STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 4, 1999
v	No. 204068 Washtenaw Circuit Court
JOHN CHANDLER EWING, Defendant-Appellant.	LC No. 84-018867 FH

Before: Gage, P.J., and MacKenzie and White, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court for consideration as on leave granted. 454 Mich 921 (1997). Defendant appeals the circuit court's order denying his motions for relief from judgment and to withdraw his July 15, 1985, nolo contendere plea to third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b); MSA 28.788(4)(1)(d), for which he was sentenced to ten to fifteen years' imprisonment.[1]

According to the complainant, on the evening of September 29, 1980, she was riding her bicycle when a man grabbed her off the bicycle, dragged her into a ditch by the side of the road and then into a cornfield, and raped her. The complainant identified defendant as her assailant after a 1984 lineup[2] and again at the preliminary examination. After the preliminary examination, defendant was bound over on the charge of CSC III. On July 15, 1985, he pleaded nolo contendere to CSC III.

After defendant was sentenced, he moved to withdraw his plea. First, he argued that by charging him with CSC III, the prosecutor violated the terms of a plea agreement executed in a separate Washtenaw County case, in which defendant pleaded nolo contendere to CSC I and received a ten- to twenty-five-year sentence. Defendant contended that the prosecutor had promised to dismiss all future Washtenaw County criminal sexual conduct charges against him in exchange for his nolo plea to CSC I. Second, defendant argued that his plea was involuntary and made unknowingly because although he had been given one police report before trial, a second report had not been disclosed prior to trial. Defendant asserted that the subsequently disclosed six-page document, written by Ann Arbor Police Detective William Eskridge, detailed the "grave doubts" Eskridge, the investigating officer, had concerning the truthfulness of the CSC III complainant's account. Defendant stated that he would not

have agreed to plead nolo contendere to the CSC III charge had he known of the weaknesses in the case against him, as cataloged in the undisclosed report. Lastly, defendant argued that his plea was involuntary and made unknowingly because his trial counsel was not prepared for trial and had failed to make several evidentiary challenges before the scheduled trial date, which defendant alleged would have been successful and would have severely compromised the strength of the case against him.

In a July 24, 1989, opinion and order, the circuit court rejected defendant's arguments and denied his motion to withdraw his nolo contendere plea. Defendant sought leave to appeal the circuit court's decision and, on December 12, 1989, this Court vacated the circuit court's order and remanded the case for an evidentiary hearing to determine

> whether (1) the plea bargain alleged by defendant was put on the record in 1984 as required by MCR 6.101(F)(2); (2) unfulfilled promises of leniency were made to defendant by the prosecutor or by defendant's trial counsel . . .; (3) defendant's plea was coerced by his trial counsel's assertion that conviction after trial on CSC I would result in a harsher sentence than a plea of nolo contendere, or by counsel's unpreparedness on the date set for the CSC III trial. [*People v Ewing*, unpublished order of the Court of Appeals, entered December 12, 1989 (Docket No. 119707).]

After holding the mandated evidentiary hearing, the circuit court again denied defendant's motion to withdraw his nolo contendere plea to the CSC III charge by opinion dated May 13, 1994. The circuit court found "absolutely no credible evidence" that it, the prosecutor, or defendant's trial counsel, extended an offer to dismiss the CSC III charge if defendant pleaded nolo contendere to the CSC I charge. Further, the circuit court did not believe that defense counsel told defendant that he would receive a greater sentence if he chose to go to trial rather than offer a plea. Lastly, the circuit court addressed defendant's claim that he would have exercised his right to a jury trial if he and his attorney had had access to Eskridge's six-page report. The circuit court found that the police retained this document innocently and also questioned whether the report would have been admissible at trial. Regardless, the circuit court found that little evidence in the withheld report was unavailable to defense counsel at the time of defendant's plea.

Defendant filed a motion for rehearing, arguing primarily that the circuit court failed to comply with the directive of the Court of Appeals "to determine whether . . . the defendant's plea was coerced . . . by counsel's unpreparedness on the day set for the CSC III trial." In an April 5, 1995, opinion and order the circuit court reiterated that defendant himself confirmed at the plea hearing that no promises of leniency had been made to him in return for his nolo plea. The circuit court affirmed its finding that neither the prosecutor nor defense counsel promised leniency to defendant. Further, the circuit court again stated that it did not believe defense counsel told defendant that the court would impose a harsher sentence if he chose to go to trial on the CSC III charge. Finally, the circuit court rejected defendant's contention that he received ineffective assistance of counsel, causing him to plead nolo contendere to the CSC III charge. The circuit court observed that defense counsel had represented defendant in other criminal sexual conduct cases in Washtenaw County and other jurisdictions, and found that defense counsel had adequate time to prepare for trial in the instant matter. This Court denied defendant's

application for leave to appeal the circuit court's decision, and the Supreme court remanded for consideration as on leave granted.

Many of defendant's arguments on appeal center on his trial counsel's effectiveness in preparing for trial. Defendant first argues that the circuit court shirked its duty to determine whether his plea was coerced by counsel's failure to prepare adequately for trial and, therefore, remand is necessary. We disagree.

Findings of fact are sufficient if they are brief, definite, and pertinent. Detailed elaboration of factual findings is not necessary. MCR 2.517(A)(2); *People v Lewis*, 168 Mich App 255, 268; 423 NW2d 637 (1988). Findings are sufficient if it appears that the trial court was aware of the issues before it and applied the law correctly. *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995).

Admittedly, the circuit court's May 1994 opinion does not address the issue whether defendant's nolo contendere plea to CSC III was coerced by defense counsel's failure to prepare for trial. However, defendant moved for rehearing and in a subsequent opinion the circuit court stated:

> This Court finds that nothing was presented at the evidentiary hearing or at any other time that would indicate defendant's plea was coerced by defendant's trial counsel's being unprepared on the date set for trial.

Although defendant and his father testified that defense counsel was not ready for trial, the circuit court concluded, consistent with defense counsel's testimony, that counsel was prepared to try the case. We defer to the circuit court's resolutions of factual issues, especially where issues of credibility are concerned. *People v Cartwright*, 454 Mich 550, 555; 563 NW2d 208 (1997). Further, although defendant argues that defense counsel's failure to make several pretrial motions challenging the admissibility of evidence on various legal grounds indicates that defense counsel was unprepared, there is no reason to assume that defense counsel would have neglected to make these motions at some point during defendant's trial. Indeed, defense counsel testified that, if the CSC III matter had gone to trial, he would have sought a hearing to determine the admissibility of the similar acts evidence. Accordingly, we find that the circuit court's findings are adequate and there is no reason to remand this matter for further findings of fact.

Defendant next attacks the substance of the circuit court's ruling, arguing that, notwithstanding the circuit court's findings, his plea was coerced because his trial counsel was unprepared and ineffective because 1) he expected the case to be dismissed; 2) he was not aware of the serious shortcomings of the state's case because the six-page report had been withheld; and 3) Detective Eskridge's investigatory misconduct was calculated to assure defendant's conviction despite his innocence.

Defendant's nolo contendere plea is an admission of all the essential elements of a charged offense and, thus, is tantamount to an admission of guilt. *People v New*, 427 Mich 482, 493 n 10; 398

NW2d 358 (1986). Generally, "[t]here is no absolute right to withdraw a guilty plea once it has been accepted by the trial court. When a motion to withdraw a guilty plea is brought after sentencing, a trial court's decision will not be reversed absent a clear abuse of discretion resulting in a miscarriage of justice." *People v Montrose (After Remand)*, 201 Mich App 378, 380; 506 NW2d 565 (1993). When reviewing a claim of ineffective assistance of counsel arising from a guilty plea, this Court must determine whether the defendant's plea was voluntary and made understandingly. *People v Bordash*, 208 Mich App 1, 2; 527 NW2d 17 (1994).

Defendant's plea of nolo contendere waives consideration on appeal of his claims involving Detective Eskridge's allegedly underhanded investigatory tactics. Defendant alleges that Eskridge tricked him into coming to the Ann Arbor police station. Then, according to defendant, police held him at the police station against his will, failed to inform him of his *Miranda*[3] rights, refused to allow him access to his attorney, and ultimately forced him to have his photograph taken, which the police subsequently used in numerous photographic showups. Defendant's nolo contendere plea waives consideration of issues concerning the legality of the police search and seizure, see *People v Harvey*, 203 Mich App 445, 449; 513 NW2d 185 (1994), as well as his argument alleging the violation of his *Miranda* rights, see *People v Sells*, 164 Mich App 219, 222; 416 NW2d 388 (1987).

We also reject defendant's argument that counsel was rendered ineffective, and defendant's plea was coerced, by the totality of Eskridge's behavior, including the failure to disclose the exculpatory six-page report. The trial court found that the failure to disclose this report was unintentional. The six-page report was indeed exculpatory in that it expressed Eskridge's reasons for doubting the veracity of the complainant's allegations. However, the fifteen-page report that had been provided to defense counsel before the plea was also clearly skeptical regarding the complainant's story. While the six-page report included certain details that the fifteen-page report did not, the six-page report did not change what otherwise appeared to be a strong prosecution case into a weak one. Rather, it revealed additional problems in what already appeared to be a case with flaws. Further, the record of the evidentiary hearing reveals that defendant pleaded nolo contendere to the instant charge for pragmatic reasons that would not have been affected had the six-page report been disclosed prior to the plea. Defendant had already been sentenced to a ten-year minimum sentence in the CSC I case (the maximum sentence permissible in the instant case), and a trial of the instant CSC III case would have been expensive. We conclude that the circuit court did not err in concluding that defense counsel was not rendered ineffective, and defendant's plea was not rendered involuntary or unknowing, by the failure to disclose the six-page report.

Lastly, defendant contends that the circuit court abused its discretion by failing to apply the standard articulated in *People v Schirle*, 105 Mich App 381, 385; 306 NW2d 520 (1981), in determining whether unfulfilled promises of leniency were made by defendant's trial counsel. If the prosecutor made an unfulfilled promise of leniency to induce defendant to plead guilty to CSC III, see *People v Haynes (After Remand)*, 221 Mich App 551, 562; 562 NW2d 241 (1997), or if defense counsel made an unfulfilled promise of leniency or a misleading statement to defendant, *Schirle, supra* at 385, this might be grounds for granting a motion to withdraw the plea. Generally, however, this

Court will reject a defendant's assertion that promises of leniency were made where the defendant has sworn on the record that no such promises were made. *Haynes*, *supra* at 562.

Here, defendant swore on the record at the plea proceeding that promises of leniency were not made to him in connection with his nolo contendere plea to CSC III, and there is no evidence that the prosecutor or defense counsel conveyed to him any promises of leniency in connection with his CSC III plea. Rather, the allegation is that such promises were made in connection with his nolo plea to a separate CSC I charge. Accepting as true defendant's assertions that he was promised that the instant CSC III case would be dismissed if he tendered a nolo plea to the CSC I charge, when it became apparent that the prosecutor intended to pursue the instant CSC III charge, defendant should have sought to withdraw his plea in the CSC I case, not the case at hand.

Assuming that defendant can challenge the instant plea based on unfulfilled promises made in exchange for a plea in a different case, we conclude that the circuit court did not err in concluding that no such promises were made. There was evidence that the prosecutor or defense counsel may have discussed offering defendant leniency in connection with his nolo plea. Assistant Prosecutor John W. Stanowski sent a letter to defense counsel in which he stated, "If Defendant wishes to waive and plead to one C.S.S.-1st Degree [sic] and agree to clear up the rest of the C.S.C. cases, not including Homicide, then no other cases involving C.S.C. will be authorized in Washtenaw County." However, prosecutor Lynwood E. Noah promptly informed defense counsel that William Delhey, the chief prosecutor, was the sole person who could make an agreement in the CSC I matter. Ultimately, the agreement that the prosecutor and defense counsel reached in the CSC I case concerned the CSC I case only. Defense counsel testified that the prosecutor and circuit court agreed to allow defendant to plead nolo contendere to the CSC I charge with the understanding that if the court decided to sentence defendant to a minimum term of incarceration that exceeded the guidelines' recommended sentence of ten years, defendant would be allowed to withdraw his plea and proceed to trial. While defense counsel was hopeful that the prosecutor would come to regard pursuing the CSC III charge a waste of prosecutorial resources in light of the fact that defendant was already serving a life sentence for a CSC I conviction in Jackson County and, therefore, the circuit court would most likely accept a ten-year sentence in the Washtenaw CSC I case, which it did, there was no agreement that the CSC III charge would be dismissed.

As to the specific issue whether trial counsel, as opposed to the prosecutor, made representations that the case would be dismissed, the circuit court concluded that defendant was being truthful when he said at the time of his plea that no other promises were made to him other than those stated on the record. Defendant asserts, in effect, that the court was obliged to accept his and his family members' testimony that they believed, based on representations of counsel, that the CSC III charge would be dismissed. We conclude that the testimony, taken as a whole, permitted the circuit court to reach a contrary conclusion.

As for the instant plea, it is clear that defendant's plea of nolo contendere to the charge of CSC III was made both knowingly and voluntarily. Again, defendant acknowledged on the record that he made his plea understandingly and voluntarily and without a promise of leniency. Moreover, the record

does not support defendant's argument that his counsel's alleged failure to prepare for trial, whether caused by the police failure to turn over the Eskridge document or defense counsel's own negligence or ineptitude, caused him to plead nolo contendere against his will. As his own testimony made clear, defendant had serious doubts about the legality of Detective Eskridge's investigation before he decided to plead nolo contendere. Moreover, defendant was aware before he pleaded that the testimony of the prosecutor's prior acts witnesses might prove assailable in a *Golochowicz*[4] hearing. Further, both counsel and defendant were aware of the weakness of the complainant's account and identification testimony. Moreover, even if defendant's decision to plead nolo contendere was influenced by his trial counsel's advice to plead guilty to avoid the expense of trial on the CSC III charge, and trial counsel's advice seems bad on hindsight, defendant cannot now seek to withdraw his guilty plea on the basis that he received bad advice of counsel, especially where the facts show that defendant was aware of the possible defenses that were available to him. See *People v Jackson*, 203 Mich App 607, 613-614; 513 NW2d 206 (1994). In light of the evidence, the circuit court did not abuse its discretion by denying defendant's motion to withdraw his plea, and that decision did not result in a miscarriage of justice.

Affirmed.

/s/ Hilda R. Gage
/s/ Barbara B. MacKenzie
/s/ Helene N. White

[1] The sentence in the instant case is to be served concurrently with a ten- to twenty-five-year sentence imposed for a separate conviction of first-degree criminal sexual conduct (CSC I) in Washtenaw County, and a sentence of life imprisonment imposed in Jackson County for still another conviction of CSC I. See *People v Ewing*, 435 Mich 443; 458 NW2d 880 (1990).

[2] The lineup was held after the complainant was shown a composite sketch of defendant about four years after the incident. She viewed the lineup twice and did not identify defendant at the actual lineup, but afterward told the detective who accompanied her to the lineup that she thought defendant was the perpetrator.

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[4] *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982).