

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

ASHLY DRAKE SMITH,

Defendant-Appellant.

1 Ok
WAYNE COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee
CHRISTOPHER M. SMITH (P70189)
Attorney for Defendant-Appellant

Supreme Court No.

Court of Appeals No. 312721

Circuit Court No. 12-4553-01 FC

Wayne CR I
D. Allen

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State

**DEFENDANT-APPELLANT'S
APPLICATION FOR LEAVE TO APPEAL**

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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Wayne County Circuit Court following a bench trial, and a Judgment of Sentence was entered on September 12, 2012. In accord with MCR 6.425(F)(3), the trial court filed a Claim of Appeal on Defendant-Appellant's behalf on September 28, 2012, pursuant to the indigent defendant's timely request for the appointment of appellate counsel filed on the same date. The Court of Appeals had jurisdiction over this appeal of right under Const 1963, art 1, §20, MCL 600.308(1), MCL 770.3, MCR 7.203(A), and MCR 7.204(A)(2). Defendant-Appellant is filing this application within 56 days of the Court of Appeals' unpublished opinion. MCR 7.302(C)(2).

STATEMENT OF QUESTION PRESENTED

- I. DID TRIAL COUNSEL DEPRIVE MR. SMITH OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO FILE A TIMELY ALIBI NOTICE OR CALL WITNESSES WHOSE TESTIMONY WOULD HAVE SUPPORTED HIS ALIBI DEFENSE?

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

This appeal stems from a bench trial held before the Honorable David J. Allen of the Wayne County Circuit Court.¹ On August 21, 2012, Judge Allen found Defendant-Appellant Ashly Drake Smith guilty of five offenses: armed robbery,² first-degree home invasion,³ larceny in a building,⁴ possession of a firearm by a felon,⁵ and felony-firearm.⁶ (TT 8/21/12 at 3-6). On September 12, 2012, Judge Allen imposed four concurrent prison terms: 13 to 20 years for armed robbery, 13-20 years for first-degree home invasion, two to four years for larceny in a building, and three to five years for felon-in-possession. (ST 9/12/12 at 14). The court also imposed a mandatory two-year term for felony-firearm, to run consecutively to the other sentences. (ST 9/12/12 at 14).

The Court of Appeals upheld Mr. Smith's convictions in a divided opinion. *People v Ashly Drake Smith*, unpublished opinion per curiam of the Court of Appeals issued April 1, 2014 (Docket No. 312721) (attached as Appendix A). The majority found that Mr. Smith had not been deprived of his right to the effective assistance of counsel. *Id.* at 4 (majority opinion of Saad and Fort Hood, JJ.). The dissent, however, found that counsel performed ineffectively by

¹ The transcript of the preliminary examination is cited as "Prelim." The transcript of Mr. Smith's arraignment in circuit court is cited as "AOI 5/21/12." Pretrial transcripts are cited as "PT," with additional reference to the date of proceedings. The trial transcripts are cited as "TT," with additional reference to the date of proceedings. The sentencing transcript is cited as "ST 9/12/12."

² MCL 750.529.

³ MCL 750.360.

⁴ MCL 750.110a(2).

⁵ MCL 750.224f.

⁶ MCL 750.227b(2).

failing to properly investigate Mr. Smith's alibi defense. *Id.* at 8 (dissenting opinion of Gleicher, P.J.). Mr. Smith now seeks leave to appeal to this Court.

A. Factual Background

The events underlying Mr. Smith's conviction took place inside an apartment in Westland, Michigan, on January 11, 2012. (TT 8/20/12, at 10). The complainant, Shawn Kelly,⁷ grew marijuana in the apartment and lived there with his brother. (TT 8/20/12, at 12, 14, 26, 31). Mr. Kelly was home alone on the night in question; his brother was still at work. (TT 8/20/12, at 26-27).

Around 7:20 PM, as Mr. Kelly played video games on his phone, he heard the door to his apartment open. (TT 8/20/12 at 28). At first, he thought nothing of this, as he believed his brother had arrived home from work early. (TT 8/20/12 at 27). He soon saw a man walk into the room with a handgun pointed at him. (TT 8/20/12 at 28-29). The perpetrator demanded money and marijuana. (TT 8/20/12 at 30). When Mr. Kelly went to reach for the marijuana, the perpetrator ordered him to lie face down on the ground. (TT 8/20/12 at 32, 33). As Mr. Kelly left his couch to comply, he noticed a second individual standing in the darkness of the hallway behind the man with the gun. (TT 8/20/12 at 33).

While Mr. Kelly was on the ground, he heard one of the men ask where the jars of marijuana were located. (TT 8/20/12 at 35, 36). After Mr. Kelly informed these two men that he did not have a large amount of marijuana, he heard them rummaging through his belongings. (TT 8/20/12 at 37). A few minutes later, Mr. Kelly heard the two men leave his room, walk down the stairs, and exit the building. (TT 8/20/12 at 37-38). He soon discovered that several items

⁷ The record contains two different spellings of the complainant's surname. *Compare* (Prelim 5) ("Kelley") *with* (TT 8/20/12 at 26) ("Kelly"). For the sake of clarity, this brief will refer to him as "Mr. Kelly."

were missing from his room, including a Playstation 3, a laptop, an iPad, \$150 cash, his identification, and his cellular phone. (TT 8/20/12 at 38).

Mr. Kelly did not immediately call the police after the incident because he did not have a phone. (TT 8/20/12 at 38). Instead, Mr. Kelly went downstairs, locked his front door, and waited for his brother to come home from work. (TT 8/20/12 at 38-40). Although a computer had been left behind, Mr. Kelly did not use it to summon the police; instead, he logged onto Facebook in an attempt to identify the individuals that robbed him. (TT 8/20/12 at 40-41). He contacted a couple of people before determining who he believed robbed him. (TT 8/20/12 at 41). He concluded that the man with the gun was 'Trey,' someone he had seen around the neighborhood. (TT 8/20/12 at 25, 55). Mr. Kelly contacted a girl named 'Stephanie,' who was Mr. Smith's ex-girlfriend. (TT 8/20/12 at 43-44). Stephanie identified 'Trey' as Mr. Smith. (TT 8/20/12 at 52).

Afterwards, Mr. Kelly posted a racially disparaging comment on his Facebook page about the man whom he believed robbed him. (TT 8/20/12 at 42). The comment denigrated the robber for being of mixed-race heritage. (TT 8/20/12 at 42, 44). Mr. Kelly testified that he also posted a comment that there would be a "bullet waiting" for the person who robbed him if that person were to come back to his house. (TT 8/20/12 at 54).

Through Facebook, Mr. Kelly also contacted Amanda Tony,⁸ who was Mr. Smith's girlfriend at the time. (TT 8/20/12 at 52). Mr. Kelly testified that he told Ms. Tony that he was "pretty sure" about the identity of the person who robbed him. (TT 8/20/12 at 65). The remainder of this conversation, however, was not disclosed at trial. (TT 8/20/12 at 64-65).)

Mr. Kelly's brother arrived home from work around 9:10 PM, nearly two hours after the robbery. (TT 8/20/12 at 28, 39). Mr. Kelly used his brother's cell phone to call the police. (TT

⁸ The pre-sentence report uses a different spelling to refer to Mr. Smith's girlfriend: Amanda Toney. (PSR 3). For the sake of clarity, this brief will use the spelling which appears in the trial transcripts.

8/20/12 at 39). When Westland police officers arrived at his house, Mr. Kelly verbally explained what had happened, but did not give a written statement. (TT 8/20/12 at 39).

The next day, on January 12, 2012, Lieutenant Thad Nelson of the Westland Police Department (WPD) went to Mr. Kelly's home to speak with him about the incident. (TT 8/20/12 at 39-40). During the interview, Mr. Kelly identified the man he suspected to be the robber. (TT 8/20/12 at 10-11). Using this identification, Lt. Nelson then created a six-person photographic lineup for Mr. Kelly. (TT 8/20/12 at 11). Mr. Kelly selected Mr. Smith's photograph and identified him as the perpetrator. (TT 8/20/12 at 11).

Mr. Kelly told Lt. Nelson that he also recognized the second man's voice as belonging to "Unc" or "Uncle," someone he had met through a mutual acquaintance known only as "Terry." (TT 8/20/12 at 14, 49-50). Unc had previously visited Mr. Kelly's apartment to purchase marijuana. (TT 8/20/12 at 15, 31, 35). Of course, as Mr. Kelly acknowledged, several other people knew he sold marijuana from his house, and, specifically, that that marijuana was kept in jars in his room. (TT 8/20/12 at 31). At any rate, Lt. Nelson followed up with Terry, who indicated that Unc's real name might possibly be "Tim." (TT 8/20/12 at 16). Lt. Nelson never identified Unc, nor did he link him to Mr. Smith.

Mr. Smith was arrested more than two months after this identification. (TT 8/20/12 at 12). The police did not recover the stolen items or any weapons. (TT 8/20/12 at 13). Nor did they make any other arrests.

B. Procedural History

The prosecution charged Mr. Smith with five crimes: (1) armed robbery; (2) first-degree home invasion; (3) larceny in a building; (4) possession of a firearm by a felon; and (5) felony-firearm. (Felony Information). The Court appointed Susan Reed to represent Mr. Smith on May

21, 2012. (AOI 5/12/12, at 3; Circuit Court Docket Entries). As of June 4, 2012, trial counsel still had not met with Mr. Smith. (PT 6/4/12, at 4). Counsel did not file a notice of alibi.

A little more than a month before trial, on July 12, 2012, counsel asked the Court to appoint an investigator. (PT 7/12/12, at 3). She indicated that “I have a list of witnesses that I need to be interviewed and possibly subpoenaed for trial.” (PT 7/12/12, at 3). The Court granted this motion and appointed the Iverson Agency to assist counsel. (PT 7/12/12, at 3; Order Appointing Defense Investigator).⁹

Trial began on August 20, 2012, and ended the next day. The prosecution relied exclusively on Mr. Kelly’s identification of the defendant. (TT 8/20/12 at 68-77). Mr. Kelly testified that he was “110% sure” of his identification, despite his more hesitant statements to Ms. Tony. (TT 8/20/12 at 65). He acknowledged that “I did also second-guess myself because I wanted to be, you know I wanted to make sure I had the right guy.” (TT 8/20/12, at 66). He added that, “...[T]he more I look back on it I was, you know I convinced myself I did see what I seen.” (TT 8/20/12, at 66).

The defense, on the other hand, maintained that Mr. Smith was not the perpetrator. (TT 8/20/12 at 8-9). The defense asserted that Mr. Kelly’s identification was tainted by his bias towards persons of mixed-race heritage. (TT 8/20/12 at 8-9, 77-81). As evidence of this bias, the defense pointed to Mr. Kelly’s Facebook activity and the racially charged statements he made immediately after the incident. (TT 8/20/12 at 8-9, 77-81).

Defense counsel made no mention of Mr. Smith’s alibi during her opening statement or her closing argument. (TT 8/20/12, at 8-9, 77-81). At the close of the prosecution’s case-in-chief, however, counsel stated for the record that, “I have subpoenaed witnesses on my client’s behalf, but after the way the testimony has gone it [sic] and further discussion with my client I am not

⁹ The Court’s “Order Appointing Defense Investigator” can be found in the circuit court file.

going to call the witness.” (TT 8/20/12, at 67). Mr. Smith answered affirmatively when asked, “Is that okay with you[?]” (TT 8/20/12, at 67-68).

The next day, on August 21, 2012, Judge Allen found Mr. Smith guilty as charged. (TT 8/21/12 at 5-6). Sitting as the trier of fact, the Court found Mr. Kelly to be a credible witness. (TT 8/21/12 at 5). Further, the Court stated Mr. Kelly’s racist comments on Facebook did not call the reliability of his identification testimony into question. (TT 8/21/12 at 5).

At sentencing on September 12, 2012, Mr. Smith argued that his appointed counsel was ineffective. (ST 9/12/12 at 8-11). He alleged that counsel had visited him on only one occasion, a short meeting the night before trial. (ST 9/12/12 at 9). He stated that counsel had admitted to him that she was very busy with her high-profile representation of Joseph Gentz. (ST 9/12/12 at 9). Further, Mr. Smith complained that counsel refused to call any of the alibi witnesses that were present at trial to testify on his behalf. (ST 9/12/12 at 10-11).

C. Ginther Hearing

Mr. Smith appealed by right to the Court of Appeals, challenging his attorney’s failure to properly investigate his alibi defense. On Mr. Smith’s motion, the Court of Appeals remanded the case to the trial court for an evidentiary hearing on this claim. *People v Ashly Drake Smith*, unpublished order of the Court of Appeals entered June 19, 2013 (Docket No. 312721). This Court further directed that “[t]he proceedings on remand are limited to the issues raised in the motion to remand.” *Id.* Per this order, Mr. Smith filed his motion for a new trial on July 3, 2013. The motion asserted the same argument presented in Mr. Smith’s motion to remand: that his trial lawyer performed ineffectively by failing to adequately investigate or present his alibi defense. *Id.* The motion also asked the trial court to direct a judgment of acquittal based on the reasonable doubts raised by the alibi testimony.

Five witnesses testified at the evidentiary hearing: (1) trial counsel, Susan Reed, (2) the defendant, Mr. Smith, (3) alibi witness Sarah Urban, (4) alibi witness Melissa Mulroy, and (5) alibi witness Timothy Mulroy. Judge David Allen, who had presided over the bench trial, was no longer part of the Wayne County Circuit Court's Criminal Division by the time of the evidentiary hearing. (GT-I 3-4).¹⁰ Instead, the hearing was held before Judge Mark T. Slavens. (GT-I 3-4). Judge Slavens declined to weigh the alibi testimony against the identification testimony of the lone eyewitness. (GT-I 7). Instead, he focused exclusively on Mr. Smith's ineffectiveness claim. (GT-I 16).

1. Alibi Testimony

Mr. Smith testified that he did not rob the complainant. (GT-I 51). Three alibi witnesses corroborated his testimony: Sarah Urban, Melissa Mulroy, and Timothy Mulroy. Each of these witnesses lived in the same apartment complex as Mr. Smith. (GT-I 48-49). That complex was located at 29865 Cherry Hill in Inkster, approximately four miles away from the scene of the robbery in Westland. (GT-I 48, 50). All three alibi witnesses confirmed that on the night of the robbery, Mr. Smith was ill and splitting his time between his own apartment and Ms. Urban's apartment across the hall. (GT-I 51-52, 72-73, 84-85, 104).

The evening of January 11, 2012, was memorable in part because nearly everyone was suffering from the flu. (GT-I 53, 71, 85). Between 6:30 PM and 8:30 PM, Ms. Urban, Ms. Mulroy, and Mr. Smith gathered in Ms. Urban's apartment to share chicken noodle soup and watch television. (GT-I 74, 85). Mr. Smith spent much of that two-hour time period lying on Ms. Urban's couch. (GT-I 71-72, 84-85). But on one or two occasions, he went across the hall to call his girlfriend, who was in the hospital with the flu. (GT-I 52-53, 74, 85). Ms. Urban

¹⁰ Transcripts of the *Ginther* hearing are cited as "GT," with additional reference to the volume of proceedings.

testified that when Mr. Smith left her apartment, he would return within five or ten minutes. (GT-I 73). Similarly, Ms. Mulroy testified that Mr. Smith never left for more than twenty minutes. (GT-I 84).

Timothy Mulroy, the defendant's roommate, was not part of the gathering across the hall. (GT-I 98). He had treated his then-girlfriend to dinner and a movie, and he returned home at some point around 7:00 PM. (GT-I 106-107). When he returned, he saw Mr. Smith sleeping on a futon. (GT-I 107). A short time later, around 7:30 PM, he received a telephone call from someone named Nick Horn. (GT-I 108). The caller told Mr. Mulroy that the complainant had just been robbed and was accusing Mr. Smith of being the robber. (GT-I 108-109). Mr. Mulroy believed that all of this had happened between 7 PM and 8 PM, but conceded that "I don't know the exact time[.]" (GT-I 110).

Sixteen months later, Mr. Mulroy signed an affidavit averring that when Nick Horn called, "Ashly Smith was sleeping on the couch in Sarah Urban's apartment," not on the futon in his own apartment. (GT-I 100, 111). At the evidentiary hearing, Mr. Mulroy testified that that was a mistake. (GT-I 112). He signed the affidavit despite this mistake because there was a "crunch for time." (GT-I 113). But Mr. Mulroy did not wish to testify without first correcting this mistake. (GT-I 112-113).

2. *Trial Counsel's Testimony*

Mr. Smith's trial lawyer, Susan Reed, did not present the alibi witnesses. At the *Ginther* hearing, she testified that she typically handles more than seventeen court-appointed cases at any given time. (GT-I 23). She received her appointment in this case on May 21, 2012. (GT-I 25-26); (AOI 5/21/12, at 3). By the time of the first pre-trial conference on June 4, 2012, she still had not met with Mr. Smith. (GT-I 26); (PT 6/4/12, at 4). By the time of the second and final

pre-trial conference on July 12, 2012, she had only spoken with Mr. Smith in the courtroom bullpen. (GT-I 28). Counsel did not meet with Mr. Smith at the Wayne County Jail until the night before trial. (GT-I 28, 31, 57).

Counsel did obtain the services of an investigator. (GT-I 29); (PT 7/12/12, at 3). The investigator served subpoenas on the defendant's alibi witnesses. (GT-I 29). Counsel was not certain whether the investigator had done anything beyond simply serving subpoenas. (GT-I 29). The investigator had not generated any written reports, but she may have relayed to counsel at least one witness's statements. (GT-I 30). (Timothy Mulroy testified that he may have briefly spoken to an investigator, whereas Sarah Urban and Melissa Mulroy testified that they had not.) (GT-I 74, 86-87, 105).

Counsel and Mr. Mulroy may have briefly conversed before trial, but neither of them was certain. (GT-I 31, 105). Counsel first spoke with the remaining alibi witnesses on the day of trial. (GT-I 31). Before trial, she decided that if she pursued an alibi defense, she would only call Timothy Mulroy. (GT-I 43). She explained:

I find that the more you put witnesses on, as we know everybody remembers things differently and witnesses will tend to testify about what they remember, but it might differ from what one of their friends remembers. And that was a concern at that point that if all four of them got on the stand then the prosecutor would be able to you know show discrepancies in everything they're saying, which that in itself I think would weaken the case. (GT-I 43).

Counsel did not indicate why she picked Timothy Mulroy over Sarah Urban and Melissa Urban. Both Mr. Smith and Ms. Urban, on the other hand, testified that counsel indicated that she had picked Mr. Mulroy because he was dressed more nicely than the others. (GT-I 66, 74).

Counsel ultimately decided not to call any alibi witnesses after the prosecution rested its case-in-chief. (GT-I 32). She testified that "I thought the case was going in such a way that the

alibi witnesses might have be[en] giving the prosecutor something to attack rather than focusing on their complainant.” (GT-I 32). She was also troubled by the alibi witnesses’ statements that they were “in and out all day.” (GT-I 34, 41).

Counsel may have spoken with Mr. Smith about forgoing the alibi defense. (GT-I 38-39). She was not sure if it was a long conversation, or whether an off-record discussion even took place. (GT-I 40). The trial transcript reflects this exchange:

THE COURT: Okay. People have rested. Ms. Reed, what's your pleasure?

MS. REED: Your Honor, I have subpoenaed witnesses on my client's behalf, but after the way the testimony has gone [in] and further discussion with my client I am not going to call the witness. Is that okay with you, mister –

MR. SMITH: Yes, ma'am.

THE COURT: Okay. (TT 8/20/12, at, 67-68).

Ms. Reed testified that “I gave him my opinion and what I thought we should do and he agreed. (GT-I 40). Mr. Smith also testified, “by her being a professional I guess I just went—I knew I wasn't guilty, so I just went along.” (GT-I 60).

Counsel acknowledged that she never filed an alibi notice or witness list. (GT-I 32). She did not mention an alibi defense during the pre-trial conferences. (GT-I 32). Nor did she mention it in her opening statement to Judge Allen. (GT-I 32). Counsel did, however, mention the alibi witnesses to the trial prosecutor. (GT-I 37). The trial prosecutor told counsel that she had no objection to the presentation of an alibi defense without notice. (GT-I 37). Further, counsel expressed confidence that Judge Allen would have allowed the alibi defense despite the lack of notice. (GT-I 37).

Counsel testified that she knew that motions for directed verdict work differently in bench trials than they do in jury trials. (GT-I 35); MCR 6.419(C). But she did not make such a motion because “I didn’t see it as an option.” (GT-I 36). Counsel could not elaborate on why such a motion was not an option for her. (GT-I 36).

3. *Trial Court’s Findings*

The trial court found that counsel made a strategic decision not to present an alibi defense. (GT-II 36). The court found that counsel made this choice based on the alibi witnesses’ inability to account for Mr. Smith for the entire time period. (GT-II 31, 36). The court added that the testimony at the *Ginther* hearing supported this decision, since Timothy Mulroy believed that Mr. Smith was in his own apartment for most of the time period between 7 PM and 8 PM, whereas Sarah Urban and Melissa Mulroy testified that he spent the majority of the time in Ms. Urban’s apartment. (GT-II 33-36).

The trial court further found that counsel had conducted an adequate investigation. (GT-II 37). It noted that counsel was aware of the alibi witnesses and took steps to subpoena them. (GT-II 37). The court also took judicial notice of the fact that many judges of the Wayne County Circuit Court will often allow defendants to present an alibi defense even when there has been no notice. (GT-II 31). Finally, the court noted that Mr. Smith had acquiesced to counsel’s decision; he did not complain about her failure to present an alibi defense or her lack of communication until after the verdict. (GT-II 32, 33, 38).

Additionally, the trial court found that Mr. Smith had not been prejudiced by the absence of an alibi defense. (GT-II 38). The court based this conclusion on the “inconsistencies in these testimony [sic] between the two young ladies and the young man on where he was.” (GT-II 38).

Smith, slip op at 5. “[T]he failure to meet with defendant in advance of the eleventh hour, combined with [counsel’s] failure to personally interview the alibi witnesses, resulted in grossly inadequate representation.” *Id.* As a consequence, counsel “was unprepared to consider presenting an alibi defense because absent reasonable investigation, she could not meaningfully comprehend the strengths or weaknesses of an alibi defense.” *Id.*

The dissent further explained that counsel’s proffered reasons for failing to present an alibi defense fell short of a valid strategic justification. *Id.* at 6-7. As for counsel’s belief that she had already demonstrated reasonable doubt in her cross-examination of the complainant, the dissent noted that counsel could have first tested this theory with a motion for a directed verdict of acquittal under MCR 6.419(C). *Id.* at 7-8. As for counsel’s conclusion that the alibi witnesses lost sight of Mr. Smith for brief intervals, the dissent noted that “the witnesses’ testimonies rendered it unlikely that an ill defendant would arise from Urban’s couch, drive to another location and conduct an armed robbery, only to return and continue watching television.” *Id.* at 7.

As for prejudice, the dissent noted that “Urban and Melissa Mulroy substantially agreed that defendant was sick with the stomach flu and spent the evening of the robbery lying on Urban’s couch, except for brief intervals when he returned to his own apartment across the hall.” *Id.* at 9. These intervals were “too short to have driven to Kelly’s place to conduct an armed robbery.” *Id.* Thus, while not conclusive as to defendant’s whereabouts every moment that evening, the testimony most assuredly cast reasonable doubt that defendant robbed Kelly.” *Id.* Moreover, “[t]he weaknesses of Kelly’s testimony enhance the prejudicial impact of [counsel’s] unreasonable failure to present the testimony of at least Urban and Melissa Mulroy.” *Id.* From this, the dissent concluded:

Had Reed performed effectively, she would have investigated and sorted out the alibi testimony well in advance of trial, filed an alibi notice, and based her decision whether to proceed with the alibi evidence on Judge Allen's directed verdict ruling. Assuming that Judge Allen found that Reed's cross-examination failed to create reasonable doubt, I believe that the alibi evidence would have done so. Absent presentation of this readily-available evidence, the accuracy of the guilty verdict deserves no confidence. Accordingly, I respectfully dissent. [*Id.* at 9-10].

Mr. Smith now seeks leave to appeal to this Court.

I. TRIAL COUNSEL DEPRIVED MR. SMITH OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO FILE A TIMELY ALIBI NOTICE OR CALL WITNESSES WHOSE TESTIMONY WOULD HAVE SUPPORTED HIS ALIBI DEFENSE.

Issue Preservation

On remand, the trial court presided over an evidentiary hearing on this issue pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). A claim of ineffective assistance of counsel may be presented for the first time on appeal because it involves a constitutional error which likely affected the trial's outcome. *People v Henry*, 239 Mich App 140, 146; 607 NW2d 767 (1999).

Standard of Review

The performance and prejudice components of an ineffective assistance of counsel claim are mixed questions of fact and law. *Strickland v Washington*, 466 US 668, 698; 104 S Ct 2052; 80 L Ed 2d 674 (1984). This Court applies *de novo* review to the trial court's legal conclusions, but reviews its factual findings for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Analysis

For the reasons eloquently stated by the dissenting judge below, Ashly Smith's trial lawyer did not adequately investigate his alibi defense. *People v Ashly Drake Smith*, unpublished opinion per curiam of the Court of Appeals issued April 1, 2014 (Docket No. 312721) (attached as Appendix A), at 5-8 (dissenting opinion of Gleicher, P.J.). Thus, counsel's failure to present this defense constituted ineffective assistance of counsel. US Const Ams VI, XIV; Const 1963, art 1, §§ 17, 20; *Strickland*, 466 US at 686; *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Ineffectiveness results when: (1) counsel's performance falls below an objective standard of reasonableness; and (2) there is a reasonable probability that the outcome

of the proceedings would have been different but for the errors. *Strickland*, 466 US at 694; *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). As the dissent below noted, both prongs have been satisfied in the instant case.

A. **Trial counsel performed deficiently when she failed to file an alibi notice or call witnesses in support of Mr. Smith's alibi.**

To establish deficient performance, the defendant must overcome the presumption that trial counsel's actions were based on reasonable trial strategy. *Strickland*, 466 US at 694. However, "[m]erely labeling [counsel's] errors "strategy" does not shield his performance from Sixth Amendment scrutiny." *Henry v Scully*, 918 F Supp 693, 715 (SD NY, 1996), *aff'd* 78 F3d 51 (CA 2, 1996). Counsel will still be found ineffective despite a "strategic" decision if the strategy employed was not a sound or reasonable one. *People v Dalessandro*, 165 Mich App 569, 574; 419 NW2d 609 (1988). In particular, counsel's behavior cannot be considered objectively reasonable if her strategy is predicated on inadequate preparation. A decision not to call a particular witness based on less than adequate investigation is not based on strategic considerations. *Strickland*, 466 US at 691.

Here, the trial court found that counsel strategically chose not to present an alibi defense so as not to detract from the weakness of the prosecution's case. (GT-II 30-31). But because this was a bench trial, counsel did not have to make this choice at all. MCR 6.419(D) provides:

In an action tried without a jury, after the prosecutor has rested the prosecution's case-in-chief, the defendant, ***without waiving the right to offer evidence if the motion is not granted***, may move for acquittal on the ground that a reasonable doubt exists. The court may then determine the facts and render a verdict of acquittal, or may decline to render judgment until the close of all the evidence. If the court renders a verdict of acquittal, the court shall make findings of fact. [MCR 6.419(D) (emphasis added)].

Under this rule, counsel did not have to guess at whether the trial court would find a reason to doubt the complainant's identification testimony. Rather, counsel could have tested the waters by first seeking an acquittal based on reasonable doubt. If that failed, counsel would have retained the ability "to offer evidence if the motion is not granted[.]" MCR 6.419(D).

There is no strategic reason for failing to pursue such an option. Indeed, trial counsel could not articulate one at the *Ginther* hearing:

- Q. Is it fair to say that in a bench trial the Judge actually has the power to consider the evidence under the traditional reasonable [doubt] standard and if there's an acquittal the case is over, if there's a conviction then the defendant has the ability to present additional evidence. Does that sound right?
- A. That sounds about right.
- Q. Okay. Was there any reason why you didn't take that approach?
- A. No.
- Q. Were you aware—You were aware of the rule at that time?
- A. At the time, yes, but I didn't see that as an option.
- Q. Why not?
- A. I didn't.
- Q. Okay. Can you elaborate on that?
- A. No, I can't. [(GT-I 36)].

Contrary to what the trial court found, this was not a case where counsel "did not file a motion for directed verdict because she felt that the Judge would just find there was a question of fact with regard to the identification." (GT-II 30-31). This might be true for jury trials, where motions for direct verdict are granted only if the evidence is insufficient as a matter of law. MCR 6.419(A). But in a bench trial, a directed verdict may enter if the judge finds reason to

doubt the facts submitted by the prosecution. MCR 6.419(D). This allows the defense to have its cake and eat it, too—a defendant can first argue for an acquittal based on reasonable doubt, and if that fails, the defendant can present evidence in support of his innocence.

Again, there was no strategic justification for refusing to take this two-step approach. Counsel's strategy for trial was that "whatever happened there [with the robbery] it was not Mr. Smith, but that he was singled out because of a racial animus that the complainant had against him." (GT-I 25). As counsel conceded, this theory was not at all inconsistent with the alibi witnesses' testimony that Mr. Smith could not have committed the crime. (GT-I 40-41).

Counsel also expressed concern that the alibi witnesses "were in and out all day." (GT-I 34). Of course, the robbery did not happen over the course of an entire day. Rather, the complainant testified that it happened around 7:30 PM and lasted for a matter of minutes. (GT-I 34, 49). The robbery also took place about four miles away from Mr. Smith's apartment complex, which is about a twenty-minute drive round-trip through city traffic. *See* Google Maps, <http://goo.gl/maps/6hnoG> (last accessed September 30, 2013). So even though Sarah Urban and Melissa Mulroy could not account for Mr. Smith for the full two-hour period between 6:30 PM and 8:30 PM, they did testify that he only left the apartment for minutes at a time and was never gone for more than twenty minutes. (GT-I 73, 84). This, coupled with the fact that the complainant never indicated that the robber exhibited any symptoms of the flu, is enough to raise doubts about the accuracy of the identification.

Counsel further testified that if she had presented an alibi defense, she would have called only Timothy Mulroy. (GT-I 43). She believed that if she called more than one alibi witness, she would have to address any inconsistencies between the witnesses' accounts. (GT-I 43). Defendant-Appellant does not argue that the decision to present only one alibi witness instead of

three would have been anything but a tactical choice. Rather, Defendant-Appellant notes that counsel's selection of Timothy Mulroy betrays her lack of investigation in this case.

It is evident that Mr. Mulroy did not come home at 7:00 as he believed. (GT-I 106-107). Mr. Mulroy testified that he came home only after taking his girlfriend to dinner and a movie; typically, those two activities are rarely completed so early in the evening. (GT-I 106-107). Further, Mr. Mulroy indicated that his estimate of time was based in part upon his telephone conversation with Nick Horn, who was not present for the robbery yet indicated that it had been perpetrated only fifteen minutes earlier. (GT-I 109). At any rate, Mr. Mulroy testified that "I don't know the exact time[.]" (GT-I 110). Judge Gleicher attributed this to "the erosion of Mulroy's memory over time." *Smith*, slip op at 7 (dissenting opinion of Gleicher, P.J.). In contrast, Ashly Smith, Sarah Urban, and Melissa Mulroy all testified consistently that Mr. Smith was in Ms. Urban's apartment during the relevant time period. (GT-I 52-53, 74, 85).

The testimony at the *Ginther* hearing indicated that counsel's belief that Timothy Mulroy was the best of the three witnesses was based on his clothing, as opposed to what he had to say. (GT-I 66, 74). Again, this is evidence of an insufficient investigation. Counsel and Mr. Mulroy may have briefly conversed before trial, but neither of them was certain. (GT-I 31, 105). Further, while counsel did obtain the services of an investigator, she did not know whether the investigator had done anything beyond simply serving subpoenas. (GT-I 29). Consequently, the bulk of counsel's interviewing took place on the first day of trial. (GT-I 31). This type of last-minute preparation falls well short of what *Strickland* requires.

Indeed, counsel's own testimony indicates that she did little in the way of preparation before the first day of trial. She received her appointment in this case on May 21, 2012. (GT-I 25-26); (AOI 5/21/12, at 3). By the time of the first pre-trial conference on June 4, 2012, she

still had not met with Mr. Smith. (GT-I 26); (PT 6/4/12, at 4). By the time of the second and final pre-trial conference on July 12, 2012, she had only spoken with Mr. Smith in the courtroom bullpen. (GT-I 28). Counsel did not meet with Mr. Smith at the Wayne County Jail until the night before trial began on August 20, 2012. (GT-I 28, 31, 57). She did not speak to Melissa Mulroy or Sarah Urban until the date of trial. (GT-I 74, 86-87). And if she spoke to Timothy Mulroy before trial, it was only briefly. (GT-I 31, 105).

Finally, counsel's inadequate investigation is reflected in her failure to file any sort of alibi notice or witness list. (GT-I 32). MCL 768.20(1) requires a written notice of alibi as a prerequisite to presenting an alibi defense. MCL 768.20(1). As the dissenting judge noted below, the plain language of this statute requires judges to exclude alibi witnesses if notice has not been given. *Smith*, slip op at 6 (dissenting opinion of Gleicher, P.J.). But even if, as the trial court found, the lack of notice would not have precluded counsel from presenting an alibi defense, the absence of any sort of pre-trial notice is evidence that counsel did not really know what Mr. Smith's defense would be until the day of trial. (GT-II 31). Indeed, her opening statement is devoid of any reference to the fact that Mr. Smith could not have committed the crime because he was somewhere else. (GT-I 32).

In short, counsel's investigation fell well short of what is required to justify her failure to present an alibi defense as "strategic." She did not meet privately with her client until the night before trial; and she did not conduct any real interviews of the alibi witnesses until the morning of trial. This is likely attributable to the fact that at any one time, counsel is handling upwards of seventeen cases. (GT-I 23). Prevailing professional norms dictate that "Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation[.]" *ABA Standards for Criminal Justice: Defense Function*, Standard 4-1.3(e).

See *Strickland*, 466 US at 688 (citing ABA standards as evidence of prevailing professional norms). They also impose a duty of “*prompt* investigation.” Standard 4-4.1 (emphasis added). Because counsel failed to live up to these standards, her decision not to present an alibi defense cannot be upheld as strategic.

B. Mr. Smith suffered prejudice from trial counsel’s failure to investigate and present alibi witnesses.

As for the second prong of *Strickland*, a defendant is not required to prove that his trial attorney’s conduct more likely than not altered the outcome of the case. *Strickland*, 466 US at 693; *Nix v Whiteside*, 477 US 478; 106 S Ct 2639; 91 LEd2d 397 (1986); *Workman v Tate*, 957 F2d 1339, 1346 (CA 6, 1992). Rather, the defendant need only show a “reasonable probability” that absent the errors, the outcome may have been different. *Strickland*, 466 US at 694; *People v Ullah*, 216 Mich App 669, 684; 550 NW2d 568 (1996). Mr. Smith has met that threshold.

The prejudice inquiry focuses upon two factors: (1) the effect of the error involved; and (2) the strength or weakness of the case against the defendant. As the *Strickland* Court explained, certain errors are more harmful than others. *Strickland*, 466 US at 695. “Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect.” *Id.* at 695-696. “Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support.” *Id.* at 696.

Here, the prosecution’s case against Mr. Smith was far from overwhelming. The prosecution called only two witnesses. The first, Lieutenant Thad Nelson, merely discussed the statement he took from the complainant and the photographic identification procedure he administered. (TT 8/20/12 at 10-11). The prosecution’s case, therefore, hinged entirely upon the identification testimony of the second witness, Shawn Kelly. (TT 8/20/12 at 25). Although Mr.

Kelly expressed “110%” confidence in his identification at trial, he exuded far less certainty during his Facebook exchange with the defendant’s girlfriend on the night of the incident. (TT 8/20/12 at 65-66). Indeed, it was only after conducting his Facebook research that Mr. Kelly “convinced myself I did see what I seen.” (TT 8/20/12, at 66).

Moreover, it is highly probable that Mr. Kelly’s identification of Mr. Smith was tainted by his bias towards persons of mixed-race heritage. As Mr. Kelly conceded, he posted racially disparaging remarks on Facebook about Mr. Smith after deciding that he must have been the culprit. (TT 8/20/12 at 42, 44). This bias casts even more doubt on the accuracy of his identification.

Given the weakness of the complainant’s identification, the testimony of even one alibi witness would have had a major impact on the trial court’s factual findings. At the very least, the alibi testimony establishes that Mr. Smith was too sick to do much of anything on the date in question. (GT-I 53, 71, 85).

Moreover, the complainant testified that the robbery took place around 7:30 PM and lasted for a matter of minutes. (GT-I 34, 49). The complainant lived about four miles away from Mr. Smith’s apartment complex, which is about a twenty-minute drive round-trip through city traffic. *See* Google Maps, <http://goo.gl/maps/6hnoG> (last accessed September 30, 2013). Mr. Smith, however, spent much of the time between 6:30 and 8:30 PM lying on Ms. Urban’s couch. (GT-I 71-72, 84-85). So even though Sarah Urban and Melissa Mulroy could not account for Mr. Smith for the full two-hour period between 6:30 PM and 8:30 PM, they did testify that he only left the apartment for minutes at a time and was never gone for more than twenty minutes. (GT-I 73, 84). This, coupled with the fact that the complainant never indicated

that the robber exhibited any symptoms of the flu, is enough to raise doubts about the accuracy of the identification.

As discussed above, Timothy Mulroy likely came home later in the evening. His timeframes are somewhat inconsistent with how Sarah Urban and Melissa Mulroy testified. But as counsel noted, this is a typical occurrence when multiple lay witnesses testify about a single event. (GT-I 43). It can happen with alibi witnesses, and it often happens with witnesses for the prosecution. (GT-I 43). At any rate, Mr. Mulroy's testimony is significant because it helps to explain why this date was so memorable for the alibi witnesses. Both Mr. Mulroy and Ms. Urban heard about the robbery almost immediately after it happened, thanks to the word-of-mouth that followed the complainant's prompt Facebook postings. (GT-I 74, 104); (TT 8/20/12 at 42, 44). Additionally, Melissa Mulroy heard about the accusation within a week. (GT-I 86). They immediately discounted the accusation because they knew Mr. Smith could not have committed the crime. (GT-I 109).

For all of these reasons, it is reasonably probable that the outcome would have been different had counsel produced these witnesses. Mr. Smith's convictions rest in large part upon dubious identification testimony that was unduly influenced by Facebook hearsay and the complainant's admitted racial bias. (TT 8/20/12 at 42, 44). Given these circumstances, counsel's failure to present alibi witnesses constituted ineffective assistance that denied Mr. Smith a fair trial. He is therefore entitled to a new trial

JUDGMENT APPEALED FROM AND RELIEF SOUGHT

Defendant-Appellant seeks leave to appeal from the unpublished opinion issued by the Court of Appeals in the proceedings below. *People v Ashly Drake Smith*, unpublished opinion per curiam of the Court of Appeals issued April 1, 2014 (Docket No. 312721) (attached as Appendix A). He respectfully asks this Court to either grant leave to appeal or peremptorily reverse his convictions for the reasons stated by the dissenting judge below.

Respectfully submitted,

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