

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EARL DONALD,

Defendant-Appellant.

UNPUBLISHED

May 20, 2008

No. 265032

Allegan Circuit Court

LC No. 98-011057-FH

Before: Saad, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant pleaded no contest to assault with intent to commit criminal sexual penetration and to being a third habitual offender in 1999, and he pleaded guilty to violating his probation in 2001. Defendant requested appointed counsel to appeal the sentence following his guilty plea, and the trial court denied the request in 2001. Instead of appealing that denial, defendant asked the trial court in 2002 to appoint counsel to appeal both of his plea-based convictions. The trial court again denied his request. Defendant did not appeal that denial and, instead, in 2003 he filed a complaint for superintending control in this Court in an effort to compel the trial court to appoint him counsel. This Court denied the complaint and the Michigan Supreme Court dismissed his application for leave to appeal. Defendant renewed his request for appointed counsel in the trial court after the United States Supreme Court issued its opinion in *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). In *Halbert*, the Supreme Court ruled that the Due Process and Equal Protection Clauses require the appointment of appellate counsel for indigent defendants who seek access to first-tier review of their guilty or no contest pleas in this Court. The trial court again denied defendant's request and this Court granted defendant's application for leave to appeal. We held this case in abeyance pending the outcome of the Michigan Supreme Court's decision in *People v Houlihan*, 474 Mich 866; 703 NW2d 473 (2005). Our Supreme Court issued an order in *Houlihan* on April 18, 2008. *People v Houlihan*, ___ Mich ___, 746 NW2d 879 (2008).

As a preliminary matter, we reject defendant's argument that the trial court was required to appoint counsel because his underlying plea-based conviction for assault with intent to commit criminal sexual penetration occurred before the enactment of MCL 770.3a.¹ Though the

¹ The statute prohibited a court from appointing counsel for a defendant who pleaded guilty,
(continued...)

statute did not become effective until April 1, 2000, after defendant was convicted, defendant's conviction nonetheless occurred after the 1994 amendment of our state constitution that eliminated the right to appeal from plea-based convictions. Const 1963, art 1, § 20. Pursuant to that amendment, then-existing MCR 6.425(F)(1)(c), and our Supreme Court's decision in *People v Bulger*, 462 Mich 495; 614 NW2d 103 (2000), defendant was not entitled to the appointment of appellate counsel. See *People v James*, 272 Mich App 182, 186; 725 NW2d 71 (2006).

We further hold that defendant is not entitled to his requested relief pursuant to *Halbert*, *supra* because *Halbert* does not apply retroactively under the facts of this case. See *Houlihan*, *supra*; *Simmons v Kapture (On Rehearing)*, 516 F3d 450 (CA 6, 2008). We also agree with and adopt the analysis set forth in Justice Markman's dissent in the original abeyance order in *Houlihan* that explains that *Halbert* is a new rule that has no retroactive application here. *People v Houlihan*, 474 Mich 958, 960; 706 NW2d 731 (2005); see also *Teague v Lane*, 489 US 288, 310; 109 S Ct 1060; 103 L Ed 2d 334 (1989).

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski

(...continued)

guilty but mentally ill, or nolo contendere, except under limited, specified circumstances. See *People v James*, 272 Mich App 182, 187; 725 NW2d 71 (2006). The statute was repealed by 2006 PA 655, effective January 9, 2007.