People of Michigan v Jeffrey Bernard Pyne

Court of Appeals No. 314684

APPENDIX A

re: People of Michigan v. Jeffrey Bernard Pyne

Court of Appeals No. 314684

AFFIDAVIT OF BERNARD PYNE

Bernard Pyne avers that:

1. That he is the father of the Defendant-Appellant, Jeffrey Bernard Pyne.

2. That he was the husband of the victim, Ruth Pyne.

3. That he was prepared to, and he expected to testify in the above-referenced case as a witness called by the defense.

4. That he could have provided testimony from personal knowledge concerning:

a) his wife's medical history, and her compliance and non-compliance with taking prescribed medications, including her compliance with her medication for months, and enhanced improvement from new medication in the days before her death;

b) his son's complete lack of any past violent behavior, even when subjected to physical violence;

c) his son's character as a peaceful person and a loving son and brother to his younger sister;

d) his son's character as an honest, and trustworthy person;

e) to the presence at the scene of the murder of a blue mark, not present prior to crime;

f) to the fact that two wood pieces, initially thought to be missing from the garage, were not missing.

I DECLARE THAT THE ABOVE STATEMENTS ARE TRUE TO THE BEST OF MY INFORMATION, KNOWLEDGE AND BELIEF.

Bernard Pyne

Dated: 19 September 2013

witness:

PAMELA DANDACHI
Notary Public - Michigan
Genesee County
My Commission Expires Jan 18, 2020
Acting in the County of [illegible]

APPENDIX B

ARGUMENT II

MR. PYNE WAS DENIED HIS SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL WHERE COUNSEL FAILED TO PRESENT A SUBSTANTIAL DEFENSE, FAILED TO OBJECT TO INADMISSIBLE HEARSAY, FAILED TO OBJECT TO IMPROPER PROSECUTION ARGUMENT, AND OPENED THE DOOR TO HIGHLY-PREJUDICIAL OPINION "EVIDENCE."

Standard of Review and Preservation of Issue

Sixth Amendment effective assistance of counsel claims are reviewed **de novo**, to determine whether the counsel's performance fell below an objective standard of reasonableness, prejudiced the defendant and as a result denied him a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994); *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1980) (setting forth a two-prong standard that a claimant must show that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for counsel's deficient performance, the result of the proceeding would have been different).

Multiple errors of counsel are evident in the existing record, and would be reviewable for the first time on appeal where the errors are evident in the existing record. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999). In any event, remand is also concurrently sought with this filing to expand on the issues, pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

The record shows many failures to object, and instances where counsel opened the door to

damaging testimony. For example, TT, 11/19/2012, 259-260, 262, 263-264, 265, 266-267; TT, 11/20/2012, 106-107, 108, 109; TT, 11/26/2012, 37, failures to object to hearsay [relating to what Mr. Pyne said about a missing board(s)]); TT, 11/20/2012, 65-66 [opening door to witness' elaboration on opinion about who killed Ms. Pyne], 67 (witness opinion, no objection); 79-80 (belated, although successful objection to opinion about emotions); 81 (counsel re-asking about opinion of Pyne's guilt); TT, 11/29/2012, 38-39, questions to Hendrick about what witnesses said about lilac bushes; TT, 11/29/2012, 72-75, opened door to prosecutor's re-direct with Hendrick about his opinions of guilt; TT, 11/16/2012, 242, failure to object to McIntosh's opinions; TT, 11/19/2012, 15-17, 18, failed to object to Bonham's opinions; 116, 118-119, failed to object to Deputy Chatterson's opinions about the believability of Mr. Pyne's actions and comments; TT, 11/19/2012, 224, Detective Zdravkovski's testimony about "fake" behavior; 259-260, another failure to object to hearsay relating to what Bernard Pyne said about missing items; TT, 11/20/2012, 106-109, still another failure to object to hearsay about missing tools and wood; TT, 11/26/2012, 55, belated objection -- overruled as "late;" 57, failure to object to blood-spatter witness opinions; 59, failure to object to further opinion about number of impact-strikes; 61-63, failure to object to description of wounds as "defensive;" 64, failure to object to testimony about the door having to have been closed; [note: many of these relating to Foreman's testimony are likely within common knowledge and experience of the officer, or any officer, and were not really at issue in case, that is, the things discussed did not touch on the ultimate questions nor address the material disputes; e.g. piece of a handle "had to have been laying there during

attack," and 76, "She was laying here the entire time"]; 11/28/2012, 18, failure to object to Hendrick's opinion about access to house; failure to object to Hendrick's opinion that defendant's reaction to news during interview "appeared to be an act for show;" 11/29/2012, 74-75, failure to object to Hendrick's opinion about 'squeegee-effect;' TT, 11/30/2012, 137, belated objection about Ms. Needham's being scared that Jeffrey fought with Ms. Pyne and she died as a result; 93, failure to object throughout Ms. Freeman's descriptions of emotional character, behaviors, and then a belated objection; 95, no follow-up objection [there had been one concerning character at 94], where Ms. Freeman spoke of Mr. Pyne's "character and what a good person he was," and she could not believe he would cheat on her.

Additionally, trial counsel failed to object to improper argument of the prosecutor (as noted above)(TT, 12/13/2012, 37, 41, 44, 45, 45, 45, 61-62, 66).

The record is clear that no defense witnesses were called. The reasons are not clear, and remand is sought for that clarification.

Analysis

The right to assistance of counsel is a fundamental right guaranteed to one accused of a crime by both the state and federal constitutions. US Const., AM VI; AM XIV; Const 1963, art. 1, §§17, 20; *Powell v Alabama,* 287 US 45, 71 (1932); *People v Sierb*, 456 Mich 519, 526; 581 NW2d 219 (1998).

A defendant raising a claim of the ineffective assistance of counsel claims must establish that

counsel's performance fell below an objective standard of reasonableness, prejudiced the defendant and, as a result, denied him a fair trial. *Pickens*, supra, 446 Mich at 338; *Strickland, supra*, 466 US at 687 (setting forth the two-prong standard that a claimant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that a reasonable probability exists that, but for counsel's deficient performance, the result of the proceeding would have been different); see, also, *People v Yost*, 278 Mich App 341, 378; 749 NW2d 753 (2008). As a general matter, trial counsel is afforded deference in matters of legitimate trial strategy. *Strickland, supra*; *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991), lv den 439 Mich 837.

However, where a lawyer fails to object to unfairly prejudicial evidence, and thereby fails to protect the client, the lawyer essentially adds to the case against the client. Such a failure to object, or acquiescence, may readily be seen as deficient representation, whether or not the failure was deliberate or inadvertent. See, for example, *Strickland, supra*, 104 S Ct at 2066 (deliberate trial tactics may constitute ineffective assistance of counsel where they fall "outside the wide range of professionally competent assistance"); *People v Fenner*, 136 Mich App 45; 356 NW2d 1 (1984), where counsel's failure to object to inadmissible hearsay corroborating the complainant's testimony was held to be ineffective assistance of counsel; *People v Ullah*, 216 Mich App 669; 550 NW2d 568 (1996)(counsel's failure to object to other-acts evidence required reversal); and see *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988) (where counsel was ineffective for calling a witness for the defense who actually provided the only substantive evidence of defendant's guilt); and, also, *Morikawa, supra*, slip op. p. 3

(counsel failed to object to improper character evidence, as well as to an instruction; the Court, in reversing for a new trial, held: "Given that this case was obviously a "close call," counsel's failure to object in this instance and in the jury instruction instance constituted ineffective assistance of counsel").

The federal courts provide additional guidance, including that found in *Washington v Hofbauer*, 228 F 3d 689 (CA 6, 2000)(counsel's failure to object to obvious prosecutorial misconduct was due to incompetence and ignorance of the law, rather than a reasonable trial strategy); *Combs v Coyle*, 205 F3d 269 (CA6, 2000)(where counsel's failure to assert objections and challenge to a Fifth Amendment violation, among other errors, was ineffective); *Davis v Booker*, 594 F Supp 2d 802 (E.D. Mich. 2009), where trial counsel was found ineffective on several grounds, including failure to make use of an investigator, and, although defense counsel had a trial strategy, he failed to investigate and develop any facts which would have supported the theory; and *Martin v Rose*, 744 F 2d 1245, 1249 (CA 6, 1984), where trial counsel's trial strategy, formulated after two years of pre-trial motions and investigation, was to do nothing and instead rely upon a favorable appeal; the lawyer's refusal to cross-examine witnesses, make objections or present evidence, although deliberate strategy, denied the defendant the effective assistance of counsel.

Also helpful, by analogy, is the case of *English v Romanowski*, 589 F Supp 2d 893 (E.D. Mich. 2008), aff'd in part, rev'd in part, *English v Romanowski*, 602 F 3d 714 (6th Cir. 2010). Defense counsel was found to have been ineffective for failing to adequately investigate and to call the defendant's girlfriend as a witness to corroborate the claim of self-defense in an assault

with intent to murder prosecution. The lawyer told the jury in opening statement that the witness would be called; however, the witness was not called. The federal court found that the Michigan court's determination that the girlfriend's testimony would have been merely cumulative of the defendant's, was error, because the girlfriend "was the only witness who would have corroborated Petitioner's version of events. In an assault case where the disputed issue concerns who was the aggressor, corroborating testimony is critical to a self-defense claim." By failing to present her testimony, the lawyer allowed the state's case "to go unchallenged save for Petitioner's own testimony." Also, as the U.S. Sixth Circuit Court of Appeals noted in the *English* case, "Undoubtedly, the testimony of a second person to corroborate the Defendant's version of the events would not have been cumulative, but rather could have critically added to the strength of the defense's case." 602 F. 3d at 727.

Mr. Pyne's case is more compelling. Counsel presented no witnesses, even after the jury had been advised during selection that experts might be called (TT, 11/14/2012, 7). Essentially, the prosecution's case went unchallenged. There was no strength to the defendant's case. There was 'no there, there.' The jury saw the picture painted only by the prosecution.

Mr. Pyne does not here assert that his trial counsel failed to investigate the case; instead, the specific problem -- leading to the unfair prejudice and denial of a fair trial -- was that counsel, after his investigation, failed to follow through on that investigation, failed to utilize the fruits of that investigation, failed to protect Mr. Pyne against inadmissible hearsay and other damaging testimony, and failed to present any substantial defense. In short, counsel failed to effectively challenge the prosecution's case, particularly as the case was so largely dependent upon

innuendo, speculation and opinion. The jury, without something specific or viable to challenge the prosecution's case, had nothing with which to counter the theories, opinions and inferences. Legitimate trial strategy? No. The jury was left with no foundation to formulate an articulable -- and reasonable -- doubt.

Deputy Foreman was allowed, without objection, to give opinion testimony -- although not qualified as an expert -- about blood-spatter, how many blows were struck, the physics of the assault, whether or not the garage side-door was open, defensive wounds, etc. (TT, 11/26/2012, 54-55, 57, 59, 61-63, 64). (Ironically, the prosecutor objected to a defense question posed to Deputy Foreman about blood-spatter; the objection was sustained. *Id* at 114).

Frankly, some of the testimony, although erroneously admitted and counsel failed to object, is not legally significant, as no real dispute exists about it. For example, whether or not a piece of a cabinet handle was on the ground during the assault (e.g., "That piece had to have been lying there during the attack," *id.* at 74), would not affect the outcome of the case and is not in dispute. It does reflect, however, another example of counsel letting the prosecution and its witnesses to venture where they may, without effective resistance or challenge.

Even the issue about "overkill" from those witnesses not qualified to give such testimony, for example, Hendrick, although likely improper and without adequate foundation for the opinion rendered (see, for example, Detective Hendrick's observation that the massive injuries were indicative of a "personal relationship with the victim" [an objection to that was sustained, however] TT, 11/29/2012,75), was not really an issue. The extent and number of the injuries suffered by Ms Pyne was not contested; the issue at trial was the identity of the perpetrator.

However, counsel's failure to challenge such testimony at the outset, and not only when it reaches the extreme stage, as in Hendrick's case, for example, is reflective of a pattern of counsel's failure to be at the forefront in the protection of Mr. Pyne's constitutional rights.

Counsel failed to effectively challenge the heart of the prosecutions' case, i.e., the opinions, assumptions, conclusions, and character evidence of the prosecution's witnesses, and, adding insult to injury, he opened to door on multiple occasions to the detailed explanations of witness opinions about Mr. Pyne's guilt (TT, 11/20/2012, 65-66 [Zdravkovski, "Yes. Your client, Jeffrey Pyne, killed his mother, Ruth Pyne"]; TT, 11/27/2012, 75-76 [Pement, stating he knew that Mr. Pyne killed his mother "based on all the information I have, yes ... Jeffrey's alibi, that didn't hold up. His lack of cooperation with the police. The injuries to his hands the evening of the incident ... Those are all circumstantial evidence"]; TT, 11/29/2012, 69-70 [Hendrick]; and TT, 11/30/2012, 137 [belated objection to Ms. Needham's fears that Mr. Pyne had done something to his mother causing her death).

There were no objections to the hearsay of what Bernard Pyne said about one or two boards possibly missing from his garage (for example, TT, 11/19/2012, 259-260; TT, 11/20/2012, 106-109; TT, 11/26/2012, 37). Without that hearsay, the prosecution's theory that a 2 X 4 or other wooden board was taken from inside the garage and used as the weapon is weakened. Without that evidence, the inference that something from inside the garage was grabbed and used is diminished, making it instead more likely that the implement was something brought to the scene by the perpetrator. In that case, the likelihood would be that a stranger brought the instrument -- perhaps some type of pry-bar or other implement -- in and used it to kill Ms. Pyne.

Trial counsel utilized a tactic, or theatric, perhaps, throughout the trial, asking almost all of the witnesses if they knew who killed Ms. Pyne. Of course, in the cases of Zdravkovski, Pement and Hendrick, they all said they did [TT, 11/16/2012, 84, Bretti did not; TT, 11/19/2012, 147, Deputy Chatterson did not; TT, 11/20/2012, 65-66, Detective Zdravkovski *did* 'know' who killed Ms. Pyne; TT, 11/26/2012, 32, Detective Hiller did not; 133, Foreman did not; 168, Koteles did not; TT, 11/27/2012, 24, Jacob did not; 75, Pement 'did;' 107, Conley did not; 11/29/2012, 72, Hendrick 'did; ' TT, 11/30/2012, 28, Deputy Cooper did not; 194, Ms. Needham did not [although she worried that Jeffrey had, *id.* at 137]; 12/10/2012, 25, Mr. Lesnew did not; 59, forensic scientist Vitta did not; TT, 12/10/2012, 146, Ms. Freeman did not; 167-168, Ms. Moore did not; 201, Ms. Ginell did not; TT, 12/11/2012, 74, Dr. Ortiz-Reyes did not].

The tactic was not reasonable and, it might be suggested, it blew up in counsel's face. More problematically, certainly, is the impact on the jury of law enforcement personnel -- with the prestige of the State behind them -- stepping into the jury's role as factfinder and presenting the otherwise inadmissible opinions of guilt. Counsel's questioning may have been strategy, but it was not reasonable strategy. *Strickland*, *supra*, 104 S Ct at 2066 (deliberate trial tactics may constitute ineffective assistance of counsel where they fall "outside the wide range of professionally competent assistance").

The harm wrought by the attorney's continuing to press detectives for opinions of guilt, for example, continuing to question Detective Pement about the basis for his opinion of guilt, is exactly the type of harm the *Freeman* Court ruled necessitated a new trial; that is, the police witness is testifying about the "opinions of others and the information that was given to" the

witness, as well as what he actually observed at the scene (TT, 11/27/2012, 76). See *Freeman, supra*, p. 5 of Appendix B)("... there is a risk ... that he [is] testifying based upon information not before the jury, including hearsay, or at the least, that the jury [c]ould think he ha[s] knowledge beyond what [is] before them ..."). Detective Pement stated that, "based on all the information [he had]" he knew who committed the crime (TT, 11/27/2012, 75-76).

Additionally, the harm is again found in the prosecution's re-direct examination of Detective Zdravkovski, after counsel had opened the door, where Zdravkovski testified that "Jeffrey Pyne, killed his mother," and his opinion was based on the evidence, the time-line, Mr. Pyne's lack of cooperation, his injuries, his lack of emotion, and "none of it made sense," and he had "lied about where he was at, he lied about what he was doing" (TT, 11/20/2012, 66, 67). Further, he said Mr. Pyne showed no emotion when told that his mother had been murdered "because he already knew that. He knew that" (*Id.* at 73).

Mr. Pyne should have, Zdravkovski said, had "elevated" emotions on the news of his mother's murder (*Id.* at 79-80). Defense counsel at that point finally, belatedly, objected; the objection was sustained (*Id.* at 80).

Counsel's follow-up was curious. He asked Zdravkovski if he thought Mr. Pyne was a liar and a murderer, to which the detective re-asserted his opinion that Mr. Pyne had killed his mother (*Id.* at 81). What is to be gained on Mr. Pyne's behalf from such questioning? Such determinations must be left with the jury. See, for example, It is "[t]he Anglo-Saxon tradition of criminal justice . . . [that] makes jurors the judges of the credibility of testimony offered by witnesses." *United States v Bailey*, 444 US 394, 414; 100 S Ct 624; 62 L Ed 2d 575 (1980).

Because it is the province of the jury to determine whether "a particular witness spoke the truth or fabricated a cock-and-bull story, " *id.* at 414-415, it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). *See also, People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). *People v Musser*, __ Mich __ ; __ NW2d __ (2013), decided July 12, 2013 (Docket No. 145237).

Defense counsel asked Detective Hendrick for his opinion. Hendrick thought "there's several facts that indicate Jeffrey Pyne killed his mother" (TT, 11/29/2012, 72). The prosecutor followed-up through the door opened by defense counsel and got a more lengthy description of Hendrick's opinions concerning Mr. Pyne's guilt (*Id.* at 73-74). Further, when discussing "overkill," Hendrick said the "excessive amount" of injury makes it likely not a random act (*Id.* at 76-77).

Trial counsel's errors, where multiple, must be reviewed for their *cumulative effect* upon the defendant's right to a fair trial. See, for example, *Goodman v Bertrand*, 467 F 3d 1022, 1030 (6th Cir. 2006)(trial court erred by weighing each error individually, instead of for their cumulative effect: "counsel's deficiencies must be considered in their totality"); and *Davis v Booker, supra* (the state court "failed to consider this impeachment testimony in the larger context of counsel's other errors and the relative weakness of the prosecutor's case"). However, constitutionally deficient performance may stem from even a "single, serious error." *Kimmelman v Morrison*, 477 US 365, 383; 106 S Ct 2574; 91 L Ed 2d 305 (1986).

There are multiple errors in the instant which, individually or cumulatively, demonstrate

deficient performance of trial counsel and prejudice to Mr. Pyne. The *Strickland* standard has been met, and a new trial is warranted.