

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

vs.

Case No. 2004-2096-FH

JULIE CHRISTINE LAEL BAUMER,

Defendant.

OPINION AND ORDER

Defendant has filed a motion for relief from judgment pursuant to MCR 6.501 *et seq.*

On September 29, 2005, defendant was convicted following a jury trial of child abuse in the first degree contrary to MCL 750.136b(2). She was sentenced on November 9, 2005 to 10 to 15 years with 41 days of jail credit. Defendant appealed as of right to the Court of Appeals, but on April 12, 2007, relief was denied on all grounds. *People v Baumer*, unpublished per curiam opinion of the Court of Appeals, issued April 12, 2007 (Docket No. 267373). In addition, defendant applied to the Michigan Supreme Court for review, but leave to appeal was denied on September 10, 2007. *People v Baumer*, 480 Mich 856; 737 NW2d 729 (2007). Defendant now seeks relief from judgment in this Court under the provisions of MCR 6.501 *et seq.*

Once a defendant has exhausted the appellate process, the only remaining manner in which to successfully challenge the conviction is by satisfying the requirements of MCR 6.501 *et seq.* *People v Watroba*, 193 Mich App 124, 126; 483 NW2d 441 (1992). The defendant has the burden of establishing entitlement to the relief requested. MCR 6.508(D). Relief may not be granted if the motion alleges grounds for relief, other than jurisdictional defects, which could

have been raised on appeal from the conviction and sentence, unless the defendant demonstrates two factors: (1) good cause for failing to previously raise such grounds on appeal or in a prior motion and (2) actual prejudice from the alleged irregularities that support the claim for relief. MCR 6.508(D)(3)(a) and (b).

“Good cause” may be established by proving the ineffective assistance of trial and appellate counsel. *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995). “Good cause” requires the showing of some impediment external to the petitioner. *People v Carpentier*, 446 Mich 19, 44; 521 NW2d 195 (1994). A trial court may waive the good cause requirement if it concludes that there is a significant possibility that the defendant is innocent of the crime. MCR 6.508(D)(3).

For purposes of challenging a conviction following a trial, the court rule defines “actual prejudice” as a situation where “but for the alleged error, the defendant would have had a reasonably likely chance of acquittal” or “the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case[.]” MCR 6.508(D)(3)(b)(i) and (iii).

When reviewing a motion for relief from judgment, the Court initially examines the motion together with all the files, records, transcripts and correspondence relating to the judgment under attack. MCR 6.504(B)(1). If it plainly appears from the face of the materials presented that defendant is not entitled to relief, the court shall deny the motion without directing further proceedings. MCR 6.504(B)(2). Such an order must include a concise statement of the reasons for denial. MCR 6.504(B)(2). If the entire motion is not dismissed under subrule (B)(2), the Court shall order the prosecuting attorney to file a response as provided in MCR 6.506, and shall conduct further proceedings as provided in MCR 6.505-6.508. MCR 6.504(B)(4).

In an Opinion and Order dated December 12, 2008, the Court ordered plaintiff to respond and permitted defendant to file a supplemental brief. The parties filed additional briefs. Evidentiary hearings were held on August 4, 2009, September 3, 2009, and September 18, 2009, where testimony was taken and arguments were heard. The Court took this matter under advisement to issue a written opinion.

In her motion for relief from judgment, defendant argues she was not provided effective assistance of counsel at trial or on appeal due to deficient investigation and mischaracterization of the medical evidence. Defendant also alleges that appellate counsel was ineffective for not raising trial counsel's ineffectiveness in failing to retain an expert radiologist or to thoroughly investigate alternative causations for the apparent injuries suffered by the alleged infant victim, Philipp Baumer (defendant's nephew). Specifically, defendant claims that both trial and appellate counsel failed to investigate, offer evidence and testimony, and argue that Philipp was actually suffering from venous sinus thrombosis (VST), or infant stroke, a medical condition unrelated to the accusation of child abuse in this case. Defendant further contends her conviction was based on insufficient evidence to constitute proof beyond a reasonable doubt. Finally, defendant claims newly discovered evidence and evidence not presented at trial regarding VST prove her actual innocence. Therefore, defendant claims she is now entitled to relief from judgment.

In response, plaintiff argues defendant has failed to meet her burden for relief. Plaintiff maintains defendant is barred from asserting "sufficiency of evidence" at this time because the Court of Appeals previously reviewed and denied this same claim. Plaintiff also argues defendant's evidence of venous sinus thrombosis is not newly discovered, since it was an established medical condition before the time of trial that was known to defense counsel. In

addition, plaintiff contends defendant was not denied the effective assistance of trial or appellate counsel, and that appellate counsel is not required to raise every issue on appeal. Finally, plaintiff argues defendant has failed to establish actual prejudice, but has merely set forth additional theories that fall short of providing a reasonably likely chance of acquittal.

First, the Court will address defendant's claim of insufficient evidence. Defendant previously raised this argument on appeal and the Court of Appeals found the evidence presented at trial was sufficient to sustain her conviction. See *People v Baumer*, unpublished opinion per curiam of the Court of Appeals, issued April 12, 2007 (Docket Number 267373). Under MCR 6.508(D)(2) a defendant is not entitled to relief if her motion "alleges grounds for relief which were decided against the defendant in a prior appeal or under this subchapter, unless the defendant establishes that a retroactive change in the law has undermined the prior decision." In this matter, defendant does not set forth any retroactive change in law that would undermine the appellate court's decision that the evidence at trial was sufficient. Accordingly, defendant is not entitled to relief from judgment based upon a claim that the evidence at trial was insufficient.

Next, defendant argues newly discovered evidence and evidence not presented at trial show her actual innocence. In order to grant a new trial "on the basis of newly discovered evidence, a defendant must show that: (1) 'the evidence itself, not merely its materiality, is 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), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996) and citing MCR 6.508(D). Defendant asserts that the recent evidentiary hearing testimony of two proposed defense experts is newly discovered and shows that a proper review of the CT

scans and MRIs confirms the diagnosis that Philipp actually suffered from VST, rather than child abuse or nonaccidental trauma.

However, notwithstanding the accuracy of the diagnosis, defendant has failed to satisfy the first *Cress* factor: that the evidence itself, not merely its materiality, is newly discovered. During the recent evidentiary hearings, trial counsel Elias Muawad testified that he received pretrial information from Dr. Patrick Barnes, a pediatric neuroradiologist, that the diagnosis of venous sinus thrombosis was a possible explanation for the medical conditions observed in suspected child abuse cases like Philipp's.¹ Defendant's instant motion cites medical articles discussing the diagnosis of VST, which were published before the trial.² Moreover, this information known or available to trial counsel shows that defendant has failed to satisfy the "reasonable diligence" requirement under the third *Cress* factor. That is, trial counsel should have discovered and produced the venous sinus thrombosis evidence at trial. Trial counsel was referred to Dr. Barnes before trial, but believed he was unable to afford the expert's assistance.³ Dr. Barnes' affidavit indicates Philipp's radiology findings were caused by VST, and he would have given the same opinion if asked to review the radiology in 2003 or 2005.⁴ Accordingly, the Court finds defendant's evidence fails to meet the factors set forth in *Cress, supra*, and defendant is not entitled to relief based on newly discovered evidence.

Finally, defendant asserts she was not provided effective assistance of counsel at trial or on appeal. Effective assistance of counsel is presumed and, therefore, the defendant carries a high burden of successfully proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). The Court will not substitute its own judgment for defense counsel's

¹ August 4, 2009 Evidentiary Hearing Transcript at 21, 30.

² Defendant's Motion for Relief from Judgment, Exhibit 5.

³ August 4, 2009 Evidentiary Hearing Transcript at 21.

⁴ September 3, 2009 Evidentiary Hearing, Exhibit A.

trial strategy and will not use the benefit of hindsight to determine counsel's effectiveness. *People v Matuszak*, 262 Mich App 42, 58; 687 NW2d 342 (2004). Appellate counsel is entitled to this same form of deference. *People v Hurst*, 205 Mich App 634, 641, 517 NW2d 858 (1994).

Ineffective assistance of trial and appellate counsel may constitute good cause under MCR 6.508(D)(3). *People v Reed*, *supra* at 375, 378-379. To sufficiently establish the "good cause" prong of MCR 6.508 (D)(3), a defendant must show that counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 384, quoting *Stickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To excuse the double failure of trial counsel and appellate counsel to challenge plaintiff's experts and pursue the VST defense, defendant must show that both trial and appellate counsels' performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive her of a fair trial. *Reed, supra* at 390. See also *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001).

Here, defendant asserts that her trial counsel should have obtained an expert radiologist to refute plaintiff's interpretation of the radiology evidence. The court defers to trial counsel's judgment regarding matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Decisions regarding what evidence or defenses to present are presumed to be matters of trial strategy, and defendant bears the burden of overcoming the strong presumption. *Id.*; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). The decision to call an expert witness is also a matter of trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). "[T]he failure to call a witness constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A substantial defense is one that might have made a

difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

In this matter, defendant has established that her trial counsel's performance was deficient. Before trial, defense counsel knew that an expert radiologist was needed to challenge plaintiff's experts and to testify regarding the interpretation of the CT scans and MRIs, but defense counsel admitted he never requested an expert radiology witness to testify on behalf of the defense due to financial constraints.⁵ Defense counsel conceded he was unaware at the time of trial that he could request the Court to appoint an expert due to defendant's inability to afford an expert pursuant to MCL 775.15.⁶

Plaintiff presented an expert radiologist, Dr. Kristie Becker, who testified at trial regarding the interpretation of the CT scans and MRIs.⁷ Solely based on the CT scans and MRIs, Dr. Becker concluded Philipp's soft tissue injuries of the brain were caused by intentional repetitive shaking and likely occurred within 24-48 hours of the images.⁸ Dr. Becker further indicated that Philipp's skull fracture was due to striking a flat or large surface, but could not designate a time frame for this injury.⁹ Plaintiff also presented Dr. Steven Ham, an expert in neurosurgery and one of Philipp's treating physicians, who discussed and relied upon the CT scans and MRIs.¹⁰ Dr. Ham testified Philipp's injuries were caused by a nonaccidental trauma within 12-24 hours of the images.¹¹ Based on the CT scans and MRIs, Dr. Ham concluded that an intentional and very significant blunt force trauma caused Philipp's injuries.¹²

⁵ August 4, 2009 Evidentiary Hearing Transcript at 14, 20-23.

⁶ August 4, 2009 Evidentiary Hearing Transcript at 25-26.

⁷ September 23, 2005 Trial Transcript.

⁸ September 23, 2005 Trial Transcript at 87, 93, 95, 100, 109.

⁹ September 23, 2005 Trial Transcript at 78-79, 117.

¹⁰ September 20, 2005 Trial Transcript at 17, 25-29.

¹¹ September 20, 2005 Trial Transcript at 32, 45-47, 59.

¹² September 20, 2005 Trial Transcript at 47, 53.

Defense trial counsel was fully aware that an expert radiologist was necessary to contest plaintiff's expert radiologist's findings of nonaccidental trauma.¹³ Nevertheless, defense counsel only presented Dr. Janice Ophoven, a pediatric forensic pathologist, who simply testified that she disagreed with the interpretation of the CT scans and MRIs, but that she was not qualified to provide an expert alternative interpretation.¹⁴

Since plaintiff's case relied heavily upon the expert radiologist's interpretation of the CT scans and MRIs, expert testimony for the defense would have been crucial to refute plaintiff's claims and assert the VST defense. There was no strategic reason for defense counsel's failure to investigate and hire an expert. Instead, counsel's decision was based solely on financial concerns. Accordingly, the Court finds defense counsel's performance fell below an objective standard of reasonableness and was constitutionally deficient.

Defendant has submitted substantial evidence that experts were available at the time of trial to challenge the testimony of plaintiff's experts and establish the VST defense. In his affidavit, Dr. Barnes states Philipp's radiology findings were caused by VST, as opposed to the alleged child abuse, and he would have expressed the same opinion if asked to review the radiology records in 2003 or 2005.¹⁵ Dr. Michael Krasnokutsky presented his opinion that the medical and radiology records did not indicate any abuse or traumatic injury, and that Philipp's apparent injuries were clearly and solely due to VST.¹⁶ Dr. Krasnokutsky also stated the VST, or infant stroke, was misinterpreted by plaintiff's experts as a hemorrhage. In addition, Dr. James A.J. Ferris offered testimony consistent with the findings of Dr. Barnes and Dr. Krasnokutsky. Dr. Ferris also testified retina hemorrhage can occur as a result of birth and is diagnostic of

¹³ August 4, 2009 Evidentiary Hearing Transcript at 14, 20-23.

¹⁴ September 27, 2005 Trial Transcript at 10-11, 22, 41, 44, 85.

¹⁵ September 3, 2009 Evidentiary Hearing, Exhibit A.

¹⁶ Defendant's Motion for Relief from Judgment, Exhibit 2; September 3, 2009 Evidentiary Hearing.

VST.¹⁷ In light of this evidence, defendant has met her burden of proving the factual predicate for her claim that trial counsel was ineffective for failing to retain experts to challenge plaintiff's experts and to establish the VST defense, and appellate counsel was ineffective for failing to claim trial counsel was ineffective on this basis. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant has also established that she suffered actual prejudice. Defense counsel offered no defense to refute the key portion of plaintiff's case, i.e. expert interpretation of the CT scans and MRIs confirms child abuse or other nonaccidental trauma. The expert testimony now presented by defendant would have directly refuted these conclusions at trial. Here, the failure to call an expert witness not only constituted ineffective assistance of counsel, it also deprived defendant of a substantial defense. *Dixon, supra* at 398; *Kelly, supra* at 526. Considering there was very little remaining evidence presented by plaintiff to demonstrate defendant abused the child, defendant has established a reasonable probability that the result would have been different if defense counsel had presented expert witness testimony of a radiologist. *Hoag, supra* at 6.

As a result, the Court finds defendant's trial counsel was ineffective due to his failure to obtain a necessary expert witness, i.e. an expert radiologist. This failure deprived defendant of a substantial defense and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.

Next, defendant contends appellate counsel was ineffective for failing to raise ineffective assistance of trial counsel based on his failure to present an expert radiologist. Appointed appellate counsel appealed five issues to the Michigan Court of Appeals: erroneous admission of statements made during a polygraph examination; erroneous qualification of Drs. Ham and Becker as experts on the issue of brain injury timing; insufficiency of the evidence; erroneous

¹⁷ Defendant's Motion for Relief from Judgment, Exhibit 1; September 3, 2009 Evidentiary Hearing.

upward departure from the sentencing guidelines; and ineffective assistance of counsel based on failure to properly investigate a birth trauma defense.

The test for ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel. See *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994). Therefore, defendant must show that her appellate counsel's decision not to raise this claim of ineffective assistance of trial counsel fell below an objective standard of reasonableness and prejudiced her appeal. *People v Uphaus*, 278 Mich App 174, 186; 748 NW2d 899 (2008). The test is not whether, in hindsight, appellate counsel failed to raise all arguable or colorable claims. *Reed, supra* at 382. Such a test would "undermine the strategic and discretionary decisions that are the essence of skillful lawyering." *Id.* at 386-387. To establish ineffective assistance of appellate counsel, the defendant must rebut the presumption that "appellate counsel's decision regarding which claims to pursue was sound appellate strategy." *Hurst, supra* at 642.

As discussed above, defendant has set forth a meritorious claim of ineffective assistance of trial counsel. Although appellate counsel raised the claim of ineffective assistance of trial counsel on appeal, the issue of defense counsel's failure to obtain an expert radiologist was not raised. The principal contested issue in this case was whether Philipp's injuries could have been caused by something other than abuse or nonaccidental traumatic injury. Plaintiff's evidence presented at trial was substantially based on the medical records, specifically interpretations of the CT scans and MRIs, which indicated Philipp's injuries were caused by nonaccidental trauma or abuse. As a result, the Court finds appellate counsel's failure to raise this significant error by defense counsel fell below an objective standard of reasonableness and prejudiced her appeal since it would have provided defendant with a substantial defense.

Further, under MCR 6.508(D)(3), defendant has also established actual prejudice in order to obtain relief from judgment. Defendant has demonstrated a substantial defense that defense counsel failed to present and appellate counsel failed to raise on appeal. Defendant would have had a reasonably likely chance of acquittal had defense counsel been effective and hired an expert radiologist to refute the crux of plaintiff's case.

"MCR 6.508 protects unremedied manifest injustice, preserves professional independence, conserves judicial resources, and enhances the finality of judgments." *Reed, supra* at 378-379. Furthermore, "[n]either the guarantee of a fair trial nor a direct appeal entitles a defendant to as many attacks on a final conviction as ingenuity may devise." *Id.* at 389-390. Both "good cause" and "actual prejudice" are required for post-judgment relief under the court rule. Therefore, it is proper for the Court to grant defendant's motion for relief from judgment since she met her burden of satisfying the requirements in MCR 6.508.

The record demonstrates trial counsel was sufficiently ineffective, and, as a result, appellate counsel was ineffective for failing to raise these issues of trial counsel's ineffectiveness on appeal. In addition, appellate counsel was ineffective for failing to pursue those claims that trial counsel overlooked, such as the VST defense. Defendant has overcome the presumption that her trial and appellate counsel were effective and, therefore, the Court finds "good cause" for defendant's failure to raise her claims of ineffective assistance of counsel in her direct appeal and "actual prejudice" to defendant as a result of defense counsels' failures. The Court concludes defendant's motion for relief from judgment should be granted, her conviction set aside, and a new trial granted.

Defendant's motion for relief from judgment raises additional issues, including "actual innocence." Defendant argues that the Court should waive the "good cause" requirement of

MCR 6.508(D)(3)(a) because there is a significant possibility that defendant is innocent of the crime. During the recent evidentiary hearings, the Court heard the expert medical testimony offered in support of the defense theory that Philipp's apparent injuries were, in fact, caused by VST, a medical condition unrelated to the accusation of child abuse in this case. Dr. Patrick Barnes is a renowned pediatric neuroradiologist, board certified in diagnostic radiology and neuroradiology, a Professor of Radiology at Stanford University Medical Center, Chief of Pediatric Neuroradiology, Medical Director of the MRI/CT Center at Lucile Salter Packard Children's Hospital, and a member of various child abuse task forces.¹⁸ Dr. Barnes averred the radiology findings establish that Philipp's medical conditions were caused by VST, a form of childhood stroke that is most often associated with illness and dehydration, and Philipp's medical history indicates an ongoing process.¹⁹ In addition, Dr. Barnes opined the absence of external bruising, significant tissue swelling or hemorrhage in the area of the right parietal fracture suggest that it was an earlier fracture, possibly from birth.²⁰ Dr. Michael Krasnokutsky, a board certified radiologist with certification in neuroradiology and Chief of Neuroradiology at Madigan Army Medical Center, and Dr. James A.J. Ferris, a forensic pathologist and Professor Emeritus of Forensic Pathology at the University of British Columbia, concur with Dr. Barnes' findings and opinions regarding the cause of Philipp Baumer's injuries.²¹ Although the Court found this testimony to be compelling, and it may well cause a jury to conclude that defendant is actually innocent, the Court need not decide this issue given that defendant's motion has been granted on other grounds. Likewise, the Court need not decide the remaining issues raised by defendant.

¹⁸ Declaration of Dr. Patrick Barnes, dated August 30, 2009.

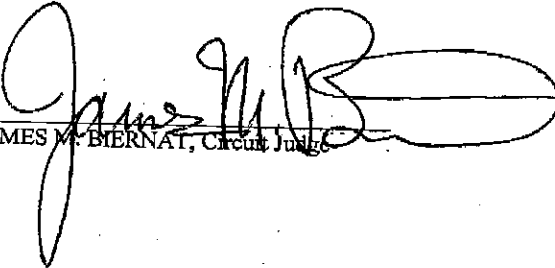
¹⁹ *Id.*

²⁰ *Id.*

²¹ Defendant's Motion for Relief from Judgment, Exhibits 1 and 2.

Based upon the reasons set forth above, defendant's motion for relief from judgment is GRANTED. Defendant's conviction is SET ASIDE and a new trial is GRANTED. In compliance with MCR 2.602(A)(3), the Court states this matter is REOPENED.

IT IS SO ORDERED.


JAMES M. BIERNAT, Circuit Judge

JMB/kmv

NOV 20 2009

DATED: _____

cc: Robert Berlin, Chief Appellate Attorney
Macomb County Prosecuting Attorney's Office

Charles I. Lugosi, Attorney at Law
Ave Maria School of Law

Carl Marlinga, Attorney at Law

A TRUE COPY

Carmella Sabaugh
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