

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DOUGLAS FRISHETT,

Defendant-Appellee.

UNPUBLISHED

January 11, 2000

No. 217322

Muskegon Circuit Court

LC No. 97-040511-FH

Before: Zahra, P.J., and Kelly and McDonald, JJ.

PER CURIAM.

Plaintiff appeals by leave granted from the January 8, 1999 order of the trial court granting defendant Douglas Frishett's motion to withdraw his plea. We affirm.

Defendant was originally charged with criminal sexual conduct, fourth degree, MCL 750.520e; MSA 28.788(5), and attempted criminal sexual conduct, third degree, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), MCL 750.92; MSA 28.287. On the day of trial, defense counsel moved to withdraw as counsel, giving as his reason for wanting to withdraw defendant's failure to keep appointments in order to prepare for trial. He also informed the court that he and defendant had a difference of opinion as to defendant's innocence. The court warned defendant that if it allowed counsel to withdraw, it could order defendant jailed to ensure that he was available for any new counsel. It then ordered defendant and defense counsel to meet in a nearby conference room in order to discuss an apparent plea offer. The prosecutor accompanied them at defense counsel's request. When the parties emerged, they announced an agreement; defendant would enter a plea of nolo contendere to CSC IV, and the attempted CSC III charge would be dismissed. The court accepted defendant's plea and later sentenced defendant as an habitual offender, MCL 769.10; MSA 28.1082, to two to three years' imprisonment.

Defendant later moved to withdraw his plea, contending that his plea was not made knowingly, intelligently and voluntarily. Defendant maintained he was effectively coerced into the no contest plea because of the conduct of his lawyer. At the hearing on defendant's motion, Edward Anderson, defendant's trial counsel, testified that his strategy had been to attempt to get the attempted CSC III charge dismissed. The CSC IV charge was supported by a written statement signed by defendant

admitting his complicity. Anderson hoped to avoid substantial incarceration for defendant. He had moved to withdraw as counsel because defendant had changed his position on the charges, saying that he wanted to contest both charges. When the court ordered them to discuss a plea offer, Anderson told defendant that sexual assault cases were not a very popular issue due to a recent highly publicized case in the area involving the kidnapping and murder of a child; the victim in plaintiff's cases was a fourteen-year-old girl.

Defendant presented a somewhat different version of events. He denied ever admitting guilt in the CSC IV case; he had told the polygraph examiner that he may have touched the victim's breast, but not "in a meaning manner or anything," apparently meaning that any touching was inadvertent. He claimed that Anderson had told him that he would move to withdraw as counsel because he did not want to take the case to trial. Defendant also said that he did not understand that a plea of *nolo contendere* meant that he would not be able to contest the charges; however, he later admitted that the court explained the legal significance of the plea.

The court granted defendant's motion to withdraw the plea, finding that, although counsel's representation did not fall below an objective standard of effectiveness, the conduct of counsel, together with the trial court's failure to administer an oath to defendant before advising him of the consequences of his plea and the failure to inform defendant that the court had discretion to set a maximum punishment that was lower than the maximum allowable for the offense, rendered defendant's plea involuntary.

We review a trial court's decision to set aside a plea-based conviction for an abuse of discretion. *People v Ovalle*, 222 Mich App 463, 465; 564 NW2d 147 (1997). To set aside a guilty plea, a defendant must show error in the plea proceeding. MCR 6.311(B); *People v Montrose*, 201 Mich App 378, 380; 506 NW2d 565 (1993). However, not all errors in plea proceedings entitle a defendant to withdraw his plea; the errors must be such that a defendant's plea was not accurate, or was made involuntarily or without understanding. See *In re Oakland Co Prosecutor*, 191 Mich App 113, 120, 122; 477 NW2d 455 (1991). This Court may consider the record as a whole to determine whether a plea was voluntary. See *People v Bettistea*, 181 Mich App 194, 197; 448 NW2d 781 (1989).

I. CUMULATIVE ERROR

The trial court's order granting defendant's motion to withdraw his plea is premised upon a cumulative error analysis. Otherwise harmless error may result in reversal when the cumulative effect of a number of errors is found to have denied defendant of his right to a fair trial. *People v Skowronski*, 61 Mich App 71, 77; 232 NW2d 306 (1975). A prerequisite to a finding of cumulative error is actual error in the proceedings. Mere irregularity in the proceedings does not constitute error. As more fully set forth below, because we find that defense counsel was not ineffective and we find no error in the court's failure to inform defendant of the court's discretion to impose a sentence less than the maximum term of incarceration, we find that a cumulative error analysis cannot support the trial court's decision to allow defendant to withdraw his plea.

II. CONDUCT OF DEFENSE COUNSEL

Plaintiff contends that the court abused its discretion by considering the conduct of counsel in determining that the plea was involuntary, since the court had already determined that counsel was not ineffective.¹ We agree. To establish a claim of ineffective assistance of counsel defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing norms. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). Moreover, under Michigan law, counsel's ineffective assistance must be found to have been prejudicial in order to reverse an otherwise valid conviction. *Id.* at 314. In this case, the court specifically found that counsel's assistance was not ineffective because it did not fall below an objective standard of reasonableness. Thus, the court's consideration of counsel's "less than optimal" assistance is irrelevant to the issue of whether there existed error in the plea proceedings. *Montrose, supra* at 380.

Moreover, there is no indication on the record that trial counsel's assistance was inadequate in any way. Counsel sought to withdraw from the case because defendant had refused to cooperate in contacting witnesses and wanted counsel to change his trial strategy. There is also some indication in the record that defendant wanted counsel to offer perjured testimony. Therefore, we find that the trial court abused its discretion by considering counsel's performance in determining that defendant's plea was involuntary.

III. FAILURE TO INFORM DEFENDANT OF COURT'S DISCRETION TO SENTENCE BELOW THE MAXIMUM TERM OF INCARCERATION

We also find that the trial court improperly considered its failure to inform defendant of the court's discretion to sentence him to less than the maximum term of incarceration. We again reiterate that defendant must demonstrate error in the plea proceedings. *Montrose, supra* at 380. However, there is no requirement that the court inform a defendant that it has discretion to impose a sentence less than the maximum term of incarceration. The Supreme Court held in *Guilty Plea Cases*, 395 Mich 96, 118; 235 NW2d 132 (1975), that a judge is not required "to inform the defendant of all sentence consequences - only the maximum sentence, any mandatory minimum and . . . if he is on probation or parole, the possible effect on his status as a probationer or parolee." See also MCR 6.302(B)(2), which incorporates this holding.

IV. FAILURE TO PLACE DEFENDANT UNDER OATH AT THE PLEA PROCEEDING

The trial court also held that the failure to place defendant under oath before his plea contributed to its finding that defendant's plea was involuntary. Because we have found that the court improperly considered the other two factors, we must determine whether the sole fact that defendant was not under oath at the plea proceeding requires a finding of involuntariness. MCR 6.302(A) requires that the court place the defendant under oath before accepting a plea of guilty or nolo contendere. Plaintiff argues that under *Guilty Plea Cases, supra*, the failure to administer an oath does not render the plea involuntary. However, *Guilty Plea Cases* merely stopped the practice of automatically reversing convictions for technical violations of the rules concerning the taking of guilty pleas. *Guilty Plea Cases* did not strip trial courts of the discretion to determine that a rule violation in a particular case served to render a plea involuntary. The court must find that as a result of the rule violation, the plea was rendered involuntary. In this case, the court specifically held in its order denying the motion for reconsideration that the failure

to place defendant under oath “deprived the court of an important mechanism . . . in determining whether defendant was telling the truth [at the time of his motion to withdraw his plea or at the plea proceeding.]”² In so holding, the trial court found either: (1) defendant’s statements under oath relating to the motion to withdraw his plea were more credible than his statements at the plea proceeding; or (2) that the court could not find by a preponderance of the evidence that defendant was truthful when he offered his plea. This Court cannot resolve questions of credibility or conflicting evidence; such questions must be resolved by the trial court. See *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). We therefore find that the trial court did not abuse its discretion. The failure to place defendant under oath at the plea proceeding constituted error and the trial court’s findings support the conclusion that the plea was not voluntarily, intelligently and knowingly made.

Affirmed.

/s/ Brian K. Zahra

/s/ Michael J. Kelly

/s/ Gary R. McDonald

¹ We note that defendant has challenged the court’s conclusion that counsel was not ineffective. Because defendant did not file a claim of cross-appeal, he has presented nothing for review. MCR 7.207(B).

² Admittedly, defendant’s testimony at the hearing on his motion to withdraw his plea was conflicting and contradictory, especially with respect to his understanding of the meaning of a nolo plea. He first testified that he believed that he would still be able to contest the charges; on cross-examination, however, he admitted that the trial court had explained the meaning of a nolo plea to him. Evidently, the trial court concluded that it would take as true defendant’s sworn testimony.