1992). Pursuant to MCR 6.502(G)(1), a defendant in a criminal case may file one and only one motion for relief from judgment with regard to conviction.

The court may not grant relief to a defendant who alleges grounds which could have been raised on appeal unless the defendant demonstrates good cause for the

failure to raise such grounds on appeal or in the prior motion, and actual prejudice from the alleged irregularities that support the claim for relief. MCR 6.508(D)(3).

Weissert certainly could have raised the issues alleged in his brief on appeal. He does not attempt, however, to demonstrate good cause for his failure to do so for the majority of the grounds he alleges. Rather, Weissert only argues that appellate counsel was ineffective for failing to raise one specific issue: the trial court precluding cross examination of state witness Anjanette Lewis on her mental health issues. To the extent that Weissert fails to demonstrate good cause and actual prejudice for the additional grounds alleged in his motion and brief in support, the court is barred from granting relief by MCR 6.508(D)(3). An analysis of the issue regarding the mental health of Mrs. Lewis follows.

Good Cause

"Good cause," as required by MCR 6.508(D)(3) can be shown by demonstrating ineffective assistance of counsel. *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995). In order to demonstrate ineffective assistance of counsel, the defendant must show that attorney's performance "fell below an objective standard of reasonableness." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). The defendant must overcome the presumption that counsel's decisions could constitute sound trial strategy. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L ED 2d 674 (1984). The defendant must also show that he was prejudiced by this performance such that he was deprived of a fair trial. *Grant*, *supra* at 486. To establish prejudice the defendant must demonstrate a reasonable probability that the outcome of trial would have differed but for counsel's conduct. *Id.* Failure to raise every issue with any arguable legal merit

appeal does not constitute ineffective assistance of counsel. *Reed, supra* at 378.

Weissert claims that the trial court's limit on cross examination and *in camera* review of Anjanette Lewis's counseling and mental health records was the strongest issue to raise on appeal, and that appellate counsel's failure to raise the issue constitutes ineffective assistance of counsel. He argues that the ultimate failure of seven of the nine issues raised by counsel establishes that the issue regarding mental health evidence is "clearly the best."

This argument fails to address or establish whether appellate counsel's performance fell below an objective standard of reasonableness, and therefore does not establish ineffective assistance of counsel. Further, Weissert fails to overcome the presumption that counsel's decision constituted sound trial strategy. Counsel presented nine issues on behalf of Weissert. While counsel may not have raised the particular issues Weissert desired, this is not a sufficient basis for this court to determine that counsel did not exercise sound discretion in determining whether to present the issue on appeal. Accordingly, Weissert has not demonstrated good cause as defined by current case law and court rule.

Actual Prejudice

Moreover, Weissert fails to demonstrate actual prejudice under MCR 6.508. In order to establish "actual prejudice" in convictions following trial, the defendant must demonstrate that but for the alleged error, the defendant would have had a reasonably likely chance of acquittal. MCR 6.508(D)(3)(b)(i).

While Weissert claims that Anjanette Lewis was the prosecution's most valuable witness, he fails to establish that without her testimony, or the limitation on cross-

examination, the outcome of the trial would have differed. Anjanette Lewis testified concerning the behavior of her husband, Eddie Lewis, and interactions she personally observed between Eddie Lewis and Weissert. The prosecution presented additional witnesses, including Eddie Lewis, who testified to those same events. Weissert has not established that absent the alleged defect the jury would have acquitted.

CONCLUSION

For the reasons set forth in this opinion and order, Weissert has failed to establish that he is entitled to relief under MCR 6.500 *et seq.* Accordingly, the motion is respectfully DENIED.

IT IS SO ORDERED.

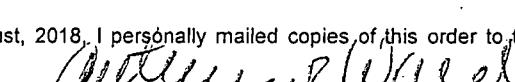
Date: August 17, 2018



Timothy G. Hicks, P35198
Circuit Judge

CERTIFICATE OF MAILING

I hereby certify that on the 17th day of August, 2018, I personally mailed copies of this order to the parties above named at their respective addresses, by ordinary mail.



Autumn R. Ward, Circuit Court
Legal & Scheduling Secretary

STATE OF MICHIGAN
IN THE 14th CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,
v
DOUGLAS WEISSERT, #632314,
Defendant.

HON. TIMOTHY G. HICKS

File No. 06-053181-FC

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OPINION AND ORDER DENYING MOTION FOR RECONSIDERATION

The court enters its opinion and order pursuant to defendant's motion for reconsideration. The court analyzes the motion for reconsideration below.

MCR 2.119(F) governs motions for reconsideration. (F)(2) precludes responsive briefing and oral argument unless the court otherwise directs. (F)(3) provides that a "motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by a reasonable implication, will not be granted." Additionally, the moving party must demonstrate a "palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error."

The court entered its opinion and order denying defendant Douglas Weissert's ("Weissert") motion for relief from judgment on August 17, 2018. Weissert now requests that the court reconsider its decision.

Weissert reasserts the positions raised in his original brief, with some added clarification and emphasis¹. He argues that he has sufficiently established both good cause and actual prejudice under MCR 6.508 to justify relief from his conviction and sentence. The court has considered defendant's argument and finds that it has not committed a "palpable error" which would merit granting the motion for reconsideration.

These same issues were considered and addressed by the court in its original opinion and order. Weissert's added clarification fails to remedy the deficiencies that led the court to its original conclusion.

The added clarification relating to the allegedly inconsistent trial testimony of Ed Lewis does not sufficiently establish good cause. Ed Lewis's trial was in August of 2006, several months before Weissert's trial. Therefore, the transcripts of both trials were discoverable to Weissert through due diligence both at the time of his own trial, and on his direct appeal. Therefore, he has not demonstrated newly discovered evidence as defined under Michigan case law. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).

In regards to the evidence of the mental health of Anjanette Lewis, Weissert has not established appellate counsel was ineffective for failing to raise the issue on appeal under the standard set for by *People v Grant*, 470 Mich 477; 684 NW2d 684 (2004). The

¹ Weissert refers to the sub-arguments in his original brief as "issues" while they were broken down into "arguments" in his original motion. However, the number designations used in his motion for reconsideration correspond to the respective Roman numeral or subsection used in the original motion for relief from judgment.

status of a witness's mental health is generally not relevant unless it bears on some specific relevant factor. The decision not to delve into it is a legitimate one entrusted to counsel.

For these reasons, the motion is respectfully **DENIED**.

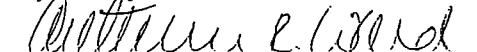
IT IS SO ORDERED.

Dated: September 26, 2018


HON. TIMOTHY G. HICKS
Circuit Judge (P-35198)

CERTIFICATE OF MAILING

I hereby certify that on this 26th day of September, 2018, I personally mailed copies of this opinion and order to the parties above named at their respective addresses, by ordinary mail.


Autumn R. Ward, Circuit Court
Judicial Secretary

Court of Appeals, State of Michigan

ORDER

People of MI v Douglas Lance Weissert

James Robert Redford
Presiding Judge

Docket No. 346640

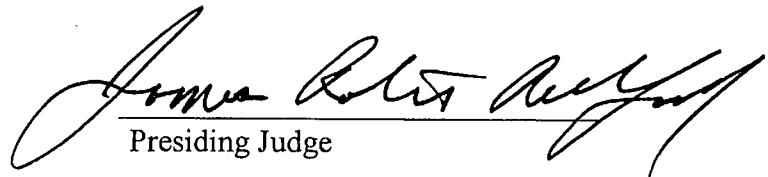
Jane M. Beckering

LC No. 06-053181-FC

Douglas B. Shapiro
Judges

The Court orders that the motion to waive fees is GRANTED for this case only.

The Court also 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.



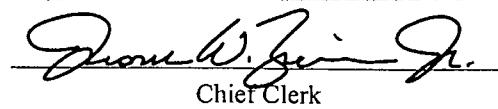
James Robert Redford
Presiding Judge



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

APR 18 2019

Date



Jerome W. Zimmer Jr.
Chief Clerk

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Court of Appeals, State of Michigan

ORDER

People of MI v Douglas Lance Weissert

James Robert Redford
Presiding Judge

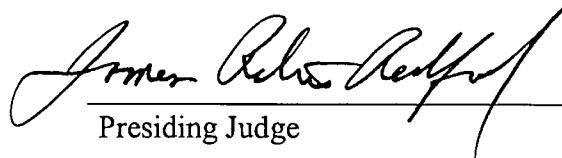
Docket No. 346640

Jane M. Beckering

LC No. 06-053181-FC

Douglas B. Shapiro
Judges

The Court orders that the motion for reconsideration is DENIED.



James Robert Redford
Presiding Judge



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

JUN - 4 2019

Date



Jerome W. Zimmer Jr.
Chief Clerk

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Order

Michigan Supreme Court
Lansing, Michigan

December 23, 2019

Bridget M. McCormack,
Chief Justice

159876 & (16)

David F. Viviano,
Chief Justice Pro Tem

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

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

v

SC: 159876
COA: 346640
Muskegon CC: 06-053181-FC

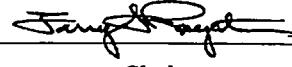
DOUGLAS LANCE WEISSERT,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the April 18, 2019 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). The motion to remand for an evidentiary hearing is DENIED.



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.

December 23, 2019



Clerk

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

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Filed: May 29, 2020

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Michigan Department of Attorney General
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Lansing, MI 48909

Douglas Weissert
Lakeland Correctional Facility
141 First Street
Coldwater, MI 49036

Re: Case No. 20-1203, *In re: Douglas Weissert*
Originating Case No. : 1:10-cv-00851

Dear Mr. Weissert and Counsel,

The Court issued the enclosed (Order/Opinion) today in this case.

Sincerely yours,

s/Roy G. Ford
Case Manager
Direct Dial No. 513-564-7016

cc: Mr. Thomas Dorwin

Enclosure

No mandate to issue

No. 20-1203

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trial court erred by barring evidence of a witness's mental health issues; and (3) trial counsel was ineffective for failing to investigate and impeach witness testimony.

Weissert cannot meet the statutory criteria for filing a second or successive § 2254 petition because, as he concedes, his proposed claims do not rely upon any newly discovered evidence or upon a new, retroactively applicable rule of constitutional law. *See* 28 U.S.C. § 2244(b)(2), (b)(3)(C).

Accordingly, we **DENY** Weissert's motion for authorization to file a second or successive § 2254 petition and **DENY** his motion for the appointment of counsel.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk