

STATE OF MICHIGAN  
IN THE SUPREME COURT

THE PEOPLE OF THE  
STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

SANDY SEAN HOLT, JR.,

Defendant-Appellant.

SC File No. 128034

COA File No. 250580

Lower Court File No. 02-47915-FC  
Muskegon County Circuit Court

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128034  
**PLAINTIFF-APPELLEE'S RESPONSE TO**  
**DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL**

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**FILED**  
JUL 26 2005  
CORBIN R. DAVIS  
CLERK  
MICHIGAN SUPREME COURT

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**COUNTERSTATEMENT OF THE QUESTIONS PRESENTED**

- I. WAS DEFENDANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENDANT WAIVED HIS RIGHT TO COUNSEL PRIOR TO SUBMITTING TO THE POLYGRAPH EXAMINATION AND WAS TESTIMONY REGARDING DEFENDANT'S EX-WIFE ERRONEOUSLY ADMITTED?

Plaintiff-Appellee says, "No".

Defendant-Appellant says, "Yes".

The trial court says, "No".

The Court of Appeals says, "No".

- II. DOES DEFENDANT'S CONVICTION VIOLATE THE 180-DAY RULE WHERE CONSECUTIVE SENTENCING APPLIES TO DEFENDANT'S SENTENCE AND BECAUSE DEFENDANT WAS NOT CONSIDERED AN INMATE FOR PURPOSES OF THE 180-DAY RULE?

Plaintiff-Appellee says, "No".

Defendant-Appellant says, "Yes".

The trial court says, "No".

The Court of Appeals says, "No".

## **COUNTERSTATEMENT OF JURISDICTION**

The Supreme Court may review by appeal a case after decision by the Court of Appeals. MCR 7.301(A)(2). The procedures for such appeal are outlined in MCR 7.302 *et seq.* The Court of Appeals' opinion was entered on December 21, 2004. (Exhibit E.) An application for leave must be filed within 56 days of an opinion of the Court of Appeals. MCR 7.302(C)(2)(b). Defendant's application was filed on February 15, 2005. Accordingly, his application for leave to appeal is timely, having been filed within 56 days of the Court of Appeals' December 21, 2004, opinion.

## COUNTERSTATEMENT OF THE FACTS

The People accept Defendant's statement of the facts except as otherwise stated in the Law and Argument section of this response.

### LAW AND ARGUMENT

I. **DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENDANT WAIVED HIS RIGHT TO COUNSEL PRIOR TO SUBMITTING TO THE POLYGRAPH EXAMINATION AND TESTIMONY REGARDING DEFENDANT'S EX-WIFE WAS NOT ERRONEOUSLY ADMITTED.**

A. Standard of Review

Defendant's standard of review is complete and accurate. In reviewing claims of ineffective assistance of counsel, this Court uses the standard set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Under the two prong *Strickland* test, a defendant must show: (1) that counsel's performance was deficient to the extent that it fell below an objective standard of reasonableness under prevailing professional norms; and (2) that counsel's deficient performance so prejudiced the defendant that it deprived him of a fair trial, i.e., that there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Pickens*, supra at 303. The defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley*, 468 Mich 135, 140; 659 NW2d 611 (2003).

B. Analysis of the issue

Defendant contends that he was denied effective assistance of counsel, and cites three alleged errors that to support his contention. Defendant first argues that counsel was ineffective for permitting him to take a polygraph examination without counsel present and without a guarantee from the prosecution that a successful polygraph would have resulted in a dismissal of

the charges. Defendant also suggests that, if he did not have representation at the time the polygraph was administered, then he was denied his right to counsel. Finally, Defendant alleges that trial counsel was ineffective for failing to move to strike testimony that his ex-wife threatened the victim in this case. For various reasons discussed below, Defendant was not denied effective assistance of counsel.

1. *Administration of Polygraph Examination*

Defendant first alleges that his counsel was ineffective for advising Defendant to submit to a polygraph examination without counsel present and without a guarantee from the prosecution that Defendant's case would be dismissed if he passed. Defendant further argues that this abandonment without guarantee constitutes prejudice per se against Defendant.

At the outset, it is important to note that Defendant cites no authority in support of his assertion that allowing a defendant to submit to a polygraph without counsel present represents prejudice per se requiring automatic reversal. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

Defendant seeks to rely on *Tyler v United States (On remand)*, 78 F Supp 2d 626 (ED Mich, 1999), for support of his position that counsel abandoned him to his polygraph examination. Despite assertions to the contrary, *Tyler* is factually distinguishable from the instant case. *Tyler* involved a situation where trial counsel arranged a plea negotiation with government agents and then abandoned the defendant to the negotiations by himself. Furthermore, counsel in *Tyler* acted as such because he felt uncomfortable representing the defendant because of prior involvement with a co-defendant. The situation in the instant case was neither a plea negotiation, nor did counsel abandon Defendant to the polygraph examiner.

A situation involving ineffective assistance of counsel claims relative to polygraph examinations has been examined several times by the Michigan Court of Appeals as well as the United States Court of Appeals. The most important difference in terms of the *Tyler* analysis, in this case as well as several others, is that Defendant has the right to waive the presence of counsel at the polygraph examination. *United States v Eagle Elk*, 711 F 2d 80 (CA 8, 1983), *People v McElhaney*, 215 Mich App 269, 274-275; 545 NW2d 18 (1996). In *Tyler*, the defendant did not waive the presence of counsel. In the instant case, Defendant clearly did waive his right to counsel. The issue of Defendant waiving his right to counsel at the polygraph examination was explored both in the testimony of Detective Ferrier as well as People's Exhibit #25, the transcript of Detective Ferrier's examination of Defendant following the polygraph, (attached as Exhibit A).

On direct examination by Raymond Kostrzewa, Detective Ferrier testified that he questioned Defendant after Lieutenant Harris Edwards of the Michigan State Police advised Defendant of his *Miranda*<sup>1</sup> rights. After being advised of his rights, Defendant gave Detective Ferrier a statement. (Trial Transcript, Volume III, p. 65.) Shortly thereafter in the trial, the jury was provided with a transcript of and listened to Defendant's taped statement. At the beginning of that transcript and statement, Detective Ferrier and Defendant have the following exchange:

F (Ferrier): Sandy . . ah . . we were, you were here talking with . um .  
Lieutenant Edwards . ah . from the Michigan State Police and have  
been talking with him and prior to your contact with him you . ah .  
were advised of your Miranda . ah . Rights and you signed a  
waiver form. Right?

H (Holt): Yes Sir.

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Under these circumstances, it is clear from the record that Defendant waived his right to counsel at the polygraph examination. In the context of an ineffective assistance of counsel claim, the question for this Court is not whether the decision to advise Defendant to take the polygraph examination was sound trial strategy, but whether Defendant was adequately advised of his rights so that he could make an understanding decision regarding whether to undergo the examination. *People v Effinger*, 212 Mich App 67; 536 NW2d 809 (1995).

On this record it is clear that the answer to that question is that Defendant was properly advised of his rights prior to submitting to the exam and waiving his right to counsel. Defendant provided the Court or Appeals with a copy of an affidavit (attached as Exhibit B) signed by Defendant's first counsel, Harold Cloz (now Judge Cloz), who affirmed that he did advise Defendant that a failure could not be used against him, that the prosecution might dismiss if Defendant passed, and advised Defendant to not make any statements if he failed. Cloz also advised Defendant that Defendant should make the decision about whether to take it or not. Under those circumstances, it is clear that Defendant knew the risks associated with taking the test, knew that there was no guaranteed dismissal for passing the test, knew that he should not make any statements if he failed, and knew that the results were not admissible against him. Knowing that, Defendant still made the decision to take the polygraph examination and waived his right to counsel.

The Court of Appeals addressed a situation virtually identical to this fact scenario in an unpublished 2002 opinion *People v Matthew David Powell*, unpublished per curiam opinion (COA Docket No. 228267; released December 20, 2002); 2002 WL 31956943 (Exhibit C).<sup>2</sup>

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<sup>2</sup> A court is entitled to conclude that the reasoning of an unpublished decision is persuasive. *Steele v Dep't of Corrections*, 215 Mich App 710, 714 n 2; 546 NW2d 725 (1996).

In *Powell* the defendant claimed ineffective assistance of counsel for failure to accompany him to his polygraph examination, just as claimed in this case. In *Powell* the defendant relied on *Tyler, supra*, for support of his position, just as Defendant did in this case. The *Powell* panel opined that the question of trial strategy need not be addressed when the record clearly indicated the defendant waived his right to have counsel present at the polygraph examination. A similar conclusion is warranted in this case.

While not specifically cited by Defendant in support of his argument, the instant case is also distinguishable from *People v Sclafani*, 132 Mich App 268; 347 NW2d 30 (1984), in which the Court of Appeals found ineffective assistance of counsel on the basis of an attorney's recommendation that his client submit to a polygraph examination. In that case, the Court found ineffective assistance because counsel was unaware that any statements made by Defendant could be used as impeachment evidence against him at trial. That situation was clearly not the case here given trial counsel's specific instruction to Defendant that he should not make any statements to the police if he were to fail the polygraph.

The *Sclafani* case also offers enlightenment to this Court on the issue of advice to take a polygraph. The Court in *Sclafani* noted that "[i]n most instances, a defense attorney's advice regarding the taking of a polygraph examination is a matter of trial strategy." *Id* at 271. Furthermore, the courts have consistently commented that they will not "second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, [the] Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999), citing *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

In the instant case, trial counsel's decision to inform Defendant of his options regarding a polygraph examination was the exercise of sound trial strategy. Defendant was made fully aware of the lack of a guarantee of dismissal should he pass the polygraph examination, and was further instructed to not give any statements should he fail. Having all of that advice at his disposal, Defendant chose to submit to a polygraph examination, which he subsequently failed and offered a series of incriminating statements following the failure of the examination. That counsel's strategy in informing Defendant of his options ultimately worked against Defendant does not render the decision a matter of ineffective assistance of counsel.

Defendant submits that a remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), is necessary to establish a factual record for this Court to make an informed decision. Given Defendant's diligence in submitting an affidavit from Defendant's first trial counsel, no such factual record is needed. This Court has all of the evidence needed to decide that Defendant was not denied effective assistance of counsel based on the advice of trial counsel as to his right to a polygraph examination.

## 2. *Lack of Counsel at Polygraph Examination*

Defendant's second allegation of error, while not actually a claim of ineffective assistance of counsel, is that he was denied counsel at a critical stage of the proceedings. For reasons already discussed extensively above, Defendant waived his right to the presence of counsel when he first agreed to attend the polygraph examination. It was therefore not reversible error for Defendant to not have counsel present at the polygraph examination.

Furthermore, despite a formal substitution of counsel not being entered until one month after the polygraph examination, it is clear Defendant had appointed counsel during his entire pre-trial process as evidenced, yet again, by Defendant's exhibits. A pre-trial memorandum,

dated January 27, 2003 (five days prior to the administration of the polygraph), listed Al Swanson as Defendant's attorney. Defendant had already been informed of his rights at a polygraph examination and chose to participate. Defendant was never denied counsel at a critical stage of the proceedings against him.

### 3 *Failure to Strike Testimony*

Defendant finally alleges error on the part of trial counsel in counsel's failure to strike testimony of Cynthia Spann that had been initially offered to show bias on behalf of a witness who ultimately chose not to testify. It is true that the trial court ultimately held that the testimony was irrelevant given the witness's refusal to testify. However, in order to satisfy the first prong of the *Strickland* test for ineffective assistance of counsel, Defendant must first overcome the burden of showing the alleged error was not a matter of sound trial strategy.

In the instant case had Defendant's trial counsel moved to strike Ms. Spann's testimony regarding Ms. Holt, it would have drawn attention back to the testimony. "Certainly there are times when it is better not to object and draw attention to an improper comment." *People v Bahoda*, 448 Mich 261, 287, fn 54; 531 NW2d 659 (1995). It could very well have been trial strategy for defense counsel to move on rather than draw attention to the statements. The decision to not strike the testimony was, therefore, the exercise of sound trial strategy, particularly in light of the overwhelming evidence directly against Defendant.

Not only has Defendant failed to overcome the first prong of the *Strickland* test, he cannot even approach the second prong of the test to show that, but for the alleged error, the outcome of the trial was reasonably likely to be different. The objectionable testimony consisted of a confrontation between the victim, Ms. Spann and Defendant's ex-wife, Michelle Holt. Even without that testimony, the jury was still presented with Ms. Spann's identification of Defendant

during the robbery, as well as Defendant's admissions to Detective Ferrier regarding his involvement in the robbery. The evidence against Defendant was so overwhelming that, with or without the testimony about Defendant's ex-wife, the outcome of the trial would have, unquestionably, been no different.

II. **DEFENDANT'S CONVICTION DID NOT VIOLATE THE 180-DAY RULE BECAUSE CONSECUTIVE SENTENCING APPLIES TO DEFENDANT'S SENTENCE AND BECAUSE DEFENDANT WAS NOT CONSIDERED AN INMATE FOR PURPOSES OF THE 180-DAY RULE.**

A. *Standard of Review*

Defendant's standard of review is complete and accurate.

B. *Analysis of the issue*

Defendant contends that his right to trial within 180 days of incarceration in the Department of Corrections was violated pursuant to MCL 780.131. Defendant is not afforded the protections of the 180-day rule because consecutive sentencing applied to his case and because Defendant was not considered an inmate for purposes of the rule.

Defendant recognizes the long held rule that the 180-day rule does not apply to prisoners facing mandatory consecutive sentences. Defendant argues that such a rule is without merit but fails to clearly articulate why. In fact, despite Defendant's arguments to the contrary, the rule about consecutive sentencing does serve the statutory purpose of the 180-day rule. The purpose of the 180-day rule is to give an inmate the opportunity to have sentences run concurrently. *People v Falk*, 244 Mich App 718, 720; 625 NW2d 476 (2001). Accordingly, the rule does not apply to a pending charge that subjects the defendant to mandatory consecutive sentencing. *People v Chavies*, 234 Mich App 274, 280; 593 NW2d 655 (1999). Consecutive sentencing is mandatory when someone commits a crime while on parole. MCL 768.7a(2). Because

Defendant was, without question, on parole at the time he committed the instant offense, consecutive sentencing is mandatory for Defendant's sentence under MCL 768.7a(2). Therefore, Defendant is not subject to the protections of MCL 780.131.

Not only is Defendant not protected by MCL 780.131 because of the consecutive sentencing exception, Defendant is not considered an inmate for purposes of the rule. MCL 780.131 provides protection for inmates of a correctional facility. However, it is well settled that the 180-day rule does not apply to an incarcerated parolee unless and until parole is revoked. *People v Von Everett*, 156 Mich App 615, 618-619; 402 NW2d 773 (1986). While it is true Defendant was incarcerated on August 25, 2002, he was held on a parole violation pending a hearing to revoke parole. Defendant's parole, however, was not actually revoked until October 12, 2002, as evidenced by order of the Michigan Department of Corrections Notice of Action/Parole Board, attached as Exhibit D. While it is true that this information was not presented to the trial court, it is certainly a matter that this Court can take judicial notice of pursuant to MRE 201(b) as a fact capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned. Because Defendant's parole was not revoked until October 22, 2002, the 180-day rule did not begin running until then. Even using Defendant's calculation of 191 days (the accuracy of which is argued below) between trial and notice, an additional 59 days would need to be removed from that 191 days meaning Defendant was brought to trial 132 days after his incarceration in the Michigan Department of Corrections.

Finally, if this Court is persuaded that neither of the above argued exceptions apply to Defendant, Defendant was still brought to trial 175 days after his incarceration, and therefore within the required 180 days. Defendant argues that the relevant starting point for the subtraction of time given his request for a polygraph examination is December 10, 2002. Using

that date, Defendant calculates that his trial was 191 days after his incarceration. However, December 10, 2002, is not the correct starting point to determine the period subtracted for Defendant to take a polygraph. Defendant requested a polygraph examination at his pretrial on November 25, 2002, meaning Defendant's trial could not have taken place anytime after that date until the polygraph was given. Therefore the period between November 25 and December 10 also need to be removed from Defendant's calculation. This subtraction of an additional 16 days from Defendant's 191 days means Defendant was brought to trial 175 days after his incarceration, and therefore within the 180 days.

In sum, Defendant's right to trial within 180 days of incarceration was not violated. Defendant had no right to trial within 180 days because Defendant's sentence for the instant offense is mandatorily consecutive to his prior sentence. Defendant was not considered an inmate for purposes of the rule until almost two months after his initial incarceration. Finally, the period excluded from the calculation for Defendant to submit to a polygraph examination demonstrates that Defendant was brought to trial within 180 days.

**RELIEF REQUESTED**

For the foregoing reasons, the Court should deny Defendant's application for leave to appeal.

Respectfully submitted,  
MUSKEGON COUNTY PROSECUTOR  
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CHARLES F. JUSTIAN (P35428)  
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Dated: July 25, 2005