

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN REGINALD JONES,

Defendant-Appellant.

UNPUBLISHED

March 3, 2009

No. 281816

Mecosta Circuit Court

LC No. 06-005870-FH

Before: Sawyer, P.J., and Servitto and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his plea-based conviction of possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). The trial court sentenced defendant as a second habitual offender, MCL 769.10, to a prison term of 15 months to 30 years. Because defendant was denied his right to effective assistance of counsel and his plea was not knowingly and voluntarily entered into, we reverse and remand for proceedings consistent with this opinion.

Defendant was pulled over when leaving a large apartment complex, in which at least one of the apartments was under surveillance for suspected drug trafficking. Upon learning that defendant was on parole, the officer that pulled defendant over contacted defendant's parole officer and was advised that under certain circumstances, a parolee has to allow a search of his vehicle if requested by a police officer. The canine unit then searched defendant's vehicle, without defendant's consent, and found an amount of cocaine in the vehicle. Defendant was subsequently charged with possession with intent to deliver a controlled substance less than 50 grams.

Defendant moved to suppress the evidence obtained in the warrantless search of defendant's vehicle. Noting that it was a "tough decision," the trial court denied the motion. Defendant subsequently entered a guilty plea in this matter and was sentenced by the trial court. Defendant thereafter moved to withdraw his plea, based upon his assertion that he plead guilty only with the understanding (through counsel's advice) that he would have the opportunity to appeal the trial court's ruling with respect to his motion to suppress. The trial court denied the motion.

On appeal, defendant first asserts that he was denied the effective assistance of counsel. The gravamen of defendant's claim is that defense counsel relayed his mistaken belief to

defendant that defendant's previously denied motion to suppress evidence would be reviewable on appeal in the event that defendant entered a guilty plea. Defendant contends that a pretrial ruling is appealable with regards to a plea-based conviction only if the plea entered is a conditional plea. According to defendant he entered a non-conditional plea based upon counsel's erroneous understanding of and advice concerning the applicable law, and that counsel was ineffective for failing to properly advise him.

To establish ineffective assistance of counsel, 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 errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Moreover, this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will we make an assessment of counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

MCR 6.301(C)(2) explicitly provides that a defendant may enter a conditional plea of guilty and that such plea "preserves for appeal a specified pretrial ruling or rulings notwithstanding the plea-based judgment and entitles the defendant to withdraw the plea if a specified pretrial ruling is overturned on appeal. . ." Despite this clear language outlining the procedure that must be employed to preserve pretrial rulings for appeal, defense counsel advised defendant that if he entered an unconditional plea, he could appeal the trial court's ruling on his suppression motion. In failing to apprise defendant of the correct law governing his ability to appeal the ruling, trial counsel's performance fell below the standard of reasonableness. Plaintiff concedes as much, and counsel admitted on the record that he so misinformed defendant. The first prong of the effective assistance of counsel analysis is thus not in dispute.

The parties do dispute, however, whether the second prong has been met, i.e., there is a reasonable probability that, if not for counsel's errors, the result would have been different. Defendant argues that if his counsel had not erroneously assured him of his right to appeal the motion to suppress after a guilty plea, he would not have agreed to the plea. Instead, he would have either gone to trial, or agreed only to a conditional plea. In either scenario, he would have preserved his ability to appeal the suppression ruling and may have prevailed on appeal, which would, in turn, lead to the evidence being suppressed and the charges against him ultimately being dismissed.

Plaintiff, on the other hand, argues that the erroneous advice had no impact on the result of the case, given that defendant did not establish the probability of his success on appeal and because the erroneous advice was overridden by the plea colloquy required by MCR 6.302 and followed by the trial court before defendant's sentencing. We disagree.

First, MCR 6.302 requires that before accepting a guilty plea, the trial court must establish, among other things, the defendant's understanding that by entering a guilty plea, he will be giving up any claim that the plea was the result of promises or threats undisclosed to the court, and his understanding that any appeal from the conviction and sentence will be by application for leave rather than by right. Contrary to plaintiff's argument otherwise, nowhere in

the record did any part of the plea colloquy contradict or correct defense counsel's misinformation. Reliance on a "promise" of an opportunity to appeal does not fit within the ordinary meaning of reliance on a "promise, inducement or coercion." Here, defendant did not rely on a promise, but on erroneous legal advice. Since the trial court did not specifically mention that defendant would be foregoing his right to appeal the results of the suppression motion, and since defendant reasonably could have understood his reliance on the chance to appeal as something that was not a "promise, inducement or coercion" because it was not a promise directly related to his conviction or sentence (such as a promise of a certain sentencing outcome), defendant should not be foreclosed from withdrawing his plea on the basis of his testimony at the plea proceeding.

Second, in his motion to suppress, defendant claimed that probable cause to search his vehicle did not exist and, perhaps, that the stop was pretextual in nature. Defendant also briefly outlined what he considered to be the evidence that would help him prevail in his potential appeal of the trial court's suppression ruling, referencing the testimony taken at the hearing on his motion to suppress and again noting the lack of probable cause and the possibility of a stop made on pretext.

It is beyond challenge that if defendant had withdrawn his guilty plea and opted either to go to trial or to strike a conditional plea with the prosecution, he would have preserved his ability to appeal the motion to suppress. The trial court acknowledged below that the circumstances of the search posed a "tough" question as to its constitutionality. Without the fruits of the search, the case against defendant would likely be subject to dismissal for insufficient evidence. Thus, the preservation of defendant's right to appeal the constitutionality of the search, in and of itself, is a materially different result which would have been reached but for counsel's faulty advice. Regardless of whether defendant would eventually prevail or lose on his appeal, the *underlying proceedings* would likely have been different but for the attorney's error. It is admittedly impossible to know for certain if, had counsel provided correct advice, the ultimate result would have been more favorable to defendant. Nevertheless, the many unknown contingencies here at the least significantly undermine any confidence in the outcome of defendant's proceedings.

The remedy for ineffective assistance of counsel "must be tailored to the injury suffered." *People v Whitfield*, 214 Mich App 348, 354; 543 NW2d 347 (1995). In *Whitfield*, the Court held that a defendant who had lost his appeal as of right from the probate court's waiver decision (due to counsel's error) had been denied the effective assistance of counsel. *Id.* at 354. The court stated, "The closest we can get to restoring defendant's lost appeal of right is to give him the right to appeal the decision of the probate court to the circuit court within twenty-one days of the decision of this Court." *Id.* In this case, the appropriate remedy for defendant is to allow him to withdraw his guilty plea and either attempt to obtain a conditional plea from the prosecution, or to plead not guilty and go to trial—so long as withdrawal would be consistent with the applicable rules and law.

MCR 6.310(B)(1) states in pertinent part:

[A] plea may be withdrawn on the defendant's motion or with the defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea.

This determination involves a two-step process. First, defendant must establish a fair and just reason for withdrawal of the plea. *People v Wilhite*, 240 Mich App 587, 597; 618 NW2d 386 (2000). If the defendant meets that burden, then the prosecution has the burden of showing that substantial prejudice would result from allowing withdrawal of the plea. *People v Jackson*, 203 Mich App 607, 611-612; 513 NW2d 206 (1994).

In reviewing a claim of ineffective assistance of counsel arising out of a guilty plea, the courts should focus upon whether the defendant's plea was made voluntarily and understandingly. *In re Oakland County Prosecutor*, 191 Mich App 113, 120; 477 NW2d 455 (1991).

Guilty pleas have been found to be involuntary or unknowing on the basis of ineffective assistance of counsel where defense counsel failed to explain adequately the nature of the charges or the consequences of the guilty plea. Guilty pleas have also been found to be involuntary or unknowing where counsel has failed to discuss possible defenses to the charges to which the defendant is pleading guilty. In these situations, counsel's deficient representation effectively renders the defendant's guilty plea involuntary because it deprives the defendant of the ability to make an intelligent and informed choice from among his alternative courses of action. [*People v Corteway*, 212 Mich App 442, 445; 538 NW2d 60 (1995)(internal citations omitted)].

In the case at bar, it can be argued that defendant was not able to make an intelligent and informed choice due to the faulty advice of his attorney. Without the understanding that his suppression motion would not be appealable if he tendered a guilty plea, defendant could not make a voluntary and knowing plea. Defendant's false impression was the result of faulty advice from his attorney—advice that fell below an objective standard of reasonableness and which was prejudicial to the outcome of the case in that it was the reason defendant pleaded guilty instead of negotiating a conditional plea or going to a trial. Adhering the standard set out in *Corteway*, *supra*, 212 Mich App at 445, and *In re Oakland Co Prosecutor*, *supra*, 191 Mich App at 120, it can be said that defendant tendered an involuntary and unknowing plea. Defendant therefore carried his burden of demonstrating that the interests of justice would be served by allowing him to withdraw his plea and therefore, he should be permitted to withdraw it--unless such withdrawal would substantially prejudice the prosecution. *Jackson*, *supra*.

In *People v Spencer*, 192 Mich App 146, 150; 480 NW2d 308 (1991) this Court explained that substantial prejudice is established if the prosecution shows, “for example, that vital physical evidence has been discarded, that a chief government witness has died, or that fifty-two witnesses who have come from all over the United States and from overseas naval bases have been dismissed (citation omitted).” At the hearing to withdraw defendant's plea in the instant matter, the prosecutor indicated that defendant's case was a small part of a series of cases/events that took place on the same day as defendant's incident. He detailed that at least one of his informants was “no longer here,” that another was in Detroit, and that another was incarcerated, and that he would have challenges in putting together “the full picture of what led to [defendants]'s arrest” if he had to try the case now. The prosecutor also admitted, however, that as far as the traffic stop and the people involved in finding the cocaine in defendant's car, all were available. There has been no assertion that the prosecutor would be unable to produce the witnesses necessary to proceed with trial. In fact, all of the law enforcement officials involved

with defendant's case were admittedly available and the prosecutor detailed the locations of several key witnesses. Moreover, defendant pleaded guilty in March 2007 and his motion to suppress was heard in June 2007. Both events took place within months of the September 2006 incident that led to defendant's arrest. It is questionable, then, whether the prosecutor, while presumably able to present these witnesses between September 2006 and March 2007 could not produce them three months later (at the time of the hearing on defendant's motion to suppress). Accordingly, the prosecution cannot show substantial prejudice and the trial court abused its discretion in finding otherwise.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Deborah A. Servitto
/s/ Michael J. Kelly