

COA Opinion: Defendant is entitled to new trial where his original trial counsel failed to subject the prosecution's case to meaningful adversarial testing.

6. April 2011 By Madelaine Lane

On April 5, 2011, the Michigan Court of Appeals published its opinion in *People v Gioglio, Case No. 293629*, concluding that the defendant was entitled to a new trial because his trial counsel was constitutionally ineffective. In reaching this conclusion, the court commented that trial counsel failed to subject the prosecution's case to any meaningful adversarial testing. Counsel waived opening statement, failed to cross-examine key witnesses, neglected to object to improper and/or inflammatory testimony, and admitted to the prosecutor that her client had confessed his guilt. Accordingly, the court concluded that prejudice must be presumed under *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). The Court reversed defendant's convictions and remanded the case for a new trial. Judge K.F. Kelly *dissented*, concluding *Cronin* does not apply to the facts of this case, and that the motion for new trial should have been analyzed under *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

After a jury trial Defendant was convicted of two counts of criminal sexual conduct in the second-degree (CSC II) and one count of attempted CSC II. During the trial, defense counsel waived her opening statement, did not cross-exam the alleged victim or another witness, failed to object to hearsay testimony and to other objectionable testimony and lines of questioning. Defense counsel rested her case without presenting any witnesses or evidence. After the trial, the prosecuting attorney wrote a letter to the court administrator expressing concerns about defense counsel's handling of the trial. New defense counsel was appointed and the defendant subsequently moved for a new trial. The trial court denied the defendant's request for a new trial concluding that this "case does not contain the type of circumstances which call for an analysis under *Cronin*." The trial court held that defendant failed to overcome the presumption that his attorney's "action constituted sound trial strategy" under *Strickland*. The Court of Appeals disagreed and determined that the trial court failed to make sufficient findings of fact and concluded that *Cronin* did apply because defense counsel "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing."

In its opinion, the Court of Appeals highlighted points where defense counsel failed to act on behalf of her client. She did not make an opening statement. She declined to cross-examine a number of key prosecution witnesses. Defense counsel did conduct a cross-examination of the victim's mother. However, the court determined that the examination was wholly inadequate. Defense counsel did not ask the witness about the context of the time she walked in on the defendant while the victim was straddling his lap. And, she did not attack the witness' credibility through an obvious line of inquiry. Defense counsel also routinely failed to make evidentiary objections. The Court noted that the jury only needed two hours to deliberate to return a verdict of guilty on all three counts. Defense counsel had created a record that gave the impression of overwhelming guilt.

The Court also discussed the prosecution's letter to the court administrator. Apparently, defense counsel had informed the prosecutor that the defendant had admitted his guilt, but still wanted to testify. The letter went on to accuse defense counsel of expressing an extreme dislike for her own client. She refused to meet with her client and mimicked his speech impediment. Defense counsel also confided in the prosecutor that she could never bring herself to cross-examine a child sexual assault victim. The court noted, with interest, that defense counsel did not deny any of the allegations but rather offered a different explanation or stated that she did not remember.

The Court began its analysis with a discussion of the *Cronic* and *Strickland* tests for ineffective assistance of counsel. Although Michigan courts will generally apply *Strickland* to ineffective assistance claims, under certain rare situations, Michigan courts will presume prejudice under the test stated in *Cronic*. See *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

In *Cronic*, the United States Supreme Court recognized that there were circumstances involving trial counsel's performance that were so likely "to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." The *Cronic* opinion identified three situations warranting a presumption of prejudice: where the defendant was completely denied the assistance of counsel at a critical stage, where the defendant's trial counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing," and where the circumstances under which the defendant's trial counsel functions are such that "the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial."

The Court of Appeals concluded that defense counsel's performance implicated the second exception, the failure to meaningfully test the prosecution's case. In so concluding the majority emphasized the word *meaningful* in the phrase "entirely fails to subject the prosecution's case to meaningful adversarial testing." It noted that "the Supreme Court recognized that there might be extreme cases where, although the defendant's trial counsel took some actions on behalf of his or her client, the actions were so few and so ineffectual that it was tantamount to having no lawyer present at all. See *id.* at 654 n 11

The majority declined to evaluate defendant's claim under *Strickland* because of its determination under *Cronic*. Nevertheless the majority stated that it would not be able to evaluate the case under *Strickland* because the trial court did not make the necessary findings. In contrast the dissent states that the case should have been evaluated under *Strickland* and that the majority was ignoring the trial court's factual findings. The dissent opined that the *Cronic* progeny demonstrate that the attorney's failure must be complete. The dissent highlighted the fact that the second *Cronic* exception includes the word "*entirely*" in the phrase "if counsel *entirely* fails to subject the prosecution's case to meaningful adversarial testing."