

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MIRCEA BOBIC,

Defendant-Appellant.

UNPUBLISHED

December 21, 1999

No. 201871

Recorder's Court

LC No. 95-000425

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

Pursuant to a plea agreement, defendant pleaded guilty to unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645, in exchange for the dismissal of an additional count of receiving or concealing stolen property over \$100 (R & C), MCL 750.535; MSA 28.803. He was sentenced to one to five years' imprisonment. He now appeals as of right. We affirm.

While this appeal was pending, this Court, while retaining jurisdiction, granted defendant's motion to remand to permit defendant to file a motion for an evidentiary hearing in an unpublished order entered January 21, 1998:

The Court orders that the motion to remand pursuant to MCR 7.211(C)(1) is GRANTED in part, and this matter is remanded to the trial court so that defendant-appellant may file, within 14 days, a motion to conduct an evidentiary hearing on his claim of ineffective assistance of trial counsel stemming from the failure to ensure that defendant could comprehend due to his difficulties with the English language and his [sic] failure to appoint an interpreter, a motion to withdraw his plea on the basis of his lack of comprehension due to his difficulties with the English language and a motion for appointment of an interpreter. Proceedings on remand are to be limited to these issues.

Following an evidentiary hearing, the trial court denied defendant's motion to withdraw his guilty plea.

A motion to withdraw a guilty plea after sentencing is within the trial court's discretion "and the trial court's decision will not be disturbed unless there is a clear abuse of discretion resulting in a

miscarriage of justice.” *People v Ovalle*, 222 Mich App 463, 465; 564 NW2d 147 (1997). In reviewing a claim of ineffective assistance of counsel arising out of a guilty plea, this Court focuses on whether the defendant’s plea was made voluntarily and understandingly. *People v Haynes (After Remand)*, 221 Mich App 551, 558; 562 NW2d 241 (1997). When a defendant seeks to withdraw his guilty plea on the basis that he was denied the effective assistance of counsel, we apply the test set forth in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that counsel’s performance fell below an objective standard of reasonableness and that he was prejudiced by the deficient representation. *Pickens, supra* at 338. “Whether a plea is unintelligently made depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases, not on whether counsel’s advice was right or wrong.” *Haynes, supra* at 558.

Our review of the record leads us to conclude that the trial court did not clearly err in finding that defendant was able to understand English sufficiently to tender an understanding plea without the aid of an interpreter. See *People v Brannon*, 194 Mich App 121, 128-129; 486 NW2d 83 (1992). Thus, the court did not abuse its discretion in denying defendant’s motion to withdraw his plea on that basis. For the same reason, the trial court properly denied defendant’s motion to withdraw his plea on the basis that trial counsel was ineffective for failing to obtain an interpreter.

Defendant next contends that counsel was ineffective due to a conflict of interest stemming from his representation of a codefendant. This issue was beyond the scope of this Court’s earlier remand order. Accordingly, our review of this issue is limited to mistakes apparent on the record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). Joint representation is not prohibited. However, a court should not permit it unless it determines on the record that it probably will not create a conflict of interest and the defendants agree to joint representation. MCR 6.005(F). The failure to comply with this rule does not, in itself, constitute reversible error. *People v Lafay*, 182 Mich App 528, 531; 452 NW2d 852 (1990). Moreover, a conflict of interest is never presumed or implied. *Id.* at 530. The defendant must show an actual conflict of interest that adversely affected his lawyer’s performance. *People v Smith*, 456 Mich 543, 557; 581 NW2d 654 (1998). Here, defendant has not made such a showing and thus has failed to establish a right to relief. The trial court did not err in refusing to consider this issue because it was beyond the scope of the order of remand. *People v Canter*, 197 Mich App 550, 567-568; 496 NW2d 336 (1992).

Defendant next contends that counsel was ineffective because counsel failed to advise him that his plea could affect his immigration status. Defendant relies on *People v Kadadu*, 169 Mich App 278; 425 NW2d 784 (1988), but that case has since been overruled, at least in part, by *People v Osaghae*, 460 Mich 529; 596 NW2d 911 (1999), wherein our Supreme Court held that “there is no state-law requirement that a defendant be” advised of the consequences of a plea on his immigration status. *Id.* at 533. Moreover, *Kadadu* does not mandate that a defendant be allowed to withdraw his plea under such circumstances; it held only that the trial court did not abuse its discretion in allowing the defendant, who had been ordered deported, to withdraw his plea. Here, defendant has not shown that he has been ordered deported or is in fact subject to deportation as a result of his plea. Thus, even if counsel

failed to advise defendant of the effect of his plea on his immigration status, defendant has not shown that he was prejudiced by that failure. Accordingly, we conclude that defendant failed to meet the high threshold necessary for withdrawing a plea for reasons relating to the consequences thereof. *Osaghae, supra*.

Defendant finally claims that he is entitled to relief because his plea bargain was illusory and counsel failed to advise him of that fact. Defendant argues that he pleaded guilty to R & C in exchange for the dismissal of a charge of operating a chop shop, MCL 750.535a; MSA 28.803(1), but the consideration for his plea was lacking because double jeopardy precludes multiple convictions and punishments for both of these offenses when they are predicated upon the theft and dismantling of the same vehicle. However, the record indicates that defendant's plea bargain was the result of different charges pending in a different case before a different judge. In this case, defendant pleaded guilty to UDAA in exchange for the dismissal of the R & C charge. To the extent defendant contends the prohibition against double jeopardy was somehow implicated by the chop shop charge in the other case, and the R & C charge in this case, both charges were dismissed and jeopardy does not attach to charges dismissed as part of a plea agreement. *People v Mezy*, 453 Mich 269, 276; 551 NW2d 389 (1996). Accordingly, we find that defendant has failed to establish a right to relief.

Affirmed.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Brian K. Zahra