

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 30, 2012

v

ANTHONY TERRELL MCGOWAN,
Defendant-Appellant.

No. 299386
Alger Circuit Court
LC No. 2008-001840-FH

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

STEPHENS, J. (*dissenting*).

I write to dissent from the majority's conclusion that defense counsel's performance was not constitutionally deficient. Because I conclude that defendant was denied the effective assistance of counsel, I would vacate and remand for further proceedings.

I reject the argument that since defendant filed his motion to withdraw without counsel that he was unrepresented at the hearing to withdraw. Substitute counsel was physically present at the hearing where the motion was granted and there was the opportunity for defendant to consult with that attorney. Therefore, defendant is not entitled to relief on a theory that he was deprived of his right to the assistance of counsel. However, I agree with defendant's argument that he was not provided with *effective* assistance of counsel. The withdrawal of the plea, like the entry of the plea, was a critical stage of the proceeding and defendant had a right to effective assistance of counsel at the hearing on his motion to withdraw. As the majority states, where a defendant asserts that he was denied the effective assistance of counsel when making a decision regarding a guilty plea, "the pertinent question is not whether counsel's advice was right or wrong; rather, it is whether counsel's advice was within the range of competence for attorneys in criminal cases." *People v Lucey*, 287 Mich App 267, 275; 787 NW2d 133 (2010). Unfortunately, defense counsel's performance at that hearing was well outside the range of performance by competent counsel. Substitute counsel appeared for what he assumed would be routine sentencing with a sentence agreement. He was informed by the court that defendant filed a motion to withdraw an extremely favorable plea agreement. By his admission, substitute counsel's only advice to defendant was that he would lose the plea if he withdrew. He did not elucidate the guidelines; he did not discuss the strength of the proofs against him. In all fairness, substitute counsel had no basis to know the relative strengths of the case against the defendant, which included a video tape of the assault at issue. While it is certainly true that the decision regarding whether to accept a plea agreement was solely a decision that could be made by

defendant, *People v Effinger*, 212 Mich App 67, 71; 536 NW2d 809 (1995), counsel was unable to fully inform defendant regarding the wisdom (or lack thereof) of withdrawing his plea agreement. Therefore, counsel's performance was objectively unreasonable.

Additionally substitute counsel was not a criminal practitioner. He did offer his client the admonishment that he would lose the benefit of the plea if his motion was granted. The transcript of the hearing reveals that defendant did not clearly understand the proceedings including his belief that his substitute counsel was going to represent him after the sentencing hearing. Counsel's bare bones admonishment fell well below the standard for effective counsel in light of defendant's confusion, the existence of a video tape of defendant committing the offense and the generosity of the plea agreement in light of the sentencing guidelines for that offense. Counsel, at the least, should have requested an adjournment to either allow new counsel to be appointed before the plea was withdrawn or to allow himself to become more familiar with the case again so that he could fully advise defendant. It is more likely than not that had he been provided with effective counsel, defendant would have realized that the plea offer was extremely generous and about to disappear in the face of overwhelming proof of his guilt. It is reasonable to conclude that just as he had previously agreed to the plea after consultation with his informed trial counsel that he would have withdrawn his motion and accepted the plea had he been given effective counseling at the hearing on his motion to withdraw. Consequently, because I conclude that counsel's performance fell below an objective standard of reasonableness and that his performance prejudiced defendant, *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), I would vacate defendant's convictions and sentences and remand for further proceedings.

/s/ Cynthia Diane Stephens