

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARQUIS DESHAWN FARR,

Defendant-Appellant.

UNPUBLISHED

June 30, 2009

No. 285513

Kent Circuit Court

LC No. 00-011096-FC

Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals in propria persona by delayed leave granted the trial court’s order denying his motion for relief from judgment. Defendant was sentenced, following a probation violation, to two to ten years’ imprisonment for his plea-based conviction of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1), on December 23, 2003.¹ We affirm the trial court’s denial of defendant’s motion for relief from judgment, but we remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant maintains that he is entitled to relief from judgment because the prosecutor deliberately failed to reveal exculpatory evidence concerning DNA testing, which occurred during the initial prosecution in 2000 and 2001. The testing revealed no semen stains on the victim’s underwear, and no DNA forensic evidence was acquired from the underwear or in swabs from the victim’s person. Defendant maintains that had he known of these results, he would not have pleaded guilty but would have proceeded to trial.

We review a trial court’s ruling granting a motion for relief from judgment for an abuse of discretion. *People v Clark*, 274 Mich App 248, 251; 732 NW2d 605 (2007). The findings of fact supporting the trial court’s decision are reviewed for clear error. *Id.*

¹ Defendant was initially charged with criminal sexual conduct in the first degree, MCL 750.520b, and criminal sexual conduct in the third degree, MCL 750.520d. These charges were dismissed pursuant to the plea agreement.

MCR 6.508(D)(3) precludes a trial court from granting relief under certain circumstances. MCR 6.508(D) states, in pertinent part,

Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

* * *

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, “actual prejudice” means that,

* * *

(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case

Defendant argues that the prosecutor has an affirmative obligation to turn over exculpatory information to the defense. See *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998). Defendant maintains, however, that the prosecutor purposely failed to provide the defense with the test results and that this misfeasance provides good cause to order relief from judgment.

In order to establish a *Brady*^[2] violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Lester, supra* at 281-282 (citation omitted).]

² *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963).

According to the trial court, defendant's trial was initially set to begin on February 19, 2001. Trial was adjourned to May 29, 2001, by stipulation of the parties because they were awaiting DNA test results. The prosecutor sent defense counsel a letter on November 17, 2000, stating that the prosecutor had not yet received final DNA results and that they would be sent to defense counsel when they became available. However, in support of his claim that the prosecutor lied to defense counsel and that the prosecutor already had the test results, defendant relied on laboratory results, dated November 1, 2000, and a phone log dated the same day, that indicates that the results were provided to the police department and the prosecutor's office.

Our review of the record does not support defendant's claim. The report on which defendant relies is not, as he maintains, the actual DNA test of the samples, but rather the preliminary immunoassay and preliminary chemical tests. Defendant's appellate materials indicate that the actual DNA tests were not completed until July 31, 2001. Therefore, contrary to defendant's assertion, there were no DNA results for the prosecutor to withhold when defendant pleaded guilty on May 29, 2001, a fact that defendant would likely have known at the time of the plea. According to the plea transcript, defendant's plea was not qualified on the receipt of any further DNA results, and defendant did not claim that counsel could not obtain the preliminary chemical results. Nor does defendant argue that his counsel was ineffective for counseling him to enter his plea before learning the results of the test. Thus, even to the extent that the absence of DNA evidence connecting him to the crime can be properly termed "exculpatory," defendant has not provided evidence of the remaining elements necessary to establish a *Brady* violation here. Therefore, we find that the trial court did not abuse its discretion when it denied defendant's motion for relief from judgment.

In its appellate brief, the prosecutor notes an irregularity that occurred during resentencing. During defendant's initial sentencing, the original guidelines were preliminarily scored at ten to 23 months. However, during sentencing the guidelines were reduced to zero to 17 months. During resentencing, the trial court apparently incorrectly noted that the guidelines were scored at ten to 23 months. The trial court also found that it was not bound by the guidelines. Subsequently, our Supreme Court held that the sentencing guidelines apply to sentences imposed after probation revocation, and "a defendant's conduct while on probation can be considered as a substantial and compelling reason for departure" *People v Hendrick*, 472 Mich 555, 565; 697 NW2d 511 (2005). Here, then, the trial court should have either sentenced defendant to an intermediate sanction, see MCL 769.34(4), or articulated reasons for departure. MCL 769.34(3); *Hendrick, supra*. Defendant does not raise this issue on appeal. However, the prosecutor essentially concedes the error, and it is plain. We thus remand for resentencing.

The trial court's denial of relief from judgment is affirmed. We remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio