

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTWAN STEPHEN HART,

Defendant-Appellant.

UNPUBLISHED

September 16, 2008

No. 278709

Wayne Circuit Court

LC No. 05-012236-01

Before: Cavanagh, P.J., and Jansen and Kelly, JJ.

PER CURIAM.

Defendant appeals by leave granted his conviction, following a no-contest plea, of false pretenses under \$20,000, MCL 750.218. He was sentenced to three years' probation, restitution in the amount of \$60,307.32, and attorney fees in the amount of \$400. We affirm defendant's conviction, but vacate the court's order of attorney fees and remand this issue for reconsideration. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Testimony at the preliminary examination revealed that defendant, doing business as R & R Scrapping, opened an account at National City Bank. Shortly after the account was opened, a counterfeit check from Hall Steel for approximately \$71,000 was deposited into defendant's account, and defendant made multiple withdrawals from the account over the next few weeks. Defendant was charged with the offense of false pretenses and initially pleaded not guilty. However, he later entered a plea of no contest. After receiving his sentence, defendant moved to withdraw his plea, arguing that he did not knowingly, understandingly, and voluntarily make the plea. The trial court denied the motion.

Four elements establish the crime of false pretenses: (1) a false representation regarding an existing fact; (2) knowledge by defendant of the falsity of that representation; (3) use of the false representation with an intent to deceive; and (4) a detrimental reliance on the false representation by the victim. *People v Gould*, 156 Mich App 413, 416; 402 NW2d 27 (1986). "The pretense relied upon to establish the offense of obtaining money by false pretenses must be a misrepresentation regarding a present or existing fact or a past fact or event." *People v Reigle*, 223 Mich App 34, 38; 566 NW2d 21 (1997). A false pretense does not have to be expressed in words but can be accomplished by an act. *Id.* at 39.

Defendant's no-contest plea was an admission of the elements of false pretenses and was tantamount to an admission of guilt. See *People v Patmore*, 264 Mich App 139, 149; 693 NW2d

385 (2004). “There is no absolute right to withdraw a guilty plea once the trial court has accepted it.” *Id.* We review a trial court’s denial of a motion to withdraw a guilty plea for an abuse of discretion. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997).

At the plea hearing, the report of the bank’s fraud investigator was used to establish a factual basis for defendant’s plea. After the assistant prosecutor read this report into the record, the trial court asked defendant’s attorney if he would stipulate that this was enough for a factual basis, and he stated, “Not the \$71,000.00; there’s got to be another transaction.” At this point, the following exchange ensued:

Ms. Slameka (assistant prosecutor): He’s not admitting to -- he’s admitting to the fact that the account was opened, it was under the name of R & R Scrapping --

The Court: For false pretenses.

Mr. Adams (attorney for the defense): Yes.

The Court: So you agree that it’s --

Mr. Adams: Yes.

Ms. Slameka: False pretenses.

Mr. Adams: Yes.

The Court: But as far as that part, you agree that it makes out a factual basis?

Mr. Adams: Yes.

Defendant contends that the fraud investigation report and his attorney’s admission did not establish that he knowingly and intentionally committed the crime of false pretenses. Because it can be difficult to prove a defendant’s state of mind with regard to knowledge and intent, minimal circumstantial evidence will suffice to establish a defendant’s state of mind, which can be inferred from all of the evidence. *People v Fennell*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004); *Reigle, supra* at 39.

The fraud investigation report demonstrated that defendant opened a business bank account, that approximately two weeks later a counterfeit check was deposited into this account, and that defendant shortly thereafter made multiple withdrawals from the account. Defendant’s attorney acknowledged that the bank account was opened for false pretenses. Defendant contends that, to the extent that his trial counsel agreed that this factual basis was sufficient, his counsel provided ineffective assistance.

In reviewing a criminal defendant’s plea, the proper focus is on whether the plea was voluntarily and understandingly made. *In re Oakland County Prosecutor*, 191 Mich App 113, 120; 477 NW2d 455 (1991). A plea is intelligently made if counsel’s advice was within the range of competence demanded of attorneys in criminal cases. *Id.* at 122. “Where the issue is counsel’s performance, a defendant must show that (1) counsel’s performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable

probability that, if not for counsel's error, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 416; 740 NW2d 557 (2007).

At the plea hearing, the court stated that it was informed by defendant's attorney that defendant wanted to plead no contest to the crime of false pretenses less than \$20,000. The court asked defendant if he understood this, and he stated, "Yes." The court asked defendant if he had read the plea form and if he went over his rights with his attorney, and defendant acknowledged that he had. The court then asked defendant if he was entering a no-contest plea because he was guilty, and he stated, "Yes." We find that this record establishes that defendant's plea was voluntarily made.

Defendant argues that his plea was not understandingly made because neither he nor his trial counsel correctly understood the elements of the offense of false pretenses. Defendant attached his affidavit to the motion to withdraw the plea, where he stated that he did not have the intent to commit a crime or even the knowledge that a crime was going to be committed when he agreed to participate in the cashing of a check through his bank account. Thus, defendant contends that he had no intent to defraud or deceive. We acknowledge that there was no direct evidence that defendant intended to defraud or cheat. However, because intent to deceive can be inferred from the evidence, and minimal circumstantial evidence is sufficient to prove defendant's intent, we conclude that trial counsel's advice to enter a no-contest plea did not fall below an objective standard of reasonableness under professional norms. See *Odom, supra*; *Fennell, supra*. Thus, we find that defendant's claim of ineffective assistance of counsel fails, and, consequently, the trial court did not abuse its discretion in denying defendant's motion to withdraw his plea.

Defendant was ordered to pay \$400 in court-appointed attorney fees. Defendant contends that this order should be reversed because he had no assets at the time of sentencing and because he had no foreseeable ability to pay in the future. In *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004), this Court determined that, before ordering a criminal defendant to pay attorney fees, the trial court needed to provide some indication of consideration of the defendant's ability to pay, such as noting that it reviewed the financial and employment sections of the presentence investigation report or a statement that it considered the defendant's ability to pay. This Court noted that "[t]he amount ordered to be reimbursed for court-appointed attorney fees should bear a relation to the defendant's foreseeable ability to pay." *Id.* at 255. "A defendant's apparent inability to pay at the time of sentencing is not necessarily indicative of the propriety of requiring reimbursement because a defendant's capacity for future earnings may also be considered." *Id.*

In the case at hand, the record is devoid of any indication that the trial court recognized and considered defendant's ability to pay the attorney fees. Thus, the trial court clearly erred in ordering reimbursement of attorney fees without considering defendant's ability to pay. Therefore, we vacate that portion of the trial court's order requiring defendant to repay the court-

appointed attorney fees and remand for a consideration of the attorney fee issue in light of defendant's ability to pay now and in the future.¹

Defendant's conviction is affirmed, but the order of attorney fees is vacated and the issue is remanded for reconsideration. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly

¹ At the trial court's discretion, this decision may be made based on the record without a formal evidentiary hearing. *Dunbar, supra* at 256 n 14.