

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
January 17, 2012

v

RONALD LEE JEX,

Defendant-Appellant.

No. 295825
Calhoun Circuit Court
LC No. 2004-003072-FH

ON REMAND

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Defendant, acting *in propria persona*, appealed by leave granted the trial court's December 17, 2009 order denying defendant's motion for relief from judgment. He sought relief from his November 4, 2004 conviction for third-degree home invasion, MCL 750.110a(4). After pleading no contest defendant was sentenced as a habitual offender-second offense, to 18 to 90 months' imprisonment. In a previous opinion we reversed in part and remanded, holding that defendant's claim of error was jurisdictional. *People v Jex*, unpublished opinion per curiam of the Court of Appeals issued April 28, 2011 (Docket No. 295825). In lieu of granting leave to appeal, the Supreme Court reversed our decision and held that defendant's arguments did not establish a jurisdictional defect. *People v Jex*, 489 Mich 983; 799 NW2d 557 (2011). The Supreme Court remanded the case to this Court to determine whether defendant has established good cause for his failure to raise his grounds for relief on appeal, and actual prejudice. *Id.* We again reverse and remand for further proceedings.

I. FACTS

We described the facts of the case in our previous opinion:

Defendant's conviction involved a combined plea proceeding concerning the initially charged offense of second-degree home invasion, MCL 750.110a(3), and charging as a habitual offender-this offense in the instant case, as well as a second charge of felonious assault as a habitual offender-third offense in an unrelated incident. Pursuant to the agreement, defendant would plead no contest to felonious assault in return for a reduction to second-habitual status, and would plead no contest to third-degree home invasion in the instant case in return for a

reduction in the charge and in his habitual offender status. The agreement also contained a sentencing agreement; i.e., that defendant would receive concurrent sentences of “probation with time capped at county time.”

At the plea hearing, the trial court provided cautionary instructions concerning the felonious assault plea first, including the possible maximum penalty for the offense, and the rights that defendant would waive by his plea. Defense counsel then read a factual basis for that charge into the record. As to the home invasion plea, the trial court provided the possible maximum penalty, asked defendant whether he understood the rights he would be giving up, and defendant replied affirmatively. The trial court then asked for a factual basis for the plea and defense counsel stated:

I can provide that, your Honor. And I’ll summarize as follows: this occurred on or about August 4th of the year 2004 in Bedford Township, Calhoun County, state of Michigan. At that time my client entered without permission a residence in which his former girlfriend Cheryl Williams resided and she awoke in the early morning hours, saw my client standing over her. She told him to get out of the house. He left. Apparently he entered through the front door. And she woke up early in the morning and found certain items of personal property missing. She believes that he took them.

The trial court asked whether the attorneys were satisfied that there was a factual basis to accept the plea, and both replied affirmatively. The trial court then asked whether any other undisclosed promises, threats, or inducements had been made and defense counsel replied that she was not aware of any. The trial court then accepted the second plea.

During sentencing on November 4, 2004, the trial court discussed the presentence investigation report (PSIR) and asked if defendant had any factual errors that needed to be corrected. Defendant maintained that he completed probation for a fleeing and eluding conviction that occurred in Barry County and that this was not in the report. Counsel challenged the ten points scored for offense variable (OV) 10. The trial court found the scoring appropriate. The court then asked whether there was a sentencing agreement, and defense counsel reiterated the agreement and asked the court to follow it. However, the prosecutor objected on the ground that he did not contemplate the information in the PSIR, including defendant’s earlier failures at probation and the probation department’s recommendation, when he agreed to the deal, and asked to “withdraw” from the agreement. Defense counsel objected on the ground that the prosecution had all the pertinent information. However, the trial court then stated that it was not bound by the agreement and, after reviewing the PSIR, decided it would not go along with the plea agreement. The trial court specifically noted that there had been three prior circuit court probations that had resulted in revocations and did not find that probation was appropriate. The trial court then asked defendant

whether he wished to withdraw his plea. After consulting with defense counsel, defendant stated that he wanted to proceed with sentencing. The trial court subsequently noted defendant's criminal history and sentenced defendant to 18 to 90 months for the instant offense.

Defendant sought no direct appeal. In October 2009, defendant moved for relief from judgment. The trial court denied the motion, finding that defendant could have raised his claims of error and ineffective assistance in a direct appeal, had failed to demonstrate good cause for failing to do so, and had failed to show actual prejudice. The trial court also found that the factual basis for the plea was sufficient, and that "[b]y pleading No Contest, the Defendant chose not to contest his factual guilt and waived any claims regarding the factual sufficiency of the plea." The trial court further found no jurisdictional defect, and that the plea was entered freely, voluntarily and knowingly. [*People v Jex*, unpublished opinion per curiam of the Court of Appeals issued April 28, 2011 (Docket No. 295825), slip op at 1-2].

Defendant argued that he could not have been guilty of home invasion because he was a lessee of the home, and thus did not need permission to enter.

In support of his claim, defendant provided the trial court with a signed copy of a lease for the premises that he purportedly executed on January 3, 2004, accompanied by an affidavit of Sandra Holbrook, the owner of the leased residence and defendant's mother. Holbrook avers, in part, that she leased the residence to defendant, that defendant resided in the residence with Williams and defendant's two sons, that she canceled the lease in September, 2004, after defendant was jailed and Williams could no longer afford the rent, that defendant had keys to the residence, and that she had not evicted defendant. Defendant also attached his bond form, and two orders appointing defendant's trial attorney to represent him in both the instant case and in the assault case. These documents list the residence as defendant's residence. Finally, defendant appends a copy of a letter supposedly written by Williams to defendant, which is dated December 19, 2004. In the letter, Williams wrote:

I knew you were coming to get your stuff and that was fine.
. . . The house was more mine than yours. I was the one paying
the rent and all the other bills, you just stayed there when you
wanted to. Most of the stuff in the house was mine not yours. I
got your keys from my mom and gave them to your mom because I
moved out in September. . . .

Defendant also provides his own affidavit with similar assertions concerning his residence at the home. Nothing in the facts presented suggests that defendant was prevented from entering the premises by PPO or other court order. Plaintiff does not even discuss the merits of defendant's underlying assertion on appeal. [*People v Jex*, unpublished opinion per curiam of the Court of Appeals issued April 28, 2011 (Docket No. 295825), slip op at 1-2].

This Court reversed, and remanded for additional proceedings, finding that defendant had alleged a jurisdictional defect and thus was not required to demonstrate cause or prejudice in order to obtain post-appeal relief. *Id.*, slip op at 4. The Supreme Court reversed this ruling, holding that defendant had not alleged a jurisdictional defect. 489 Mich at 983. The Supreme Court held that under MCR 6.508(D)(3)(a), (b), defendant must therefore “establish both good cause for his failure to raise his grounds for relief on appeal, and actual prejudice,” and remanded to this Court to determine whether defendant met this burden. *Id.*

Given the definition of “without permission” in MCL 750.110a(1)(c),¹ and relevant case law, defendant correctly asserts that the entering without permission element of the conviction offense is not present if he had a legal right to enter the premises. See e.g., *People v Rider*, 411 Mich 496, 497-501; 307 NW2d 690 (1981) (a defendant does not commit a breaking if access is obtained by use of a key entrusted to him without restrictions on its use); *People v Brownfield (After Remand)*, 216 Mich App 429, 432; 548 NW2d 248 (1996) (a defendant does not commit a breaking and entering if he has the right to enter the building, even if the defendant commits a larceny once in the building).

The assertion that this element of the offense could not be shown underlies not only defendant’s substantive claim for relief, but also his claim that he meets the good cause and actual prejudice requirements of MCR 6.508(D). MCR 6.508(D)(3)(b)(ii) provides that the prejudice requirement is met in a plea case where “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.” Defendant’s claim of innocence is relevant to the good cause determination since a “court may waive the ‘good cause’ requirement . . . if it concludes that there is a significant possibility that the defendant is innocent of the crime”. MCR 6.508(D)(3).

Even if the good cause requirement is not waived, it may still be established by showing ineffective assistance of counsel, *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995), or “by showing that some external factor prevented counsel from previously raising the issue” *Id.* at 378-379. Here, as a substantive matter defendant argues that his counsel was ineffective for recommending the no-contest plea and/or not recognizing that defendant had a complete defense to the charge of home invasion. As a procedural matter, counsel’s ineffectiveness is relevant to the loss of an appeal of right and the failure to advise defendant that he had a strong basis to appeal.²

¹ “‘Without permission’ means without having obtained permission to enter from the owner or lessee of the dwelling or from any other person lawfully in possession or control of the dwelling.” MCL 750.110a(1)(c).

² Ineffective assistance in the context of a plea revolves around whether the plea was made knowingly and voluntarily. *In re Oakland Co Prosecutor*, 191 Mich App 113, 120; 477 NW2d 455 (1991). “[W]hether 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

If the trial court elects not to waive the good cause requirement, defendant may also demonstrate good cause by showing that counsel did not advise him of the fact that he could appeal on the grounds that an element of the offense could not have been proven. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). To demonstrate ineffective assistance of counsel, defendant must show that his attorney's performance fell below an objective standard of reasonableness and that this performance prejudiced him. *Id.* The Supreme Court in *Kimble* found the good cause requirement satisfied where appellate counsel failed to raise in the defendant's initial appeal an "obvious" mistake made during sentencing. *Id.* In the present case, unless the prosecution is able to present sufficient evidence that defendant needed permission in order to lawfully enter the residence in question, there is an obvious mistake in the record that defense counsel failed to address via direct appeal. As we stated in our prior opinion:

As noted, the bond and attorney appointment documents listed the residence as defendant's address and, presumably, his attorney was aware of this fact. Defendant contends that counsel did not adequately explain the elements of the crime or any applicable defenses to him and, thus, he did not realize that he could not have been found guilty of the charge. If this is true, given the documents that support a finding that defendant did not need permission to enter the home due to his status as a lessee, defendant's counsel did not provide objectively reasonable advice to plaintiff, such that his plea was not made "intelligently." *Haynes*, 221 Mich App at 558-559. While defendant certainly should have known about the lease and that he lived at the residence, he has raised a credible assertion that he did not recognize the significance of these facts in relation to the charged crime. [*People v Jex*, unpublished opinion per curiam of the Court of Appeals issued April 28, 2011 (Docket No. 295825), slip op at 7].

Similarly, counsel did not provide adequate advice by failing to inform defendant that a direct appeal on this issue would likely be successful.

Accordingly, we reverse the trial court's denial of defendant's motion for relief from judgment and remand for further proceedings. On remand, the trial court shall review evidence from both parties concerning defendant's claim that he did not need permission to enter the home. If the trial court concludes that there is a significant possibility that defendant is innocent of home invasion it may waive the good cause requirement of MCR 6.508(D)(3). If the trial court declines to waive the good cause requirement, it shall conduct a *Ginther*³ hearing to review defendant's ineffective appellate assistance claim to determine whether defendant received objectively reasonable advice from counsel concerning the possibility of a direct appeal. If the trial court finds good cause and actual prejudice under MCR 6.508(D)(3), it shall consider

counsel's advice was right or wrong." *People v Haynes*, 221 Mich App 551, 558-559; 562 NW2d 241 (1997), citing *In re Oakland Co Prosecutor*, 191 Mich App at 122.

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

defendant's substantive claim for relief based on sufficiency of the evidence and his motion to withdraw his plea based on ineffective assistance of trial counsel. We retain jurisdiction

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro

Court of Appeals, State of Michigan

ORDER

People of MI v Ronald Lee Jex

Docket No. 295825

LC No. 2004-003072 FH

Deborah A. Servitto
Presiding Judge

Elizabeth L. Gleicher

Douglas B. Shapiro
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 56 days of the Clerk's certification of this order, and they shall be given priority on remand until they are concluded.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 28 days after completion of the proceedings.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

JAN 17 2012

Date

A handwritten signature in black ink, appearing to read "Larry S. Royster", is written over a horizontal line. Below the line, the text "Chief Clerk" is printed.

Chief Clerk