STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY D. ALTMAN,

Defendant-Appellant.

UNPUBLISHED
March 20, 1998

No. 160952
Oakland Circuit Court
LC Nos. 92-115146 FH;
92-115042 FC

Before: Holbrook, Jr., P.J., and Michael J. Kelly and Gribbs, JJ.

PER CURIAM.

In LC No. 92-115042 FC, defendant pled guilty to solicitation to commit murder and solicitation to commit breaking and entering an occupied dwelling, receiving prison sentences of 15 to 40 years and 3 1/3 to 5 years, respectively. In LC No. 92-115146 FH, defendant pled nolo contendere to extortion, for which he was sentenced to serve 5 to 20 years in prison. On these appeals of right, defendant's original brief, untimely filed, raised two issues, a contention that his sentence for solicitation to commit murder is disproportionate to the offense and the offender, and an argument that the prosecutor improperly referred to information from psychological evaluations prepared for determination of defendant's competency at the sentencing proceeding, in violation of defendant's statutory privilege and Fifth Amendment rights. After remand proceedings, defendant asserts through new counsel that he was deprived of the effective assistance of trial counsel in numerous respects, and that the lower court abused its discretion in denying his motion to withdraw his pleas.

With respect to the ineffective assistance of counsel claims, defendant charges that trial counsel failed to properly investigate the case, failed to prepare and investigate insanity and/or diminished capacity defenses as well as an entrapment defense, and pursued ill-chosen strategies and tactics. Following four days of evidentiary hearings before a substitute trial judge, the trial court found that, contrary to defendant's arguments, defendant's trial counsel had investigated the case, as well as insanity, diminished capacity, and entrapment defenses, and, based on the best information available, correctly concluded that no such viable defense could be presented at trial.

As there was conflicting evidence in some respects, the trial court's findings of historical fact are properly viewed for clear error, while its legal conclusions and its decision concerning any

mixed questions of law and fact are properly reviewed de novo. See *People v Burrell*, 417 Mich 439, 449; 339 NW2d 403 (1983). The trial court's historical findings of fact are not clearly erroneous. For example, defendant's forensic expert, Dr. Tanay—although opining a causal relationship between defendant's supposed mental illness and his crimes—failed to establish a basis for asserting an insanity defense or a diminished capacity defense, i.e., Dr. Tanay himself never testified that as a result of a substantial disorder of thought or mood significantly impairing defendant's judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life, MCL 330.1400a; MSA 14.800(400a), defendant lacked "substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law." MCL 768.21a(1); MSA 28.1044(1)(1).

The evidence also clearly supported defense counsel's testimony and the trial court's finding that the evidence of defendant's actual conduct so clearly established his specific intent as to each crime as to justify counsel's strategic conclusion that a viable diminished capacity defense could not be presented. *People v Mangiapane*, 85 Mich App 379, 395; 271 NW2d 240 (1978). Similarly, where the plan to burglarize defendant's ex-girlfriend's residence to retrieve expensive gifts which defendant had bestowed on her, and to murder a former business associate so defendant could collect the insurance proceeds, both originated with defendant, the mere investigative participation of a police officer, posing as an assassin for hire, could lead at least a minimally competent criminal defense practitioner to the conclusion that a valid entrapment defense did not exist. *People v Butler*, 444 Mich 965-966; 514 NW2d 772 (1994).

The tactic of precluding the admission of much evidence that would have placed defendant in an extremely poor light at sentencing by pleading guilty or nolo contendere, and of minimizing defendant's mental illness as a basis for avoiding an inference of dangerousness for sentencing purposes, was well within the range of reasonable legal assistance by a competent criminal defense practitioner. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Accordingly, defendant's pleas were knowing, understanding, and voluntary, and defendant was not deprived of the effective assistance of counsel in any respect. *People v Corteway*, 212 Mich App 442, 445-446; 538 NW2d 60 (1995). As no viable defense could be presented, defendant was not called upon to make an informed choice about whether to waive particular defenses, and absent a showing that defendant's pleas were not knowing, voluntary and understanding, the trial court did not abuse its discretion in denying defendant's motion to withdraw his pleas. MCR 6.311; *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

In conjunction with sentencing, defense counsel submitted a psychiatric evaluation by Dr. Abramsky. In rebuttal, the prosecutor referred to the opinions of two forensic psychiatric examiners who had evaluated defendant for competency to stand trial, who opined that defendant's mental illness was essentially feigned. The prosecutor further noted that defense counsel, after initially filing a notice of insanity defense, withdrew that notice. Defense counsel at the time objected on grounds that the prosecutor was misrepresenting the opinions of the forensic examiners, but now defendant asserts that the use of such evaluations violated his Fifth Amendment privilege against self-incrimination and his

statutory privilege not to allow the use of competency evaluations for any other purpose under MCL 330.2028(3); MSA 14.800(1028)(3). We reject these contentions.

First, because the objections now advanced were not presented to the trial court at the time of sentencing, the issue is unpreserved. Second, if defendant had a privilege, it was waived when defendant chose to introduce his own psychiatric evaluation. *People v Garland*, 393 Mich 215, 218-219; 224 NW2d 45 (1974). Third, the statutory privilege is limited to preventing use only of the opinion concerning competency, *People v Dobben*, 440 Mich 679, 692; 488 NW2d 726 (1992); as the prosecutor did not refer to the opinions concerning competency, but rather to observations and findings concerning the existence of mental illness, the statute was not violated. Fourth, defendant's guilt had already been established by plea, and this was the sentencing phase, not the guilt determination phase of the proceedings. Defendant's Fifth Amendment arguments are therefore misdirected. *People v Wright*, 431 Mich 282, 286; 430 NW2d 133 (1988).

Finally, with regards to defendant's challenge to the proportionality of his sentence for solicitation to commit murder, the facts of the case establish that the murder was not only one for hire, but that the motive was financial. Defendant wished to kill a former business associate in order to collect life insurance proceeds and pay off his own (defendant's) debts. There are no guidelines applicable to this offense, which is punishable by imprisonment for life or any term of years. MCL 750.157b(2); MSA 28.354(2). Although the offense is inchoate, and no one was actually killed or even injured, the offense is nonetheless extremely heinous. See *People v Jahner*, 433 Mich 490, 498; 446 NW2d 151 (1989). In *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992), this Court upheld a prison sentence of 40 to 60 years for the same offense, rejecting a contention that the sentence was excessive because the supposed killer would never have carried out the act. We likewise conclude that defendant's sentence does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly
/s/ Roman S. Gribbs