STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 20, 2002
v	No. 234440 Kent Circuit Court
WILLIAM ANSON BRADLEY, SR., Defendant-Appellant.	LC No. 96-009826-FH

Before: Whitbeck, C.J., and Zahra and Murray, JJ.

PER CURIAM.

Defendant William Anson Bradley, Sr., pleaded guilty of first-degree criminal sexual conduct (CSC),[1] for which the trial court sentenced him to serve six to twenty years in prison. Because his conviction involved criminal conduct predating the amendment of Const 1963, art 1, § 20, that eliminated appeals as of right in guilty-plea cases, Bradley is entitled to appeal as of right.[2] As a result, he claims an appeal in this case. We affirm.

I. Procedural History

The prosecutor alleged that, in 1993 and 1994, Bradley committed CSC against his son and daughter, both of whom were minors. Following Bradley's arrest in 1996, the prosecutor brought Bradley to trial, and a jury convicted him of two counts of CSC. The trial court then sentenced Bradley to twelve to thirty years in prison. When Bradley appealed, this Court reversed his conviction, and remanded the case for a new trial on the basis of a prejudicial evidentiary error that occurred at trial.[3] This Court did not retain jurisdiction.[4]

On remand, the prosecutor proceeded to retry Bradley in front of a jury. However, evidently, on the fourth day of trial Bradley and the prosecutor reached a plea agreement, prompting the trial court to hold a plea hearing that day. The trial court advised Bradley of all

[1] MCL 750.520b(1)(b).

[2] See *People v Kaczmarek*, 464 Mich 478, 481-482; 628 NW2d 484 (2001).

[3] See *People v Bradley*, unpublished per curiam opinion of the Court of Appeals, issued August 13, 1999 (Docket No. 204652), slip op at 3-4.

[4] *Id*. at 4.

the rights he was forgoing by entering a plea, including: the right to a jury trial or a bench trial; the presumption of innocence; the prosecutor's burden of proving his guilt beyond a reasonable doubt; the right to cross-examine witnesses against him; the right to have the trial court compel witnesses to testify on his behalf; and the right to remain silent. The trial court paused five times while listing these rights to ask Bradley, "Do you understand that?" Each time Bradley responded, "Yes." The trial court also informed Bradley:

> Do you further understand that if your plea is accepted here today, you'd be giving up any claim that the plea was the result of promises or threats that were not disclosed at this proceeding or that it was not your own choice to enter this plea?

Bradley again responded, "Yes."

The trial court then asked the prosecutor to explain the plea agreement:

> MS. BRINKMAN [the prosecutor]: Your Honor, that upon successful plea and sentence to Count One, the People will dismiss Count Two, and we had agreed with the Court to a sentence of six to twenty years.
>
> THE COURT: Well, my understanding was that the minimum would be six. Would you like to see a twenty-year maximum? Mr. Doele [defense counsel] would like to see a fifteen-year maximum. I'm not getting involved in sentencing at this point, not making any commitment. I want to see the pre-sentence report and then it will be my call at sentencing where [sic] the maximum will be within that range.
>
> Is that correct, Miss Brinkman?
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> MS. BRINKMAN: That's not what my understand was, but –
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> MR. DOELE: Wait, we're not going to negotiate this in this courtroom.
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> THE COURT: Again, that was my understanding after talking to counsel, that the minimum would be six. Miss Brinkman, you'd like to see at least a twenty-year maximum on it. Mr. Doele would like to see no more than a fifteen-year maximum on it.
>
> I'm not getting involved in the negotiations. Obviously, I will pronounce final sentence at a later date, and the maximum will be up to the Court.
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> MR. DOELE: That's my understanding, your Honor.
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> MS. BRINKMAN: Okay, your Honor.
>
> THE COURT: All right.
>
> *Mr. Bradley, has the complete plea agreement been correctly stated?*

THE DEFENDANT: *Yes.*[5]

Bradley then pleaded guilty of the allegations in the first count. Bradley indicated that his guilty plea was not the product of threats or promises, and that it was his own choice to plead guilty.

After Bradley provided factual support for his plea, the trial court asked the prosecutor whether she had any additional questions. She asked whether Bradley "would also admit to [the crime against his daughter], even though Count One is only one count [of criminal sexual conduct against his son]." Defense counsel responded that Bradley admitting to CSC against his daughter was "not part of the agreement." The prosecutor conceded, "I know that," and the trial court added, "That's my understanding, that he's pleading guilty to Criminal Sexual Conduct First Degree involving his son . . ., just on Count One, and Count Two would be dismissed." The prosecutor then clarified that she was asking whether Bradley would admit the conduct for his daughter's sake. Defense counsel declined this offer on behalf of Bradley, and the trial court said, "That can be covered at a later date."

After the hearing, the trial court noted in writing in the record:

> All parties present in open court for the ***fourth*** day of jury trial. The People are represented by Helen Brinkman, assistant prosecuting attorney, and the defendant is represented by Joseph Doele.
>
> Defendant plead [sic] guilty to Count 1 (CSC 1), Count 2 was dismissed, and the prosecutor's office recommends 6-20 years. A presentence investigation was ordered, and defendant's bond was continued pending sentencing . . . .[6]

The trial court later sentenced Bradley consistently with the minimum and maximum sentence range it understood that the prosecutor wished to have imposed on him. The judgment of sentence reflects that a single charge against Bradley and indicates that he pleaded guilty of the charge.

Defense counsel Doele filed a claim of appeal on behalf of Bradley in May 2001. When Doele failed to file a brief by February 2002, this Court dismissed the appeal. Bradley then retained a new attorney, Mary Owens, who filed a timely motion to reinstate the appeal in April 2002. This Court reopened the case on April 16, 2002, but subsequently denied the motion to remand that Owens filed.

II. Involuntary Plea

Bradley first contends that his guilty plea must be set aside because it was involuntary, arguing that Doele never told him that he could be sentenced to a minimum six-year prison sentence. Bradley asserts that Doele told him that the sentence would be a maximum of six years in prison, and that it was likely that he would be out of prison after thirty or thirty-six months.

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[5] Emphasis added.

[6] Emphasis in the original.

As the prosecutor points out, MCR 6.311(C) provides:

> A defendant convicted on the basis of a plea *may not raise on appeal* any claim of noncompliance with the requirements of the rules in this subchapter, *or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court*, raising as a basis for withdrawal the claim sought to be raised on appeal.[7]

MCR 6.311(A) states that a defendant may file a motion to withdraw a plea "within the time for filing an application for leave to appeal," which is twenty-one days "after entry of the judgment or order to be appealed from or within other time as allowed by law or rule."[8]

Bradley did file a motion to withdraw, but did so at the same time he filed his brief in this appeal – about one year after the judgment of sentence. This was, plainly, an untimely motion to withdraw the plea. MCR 6.311(C) and the standard of review that applies when this Court reviews a trial court's decision to grant or deny a motion to withdraw a plea contemplate having a ruling to review on appeal.[9] However, nothing in the record we have available reveals that the trial court ever ruled on the motion.[10] Thus, we have nothing to review.[11]

Owens implores us to be as flexible as possible in applying various procedural requirements in order to accommodate her willingness to provide Bradley zealous representation on the heels of Doele's alleged laxity in representing Bradley on appeal. Still, she does not claim that Bradley is exempt from this preservation requirement.[12] Thus, as the record of the plea hearing suggests nothing other than a completely knowing, voluntary, and accurate plea from Bradley, we are not at liberty to consider this issue further.

III. Illusory Plea

Bradley also claims that his guilty plea must be set aside because the plea agreement was illusory. Specifically, Bradley argues that the plea agreement was illusory because the prosecutor's and trial court's comments at the plea hearing suggest that he might be tried in the future for his alleged offense against his daughter. We can assume solely for the sake of analysis that Bradley's failure to move to withdraw his plea on this ground does not implicate the

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[7] Emphasis added.

[8] MCR 7.205(A).

[9] See *People v Wilhite*, 240 Mich App 587, 594-597; 618 NW2d 386 (2000) (examining the trial court's exercise of discretion in granting the motion to withdraw the plea).

[10] Nor does Bradley explain how it would have been possible for the trial court to decide that untimely motion after this Court had already taken jurisdiction over the case. See, generally, MCR 7.208(B).

[11] See *People v Johnson*, 210 Mich App 630, 632; 534 NW2d 255 (1995).

[12] The brief filed in this appeal insinuates that Doele's performance as Bradley's attorney denied Bradley of his right to effective assistance of counsel in a number of respects. However, Bradley has not presented us with an ineffective assistance of counsel claim. See MCR 7.212(C)(5).

preservation requirement in MCR 6.311. Nevertheless, the record simply does not support Bradley's assertion that the plea bargain is illusory, and therefore may be withdrawn,[13] because the prosecutor could reinstate the charge involving his daughter.

At the plea hearing, the prosecutor attempted to have Bradley admit his alleged criminal conduct against his daughter, but apparently did so in order to help Bradley's daughter heal from the trauma she suffered. In fact, the prosecutor clearly and unequivocally agreed on the record to dismiss the second CSC charge in return for a guilty plea. The trial court expressed this as its understanding of the agreement at the hearing and in writing in a memorandum. The trial court accepted Bradley's plea, which was the centerpiece of the agreement. On appeal, the prosecutor does not contend that it would be possible to reinstate the second CSC charge against Bradley in the future for any reason. Because the trial court accepted the plea, we see no basis on which the prosecutor could now or in the future reinstate the CSC charge.[14] This plea bargain was of benefit to Bradley; it was not illusory.[15] Therefore Bradley is not entitled to withdraw his plea.

Affirmed.

/s/ William C. Whitbeck
/s/ Brian K. Zahra
/s/ Christopher M. Murray

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[13] See *People v Mrozek*, 147 Mich App 304, 306-307; 382 NW2d 774 (1985).

[14] See *People v Siebert*, 201 Mich App 402, 427; 507 NW2d 211 (1993), aff'd on other grounds 450 Mich 500 (1995).

[15] See *People v Graves*, 207 Mich App 217, 218; 523 NW2d 876 (1994), citing *Mrozek*, *supra*.