STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 26, 2000
v	No. 211374 Monroe Circuit Court
BASIL A. PERRY, Defendant-Appellant.	LC No. 97-28166-FH

Before: Cavanagh, P.J., and Holbrook, Jr. and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his plea-based conviction of two counts of attempted third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). He was sentenced to serve twenty-four to sixty months in prison. We reverse and remand to allow defendant to withdraw his plea.

Defendant is a citizen of Jamaica and has been a resident alien of the United States for nearly thirty years. He was originally charged with four counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788, and with four counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). All eight counts arose out of alleged sexual relations defendant had with a young girl who was between the ages of thirteen and sixteen when the crimes occurred between August 8, 1994, and May 19, 1995.

At the time of the preliminary examination held on March 11, 1997, the complainant was incarcerated for running away from home and violating a court order to stay away from defendant. She testified that the sexual acts were voluntary and that defendant never forced himself on her. Apparently, she was living with defendant and caring for defendant's nine-year-old son while defendant was at work. She stated that defendant was supporting her. She also stated that she did not make a complaint to the police and that she did not speak to officers until two years after the incident when she was arrested for running away and violating the court order. After hearing the victim's testimony, defendant was bound over on two counts of third-degree criminal sexual conduct. Those counts were later reduced to two counts of attempted CSC III.

On July 29, 1997, defendant signed a plea agreement which was entered on July 30, 1997, under which agreement defendant pleaded no contest to two counts of attempted CSC III, and the prosecution dismissed the two counts of CSC III. Also, defendant's minimum sentence would not exceed twenty-four months. On September 2, 1997, defendant expressed a desire to withdraw his plea, and his counsel sought to withdraw citing a breakdown in the attorney/client relationship. The court allowed counsel to withdraw and new counsel was appointed.

Defendant restated his desire to withdraw his plea at a pretrial hearing on September 16, 1997. At that hearing, the trial judge noted that he was familiar with the victim who had appeared before him in probate court. Defendant filed a written motion to withdraw his plea claiming that his first counsel failed to inform him that he would be subjected to deportation because of the plea-based conviction. He also professed his innocence.

At the motion hearings, which were held October 21, 1997 and November 18, 1997, defendant argued that the prosecution would not be prejudiced because there had already been considerable delay between the time of the alleged offenses and the charges being levied. He noted that he had not pleaded guilty, and that the lone complainant had since recanted her story. The prosecution expressed its opinion that the letter presented by the defendant evidencing the victim's recantation was an attempt to perpetrate a fraud on the court. When the prosecution challenged the authenticity of the victim's letter, the judge noted that he had received letters from the victim while he was sitting as a probate judge, and that there was a possibility of doing a comparison. The judge then disqualified himself and referred the matter to the clerk for reassignment to another judge. The authenticity of the letter was never established.

On December 5, 1997, the parties appeared before the newly assigned judge and made their respective arguments. The court put the matter over until December 18, 1997. After hearing additional arguments, the court noted that the charges were obviously old. Looking at the age of the case, the fact that the case was delayed, that the victim had recanted her story and that defendant pled no contest, the court, nevertheless, ruled that the plea would stand and the defendant was thereafter sentenced to serve twenty-four to sixty months in prison.

Once a guilty plea or a plea of nolo contendere has been accepted by the trial court, there is no absolute right of a defendant to withdraw it. *People v Eloby (After Remand)*, 215 Mich App 472, 474-475; 547 NW2d 48 (1996). "[T]he court in the interest of justice may permit an accepted plea to be withdrawn before sentence is imposed unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea." MCR 6.310(B). The decision to allow the withdrawal of a plea before sentencing lies within the sound discretion of the trial court. *People v Spencer*, 192 Mich App 146, 150; 480 NW2d 308 (1991).

Recent Michigan decisions have held that a defendant's ignorance of the deportation consequences of his plea-based conviction is insufficient grounds for allowing him to withdraw his guilty plea. In *People v Osaghae (On Reconsideration)*, 460 Mich 529; 596 NW2d 911 (1999), our Supreme Court held that the trial court erred in setting aside the defendant's guilty plea, in part, because there is no state-law requirement that a defendant be advised of the consequences of a plea under

federal immigration law. *Id.*, 533. This Court subsequently ruled that deportation is a collateral consequence of a plea that is "the fulfillment of a federal immigration policy, . . . unrelated to the trial court's inquiry" whether to allow withdrawal of a plea. *People v Davidovich*, 238 Mich App 422, 431; 606 NW2d 387 (2000).

This case is distinguishable from *Osaghae* and *Davidovich*, however, in that defendant did not simply argue that he was not advised of the consequences of his plea. He also claimed his innocence. Additionally, defendant here pled "no contest," whereas the defendants in *Osaghae* and *Davidovich* pled guilty.

Defendant was originally charged with four counts of first-degree criminal sexual conduct and four counts of third-degree criminal sexual conduct. He was bound over for trial on only two counts of CSC III. Those charges were further reduced by the prosecution to two counts of attempted CSC III. After defendant's plea was accepted, the victim wrote a letter apparently recanting her testimony given at the preliminary examination. There had been a delay of more than two years between the time of the alleged offenses and the preliminary examination. There was another delay of nearly eleven months from the time defendant first expressed his desire to withdraw his plea until sentencing.

Under the circumstances of this case, we find that defendant met his burden "to establish a fair and just reason for withdrawal of the plea." *People v Jackson*, 203 Mich App 607, 611; 513 NW2d 206 (1994). The delays in this matter were not the fault of defendant. Defendant expressed his desire to withdraw his plea just over one month after it was entered. Although the prosecution may have difficulty locating witnesses because of the delay in filing the charges, the prosecution has not established that substantial prejudice would arise from the withdrawal of the no contest plea. *Id.* at 611-612. Although we agree that defendant's ignorance of the deportation consequences of his plea by itself is not sufficient, we find that the other factors cited by defendant constitute fair and just reason to allow withdrawal of his plea. It cannot be said that defendant's motive in requesting withdrawal of his plea was based solely on a frivolous concern regarding sentencing; it was also based on the lack of evidence and his professed innocence. Consequently, the trial court abused its discretion by denying defendant's motion to withdraw his plea of no contest.

Defendant also argues ineffective assistance of counsel for his first counsel's failure to inform him that a conviction for criminal sexual conduct could result in deportation. Defendant makes no other claim of error concerning his counsel. Respondent's failure to request an evidentiary hearing on his claim of ineffective assistance of counsel limits our review to errors apparent on the record. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). "[W]hen a defendant argues ineffective assistance of counsel in the context of a guilty plea, the defendant is essentially arguing that counsel failed to provide sufficient information regarding the consequences, elements, or possible defenses of the plea. Absent sufficient information, the plea would be unknowing and, consequently, involuntary." *Davidovich*, *supra* at 427. Nevertheless, in accordance with the Supreme Court's ruling in *Osaghae*, *supra*, counsel's

failure to inform defendant of the collateral deportation consequences of his plea would not constitute ineffective assistance of counsel.

Reversed and remanded to allow defendant to withdraw his plea.

/s/ Mark J. Cavanagh
/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly