STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

vs. Case No. 2005-3245-FC

ANTHONY JEROME DELEON,
Defendant.

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OPINION AND ORDER

This matter is before the Court on Defendant Anthony DeLeon's motion for new trial following a *Ginther*[1] hearing.

I. Background

On January 23, 2006, after a jury trial, Defendant Anthony DeLeon (DeLeon) was convicted of one count of first-degree murder, contrary to MCL 750.316, and one count of felony firearm, contrary to MCL 750.227b. On February 28, 2006, DeLeon was sentenced to life imprisonment without the possibility of parole for the first-degree murder conviction and a concurrent two-year term for the felony-firearm conviction. On May 19, 2006, DeLeon appealed as of right, and on September 18, 2007, the Court of Appeals affirmed DeLeon's convictions in an unpublished opinion per curiam.[2]

On January 4, 2017, this Court granted DeLeon's motion for appointment of counsel, and on March 11, 2019, the Court heard DeLeon's motion for relief from judgment and request for a

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).
[2] *People v DeLeon*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 2007 (Docket No. 269574)

Ginther hearing. After the parties submitted supplemental briefs, the Court granted a *Ginther* evidentiary hearing, which was held on November 8, 2019. Upon careful consideration of the evidence and arguments presented, the Court now concludes that a new trial must be granted to avoid a miscarriage of justice.

II. Standard of Review

Under MCR 6.508(D), a defendant bears the burden of establishing entitlement to relief from judgment. MCR 6.508(D); *People v Clark,* 274 Mich App 248, 251; 732 NW2d 605 (2007). MCR 6.508(D) provides, in pertinent part:

> 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 requirement of 'good cause' can be established by proving ineffective assistance of counsel." *People v Swain,* 288 Mich App 609, 631; 794 NW2d 92 (2010).

III. Parties' Arguments

DeLeon argues that his trial counsel, Salvatore Palombo, made several knowing misrepresentations to DeLeon and to the Court, which were not revealed until after he had filed his appeal. DeLeon contends that Palombo now asserts that his decision not to call key expert witness Dr. Herbert MacDonell was a matter of trial strategy, but the trial record expressly contradicts this assertion. DeLeon avers that the evidence presented calls into question Palombo's strategic decision making and rebuts the presumption of effective assistance.

The prosecution argues that despite Palombo's contradictory testimony, he did not lie to the Court, and there is no reason that Palombo was required to be candid with the Court regarding his reasons for not calling a witness. The prosecution contends that Palombo's testimony establishes a valid strategic reason for failing to call Dr. MacDonell. The prosecution avers, in any event, that the Court of Appeals has already determined that DeLeon was not prejudiced by the failure to call Dr. MacDonell, and there are no grounds warranting relief from judgment.

IV. Law and Analysis

"Both the Michigan and the United States Constitutions require that a criminal defendant enjoy the assistance of counsel for his or her defense." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012) (citing Const 1963, art 1, § 20; US Const, Am VI). In a claim of ineffective assistance of counsel, "[t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *People v Toma*, 462 Mich 281, 316; 613 NW2d 694 (2000), quoting *Strickland v Washington*, 466 US 668, 696; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

> Representation of a criminal defendant entails certain basic duties. Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. . . . From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.

Strickland, 466 US at 688. Ultimately, "[a] defendant must meet two requirements to warrant a new trial because of the ineffective assistance of trial counsel." *People v Armstrong*, 490 Mich 281, 289–90; 806 NW2d 676 (2011). "[A] 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." *Trakhtenberg*, 493 Mich at 51; see also MCR 6.508(D)(3)(b)(i).

"In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Trakhtenberg*, 493 Mich at 52. Generally, "[t]he decision whether to call witnesses is a matter of trial strategy which can constitute ineffective assistance of counsel only when the failure to do so deprives the defendant of a substantial defense." *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793(1990). "A substantial defense is one that might have made a difference in the outcome of trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotation marks and citation omitted). "To find prejudice, a court must conclude that there is 'a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.'" *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994), quoting *Strickland*, 466 US at 695.

In the unique circumstances leading to DeLeon's criminal prosecution, DeLeon's wife, Karen DeLeon, died from a gunshot wound to the head on April 15, 1998. Dr. Werner Spitz, Macomb County medical examiner, ruled that the manner of death (i.e., suicide or homicide) was undeterminable. Finally, the police investigation closed with the determination that Mrs. DeLeon's death was a suicide; all physical evidence collected, aside from DeLeon's handgun, was therefore destroyed on April 22, 1999. Only in 2005 were criminal charges authorized against DeLeon, and the ultimate issue at trial, based on limited circumstantial evidence, was the manner of Mrs. DeLeon's death: suicide or homicide.

At the *Ginther* hearing, Palombo testified that Dr. Herbert MacDonell held himself out as an expert in blood spatter, and his opinion supported the defense that Mrs. DeLeon's death was a

suicide. When initially asked why he did not call Dr. MacDonell to testify at trial, Palombo testified that things were going very well, and DeLeon agreed, so "we were satisfied that we had created a reasonable doubt." He expressly testified that he discussed the decision with DeLeon, asked DeLeon's permission, and DeLeon "agreed that we could close the defense of the case and rest without calling Dr. MacDonell." Palombo further testified that he did not want to erode the defense he had already established, and that the prosecuting attorney indicated that he would call as a rebuttal witness a "very respected Michigan State Police lieutenant who was qualified to testify as to blood spatter as well."

However, Palombo also acknowledged reporting at trial, on two separate occasions, that Dr. MacDonell had to leave suddenly due to a family emergency. He testified that he never spoke to Dr. MacDonell directly about this sudden emergency, but he had no reason to disbelieve this information, which his assistant reported to him. Palombo testified that, despite the decision to rest without calling Dr. MacDonell, he did not tell Dr. MacDonell to leave at any time. Palombo also testified that Dr. MacDonell was somewhat egotistical and arrogant, and he speculated that Dr. MacDonell was angry that he did not get to testify at DeLeon's trial. Palombo testified, however, that he had no contact with Dr. MacDonell after the trial and he did not talk to Dr. MacDonell regarding his reasons for leaving.

When asked by the Court to clarify when he made the strategic decision not to call Dr. MacDonell in relation to learning that Dr. MacDonell had left for a family emergency, Palombo was unable to make a distinction. Palombo reiterated that he never spoke to Dr. MacDonell, and he testified that his assistant would not have told Dr. MacDonell to go home. He testified again that he consulted with DeLeon, who agreed to rest the case, but also that Dr. MacDonell left for a family emergency the night before the defense rested its case. Finally, upon final redirect

questioning, Palombo testified that he received DeLeon's permission to rest the case without calling Dr. MacDonell, and when asked whether this occurred before learning that Dr. MacDonell was no longer available to testify, he testified, "Oh yeah."

DeLeon, meanwhile, testified clearly and unequivocally that Palombo never informed him that he did not plan to call Dr. MacDonell, that "nothing could be farther from the truth," and that the first time he learned that Dr. MacDonell would not testify was when Palombo informed the Court that the defense rested its case. DeLeon testified that upon hearing this, he was "dumbfounded" and he did not know why Dr. MacDonell would not be testifying. Only after his conviction, when Dr. MacDonell took it upon himself to call DeLeon's father to discuss the outcome of the case, did DeLeon learn that Palombo had in fact told Dr. MacDonell to leave.

Dr. MacDonell passed away in April of 2019 and was therefore unavailable to testify at the *Ginther* hearing. But he provided a sworn affidavit in February of 2018:

> In October 2005 affiant was contacted by attorney Salvatore D. Palombo of Center Line, Michigan requesting my assistance with the Anthony DeLeon case. Affiant spent considerable time reviewing the firearms and medical reports in that case. Affiant wrote a forensic report on his findings dated 13 September 2005 and sent it to Mr. Palombo. Affiant was asked to come to Detroit to give evidence during the trial. On 17 January 2006 affiant went to Detroit and was in the courthouse all day on the 18th and 19th waiting to be called as a witness. In the late afternoon of the 19th Mr. Palombo advised affiant that the case was going so well he was not going to call him as a witness. Affiant was astounded because he was there two days ready to explain the gunshot residue results while Palombo put on local witnesses ahead of him. Affiant had never had an attorney who had him in the courthouse ready to testify and then be told to go home. Affiant was astounded to say the least. Affiant later learned that Mr. Palombo told the court that he had to leave because of a family emergency. That is not at all true, affiant was told me [sic] to go home as he was no longer needed.

Dr. MacDonell's Affidavit at 3.

The Court finds that Palombo's testimony is somewhat inconsistent and his representations to the Court during both the trial and the *Ginther* hearing are contradictory.

Here, Palombo testified unequivocally that he "absolutely" discussed the matter with DeLeon, that he asked DeLeon's permission not to call Dr. MacDonell, and that DeLeon agreed that the case could rest without calling Dr. MacDonell. But this is in contrast to Palombo's own representations to the Court during trial as well as to DeLeon's testimony at the *Ginther* hearing. And while Palombo testified that both reasons for failing to call Dr. MacDonell were true (i.e., that it was a matter of trial strategy but it was also due to Dr. MacDonell's abrupt departure), Dr. MacDonell's unequivocal affidavit leaves the Court with the conclusion that Palombo's representation to the Court and DeLeon on January 20, 2006, the day after Dr. MacDonell was dismissed may have been mistaken. The evidence presented at the *Ginther* hearing reveals that DeLeon may not have been consulted on this important decision. Considering the record as a whole, the Court finds that the failure to call Dr. MacDonell as a witness may not have been a strategic decision, and that Palombo's representations to the Court and to DeLeon, as well as his failure to keep DeLeon informed of the status of a key expert witness, leads to the conclusion that Palombo's performance fell below an objective standard of reasonableness.

The Court must next determine whether there is a reasonable probability that, absent the deficient performance, the factfinder would have had a reasonable doubt respecting DeLeon's guilt. The only known consequence of Palombo's deficient performance is the inability to present Dr. MacDonell's expert opinion. When briefly addressing the issue without the benefit of the instant *Ginther* hearing, the Court of Appeals reasoned that "Dr. MacDonald's [sic] testimony would have added little beyond rehashing the residue report. We also reject defendant's argument that counsel should have called Dr. MacDonald [sic] earlier to avoid the possibility that he would leave town before he took the stand, because decisions about the order

in which to present evidence and decisions about calling and questioning witnesses, generally are matters of trial strategy." *People v DeLeon*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 2007 (Docket No. 269574), p 4. The Court believes the facts regarding the reasonableness of Palombo's performance have materially changed since the Court of Appeals took up the issue. See *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000); *People v Herrera*, 204 Mich App 333, 340-341; 514 NW2d 543 (1994).

In DeLeon's criminal trial, the evidence against DeLeon was circumstantial, and even Dr. Spitz, the medical examiner who performed the autopsy, struggled to determine whether Mrs. DeLeon's death was a suicide or homicide. Relevant to the present issue, trial witnesses testified about the presence or absence of blood as well as the presence or absence of gunshot residue (GSR) on DeLeon, Mrs. DeLeon, and on the surfaces in the bathroom where the gun was discharged.

Although Dr. MacDonell reviewed the same data and physical evidence that was presented at trial, his opinions and methodology differed. For example, Dr. MacDonell reviewed Dr. Spitz's medical examination report and found:

> Trajectory within the head is consistent with a suicide and inconsistent with a homicide. If the victim was shot by someone other than herself with such an upward trajectory, the shooter would have to have held the revolver in a most awkward manner if it were possible at all to do so and pull the trigger.

Forensic Report at 1. Dr. MacDonell also made conclusions from the firearms report and the GSR report, including that the GSR leakage from the Taurus handgun is significantly greater than from other similar handguns, and that the GSR report's analysis was presented in "a less than objective manner." *Id.* Here, Dr. MacDonell presented his own objective analysis of the barium, antimony, and lead levels taken from the front and back of DeLeon and Mrs. DeLeon's hands. See *id.* at 2 (GSR Comparison with the Controls Subtracted). Based on his analysis, Dr.

MacDonell concluded that the relative levels of barium, antimony, and lead on DeLeon and Mrs. DeLeon's hands were consistent with Mrs. DeLeon holding the revolver in her right hand and steadying it with her left hand when it discharged, and with DeLeon either holding his wife or picking up the recently discharged revolver. *Id.* As he provided in no uncertain terms:

> All four areas tested on both Anthony and Karen support only one logical conclusion; Karen held the revolver in her right hand and while steadying it with her left hand she pulled the trigger. Her husband could not have such high levels of lead in the palm of his right hand if he had held the revolver in that hand in a normal grip when it discharged. I was disappointed to read White's report that the GSR ratios above were not addressed. Apparently, they were ignored because the levels were not up to threshold amounts.

Id. It follows that, more than merely rehashing the residue report, Dr. MacDonell could have provided expert opinion testimony regarding objective analysis that the report omitted.

Further, photographs of the bathroom, where Mrs. DeLeon suffered her fatal gunshot wound, were introduced and discussed at length at trial. Dr. MacDonell was additionally prepared to testify on the appearance of bloodstains and why the absence of blood was not dispositive of key disputed issues (e.g., the absence of blood droplets on the firing hand of someone committing suicide by handgun is not uncommon). *Id.* at 3.

Relying on the objective physical evidence presented at trial, Dr. MacDonell ultimately concluded that Mrs. DeLeon shot herself. *Id.* He reached this conclusion "well beyond a reasonable degree of scientific certainty." *Id.*

Based on his report and affidavit, the Court finds that Dr. MacDonell was prepared to offer his unequivocal opinion, based on his unique and distinct expertise in analytical chemistry and forensic science, that Mrs. DeLeon's death was a suicide. The proffered interpretations and opinions, and their scientific bases, would have been crucial in this case where the physical evidence was rendered unavailable for independent analysis. Such expert testimony, which

interpreted the limited circumstantial evidence, was crucial to DeLeon's defense that his wife's death was a suicide. It is inconceivable that trial counsel would not introduce this extremely exculpatory evidence, which demonstrates a reasonable probability that the outcome of DeLeon's trial would have been different if the jury had been presented with Dr. MacDonell's expert opinion.

The evidence presented at the *Ginther* hearing reveals that DeLeon was denied the effective assistance of counsel, undermining the fundamental fairness of the trial proceedings. After a careful credibility determination and a thorough review of the defense presented at trial, the Court finds that DeLeon has demonstrated good cause and actual prejudice warranting a new trial based on the ineffective assistance of trial counsel.

V. Conclusion

For the reasons set forth above, DeLeon's motion is GRANTED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* reopens this case. A Pre-Trial Conference is set for April 9, 2020 at 9:00 a.m.

IT IS SO ORDERED.

HONORABLE RICHARD L. CARETTI
Circuit Court Judge

DATE: March 11, 2020

cc: Emil Semaan, Esq.
Joel D. Kershaw, Esq.

COUNTY OF MACOMB • STATE OF MICHIGAN •