

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD LEE KRAMP, II,

Defendant-Appellant.

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UNPUBLISHED

July 17, 2008

No. 278762

Washtenaw Circuit Court

LC No. 06-000398-FH

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Our Supreme Court has remanded this case for consideration as on leave granted. Defendant appeals the trial court's denial of his motion to withdraw his guilty plea for criminal sexual conduct in the third degree (CSC III), MCL 750.520d(1)(a). On July 18, 2006, defendant was sentenced to one to 15 years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends that he is entitled to withdraw his plea because his trial counsel erroneously advised him that he was eligible for probation for his offense.

A trial court's denial of a defendant's motion to withdraw a guilty plea is reviewed for an abuse of discretion. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997). An abuse of discretion occurs when the trial court's decision falls outside a principled range of outcomes. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). To the extent defendant's arguments rest on a claim of ineffective assistance of counsel, our review is limited to the mistakes apparent on the existing record, because an evidentiary hearing was not conducted. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

There is no absolute right to withdraw an accepted guilty plea. *People v Gomer*, 206 Mich App 55, 56; 520 NW2d 360 (1994). Courts may permit a guilty plea to be withdrawn in the interest of justice before sentencing unless withdrawal of the plea would substantially prejudice the ability to prosecute the defendant because of the prosecutor's reliance on the plea. MCR 6.310(B)(1). In the absence of a procedural error in receiving the plea, a defendant must establish a fair and just reason for withdrawal of the plea. *Harris, supra* at 131; *People v Jackson*, 203 Mich App 607, 611; 513 NW2d 206 (1994). Examples of fair and just reasons for withdrawal include when the plea resulted from fraud, duress or coercion, *Gomer, supra* at 58, when the plea involved erroneous legal advice coupled with actual prejudice to legal rights,

*People v Jackson*, 417 Mich 243; 334 NW2d 371 (1983); *People v Shannon*, 134 Mich App 35, 38; 349 NW2d 813 (1984), or if the bargain on which the plea was based was illusory, i.e., that the defendant received no benefit from the bargain, *Harris, supra* at 132. If the facts of the case indicate that the plea was voluntary, it will be upheld regardless whether the defendant received consideration in return. *Id.* However, MCR 6.310(B)(2)(a) and (b) provide that a defendant is entitled to withdraw the plea if the plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation, or the trial court states that it will sentence defendant to a specified term or within a specified range, and then finds that it is unable to do so.

To the extent that defendant's claim rests on an implicit assertion that his plea was due to the ineffective assistance of counsel, the proper focus is on whether the plea was made voluntarily and understandingly. *In re Oakland County Prosecutor*, 191 Mich App 113, 120; 477 NW2d 455 (1991). "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." *People v Haynes*, 221 Mich App 551, 559; 562 NW2d 241 (1997), citing *In re Oakland County Prosecutor, supra* at 122. In addition, "requests to withdraw pleas are generally regarded as frivolous where the circumstances indicate that the defendant's true motivation for moving to withdraw is a concern regarding sentencing." *Haynes, supra* at 559, citing *People v Holmes*, 181 Mich App 488, 492; 449 NW2d 917 (1989). Therefore, counsel's incorrect prediction concerning a defendant's sentence is generally regarded as insufficient to support a claim of ineffective assistance of counsel, or to establish good cause for withdrawal of a plea. *Haynes, supra* at 559, citing *In re Oakland County Prosecutor, supra* at 124; see also *People v Wilhite*, 240 Mich App 587, 596-597; 618 NW2d 386 (2000).

In this case, defendant was charged with CSC III. In exchange for defendant's plea of guilty to that charge, the prosecutor agreed to bring no further charges based on defendant's additional penetrations of the victim or his use of a computer to communicate with the victim prior to the sexual activity. The trial court complied with the requirements of MCR 6.302, including informing defendant of his maximum 15-year sentence. The trial court repeated defendant's agreement with the prosecutor, and specifically asked, "Other than that, did anyone promise you anything else to get you to plead guilty?" Defendant replied, "No, sir." Defendant also provided the same response to the trial court's question as to whether anyone had threatened, coerced, or forced him to plead guilty. After questioning defendant about the circumstances of his sexual intercourse with the victim, the trial court accepted defendant's plea.

The Department of Corrections prepared a presentence report recommending a minimum range of 24 to 40 months in prison. Defendant provided a sentencing memorandum to the trial court. In the memorandum, defense counsel acknowledged the guideline range and concurred with the scoring. However, counsel argued that the trial court could decide to depart downward from the appropriate sentence range if it found substantial and compelling reasons to do so. Counsel further stated that, "Defendant understands that the charge he has been convicted of carries a 15 year maximum penalty and that according to MCL 771.1 he is not eligible for probation, but if the Court were to find a substantial and compelling reason to depart from the guidelines, the Court could sentence Defendant to a term of probation and/or jail and that is what he is asking Your Honor to do."

During sentencing, the trial court indicated that it had rescored certain of defendant's offense variables (OVs). This resulted in a lowering of defendant's OV scores and in a reduced guidelines range of 12 to 20 months. The prosecutor stated that she agreed with the probation department's recommendation, that MCL 777.1 prohibited probation for CSC III, and that no substantial and compelling reasons to depart existed in any case. Defense counsel repeated his assertion that the trial court could depart downward if it found substantial and compelling reasons to do so, argued that those existed here, and asked for a "term of probation or in the alternative jail rather than prison." The trial court stated, "Well, there are cases where a departure from a prison sentence is appropriate. I don't believe this is one of them given the facts of this case." The trial court sentenced defendant to one to 15 years in prison. During the subsequent hearing on defendant's motion to withdraw his plea, the trial court found that it had made a detailed inquiry at the time the plea was entered. It then denied defendant's motion, stating:

Even assuming, even assuming, without deciding that there was advice from counsel that he could be placed on probation, I specifically asked him under oath if anyone had promised him anything in order to get him to plead guilty other than what was specifically stated in court and he sworn (sic), under oath, that no one had promised him anything, and I certainly include in that a promise, any promise that he be eligible for, for probation. In fact, at the time, at the time the plea was entered, counsel understood and discussed that at that point, the sentencing guideline calculation was 24 to 40 months which was certainly not within a probationable recommendation. Subsequently, at sentencing, I revised those guideline expectations, but I see no basis upon which there can be a claim of ineffective assistance of counsel with regard to a promise about sentence when the Defendant testified under oath that there was no such promise.

Defendant bases his claim that he should have been allowed to withdraw his plea on the ground that counsel informed him prior to entering his plea and up until the sentencing hearing that he was eligible for probation. In support of his claim, he presents trial counsel's sentencing memorandum and his own affidavit stating that counsel advised him that he was eligible for probation.

We need not decide whether trial counsel clearly erred by arguing to the court that defendant could receive probation for his offense, under what appears to be a novel application of *Babcock*.<sup>1</sup> Assuming that defendant was not, in fact, eligible for probation even if the trial court had found substantial and compelling reasons to depart, defendant cannot meet his burden of demonstrating that the trial court abused its discretion in refusing to allow him to withdraw his plea. Defendant stated under oath that he was not promised anything other than a reduction of his charges in return for his plea. Trial counsel's sentencing memorandum acknowledged that the guideline range for defendant's offense was 24 to 40 months and that defendant would be sentenced within this range, in the absence of the trial court's finding of substantial and compelling reasons to depart. The memorandum also acknowledged that MCL 777.1 generally

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<sup>1</sup> See *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).

prohibited probation for defendant's offense. Thus, not only was defendant not promised probation; he has not shown that he was informed that he would likely receive probation. He had no justifiable expectation that the trial court would agree with counsel's novel argument, or find defendant's case to be one that supported a downward departure.

Moreover, we note that the trial court did consider whether to depart downward from the sentencing guidelines, and decided that the circumstances of defendant's offense did not warrant any departure. Under the circumstances, defendant cannot show either that his plea involved erroneous legal advice coupled with actual prejudice to his legal rights, or that the bargain on which the plea was based was somehow illusory.

Defendant acknowledges on appeal that MCR 6.302 did not specifically require the trial court to inform him prior to his plea that he would not be eligible for probation. However, in an apparent attempt to fault the trial court for failing to advise him that he was ineligible for probation, he argues that the trial court was required under MCR 6.302(B)(2) to inform him of any mandatory minimum sentence. This argument is without merit. Defendant cannot show a violation of this provision because he has not shown that he was, in fact, subject to a mandatory minimum sentence for his offense. MCL 750.520d does not contain a mandatory minimum sentence.

For these reasons, we find that the trial court did not abuse its discretion when it refused to allow defendant to withdraw his plea.

Affirmed.

/s/ Henry William Saad  
/s/ Karen M. Fort Hood  
/s/ Stephen L. Borrello