STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY D. OAKLEY,

Defendant-Appellant.

UNPUBLISHED
August 2, 1996

No. 180521
LC No. 93-126033-FC

Before: Smolenski, P.J., and Holbrook, Jr., and F. D. Brouillette,* JJ.

PER CURIAM.

This case is before this Court for the second time. Defendant originally pleaded guilty of assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, and second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), pursuant to a plea agreement whereby two charges of first-degree criminal sexual conduct were dismissed. At sentencing, defendant pleaded guilty to an additional habitual offender charge, MCL 769.11; MSA 28.1083. Defendant appealed his convictions based on his guilty pleas and this Court remanded to allow defendant to move to withdraw his guilty pleas in the trial court. The trial court granted defendant's motion to withdraw his guilty plea to the habitual offender charge but denied his motion to withdraw his pleas to the underlying offenses and his motion to dismiss the supplemental habitual offender information. Following a bench trial, defendant was convicted on the habitual offender count. Defendant now appeals as of right from the trial court's denial of his motions to withdraw his guilty pleas and dismiss the habitual information. Because defendant may have been prejudiced by a lack of notice of the habitual offender charge prior to his guilty plea to the underlying offenses, we remand for a factual determination regarding when defendant received actual notice of the habitual offender information.

Defendant first argues that the trial court abused its discretion in refusing to dismiss the supplemental habitual offender information. We disagree. Defendant asserts that the Michigan Court Rules implicitly require that the trial court advise any defendant prior to entry of a guilty plea that, once convicted, the defendant might be charged as an habitual offender if he has been convicted of previous crimes and that a plea-based conviction may not be the triggering offense in an habitual offender count

* Circuit judge, sitting on the Court of Appeals by assignment.

unless the defendant is so advised. Although former GCR 1963, 785.7(1)(c) required that a defendant be informed of the possibility that his guilty plea might form the basis for a habitual offender charge, that requirement was deleted. The reasons for the deletion are not specified, but the staff comment to the April 25, 1984, amendment indicates that the deletion was intentional. In the face of the Supreme Court's intentional deletion of that requirement from the court rules, the trial court did not err in denying defendant's motion to dismiss the supplemental information on this basis.

Defendant argues that due process requires that the supplemental information be dismissed because he had no notice of it until the day he pleaded guilty to the habitual offender count. However, defendant was allowed to withdraw his guilty plea to that offense and proceed to trial. Thus, defendant already received the remedy due under *People v Hays*, 164 Mich App 7, 15; 416 NW2d 358 (1987).

Defendant next argues that the trial court erred in refusing to allow him to withdraw his guilty pleas to the underlying offenses where he claims not to have had actual notice of the habitual offender information until after he pleaded guilty to the underlying offenses. Defendant argues that his pleas were not voluntarily given when he had no knowledge of the habitual information. Although the information was filed within the fourteen-day rule enunciated in *People v Shelton*, 412 Mich 565, 569; 315 NW2d 537 (1982), the record is unclear regarding when defendant received actual notice of the habitual offender information. Accordingly, we remand for an evidentiary hearing at which the court is to determine when defendant or his counsel received actual notice and whether the notice was sufficiently timely to enable defendant to knowingly plead. *Hays, supra*. If the notice was timely, defendant's conviction should be affirmed. If not, defendant's conviction must be vacated and he must be given the opportunity to proceed to trial on the underlying offenses. *Id*.

Although our discussion above requires remand, we address defendant's final argument. Defendant argues that he suffered ineffective assistance of counsel where his attorney spent ten minutes explaining the habitual offender charge to him and where his attorney failed to move immediately to set aside the underlying charges based on defendant's purported lack of knowledge of the habitual count. In reviewing a claim of ineffective assistance of counsel arising out of a guilty plea, we focus on whether the defendant voluntarily and knowingly entered the plea. *People v Nunn*, 173 Mich App 56, 59; 433 NW2d 331 (1988). First, defendant was allowed to withdraw his plea to the habitual count. Thus, no prejudice flowed from that deficiency. Second, counsel's failure to move to set aside the underlying counts occurred after defendant's pleas were entered. Thus, it appears impossible for this failure to have affected whether defendant voluntarily and knowingly entered the plea prior to this alleged deficiency. Defendant's ineffective assistance claim is therefore unpersuasive.

Remanded for an evidentiary hearing on defendant's claim that he failed to receive actual notice of the habitual offender information until after his guilty pleas were entered. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Donald E. Holbrook, Jr.