STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STANLEY EUGENE DEHOLLANDER,

Defendant-Appellant.

UNPUBLISHED
December 6, 1996

No. 176788
LC No. 94-0000578

Before: Neff, P.J., and Hoekstra and G.D. Lostracco,* JJ.

PER CURIAM.

Defendant pleaded nolo contendere to first-degree criminal sexual conduct (CSC-1st), MCL 750.520b; MSA 28.788(2) and unarmed robbery, MCL 750.529; MSA 28.797, and pleaded guilty to habitual offender, fourth offense, MCL 769.12; MSA 28.1084, and was sentenced to 33 to 60 years' imprisonment. Subsequently, the trial court denied defendant's motion to withdraw his plea. Defendant now appeals as of right. We affirm.

A.

On May 1, 1994, defendant was charged with CSC-1st, two counts of CSC-2nd, and unarmed robbery, arising from the sexual assault and robbery of a convenience store clerk. In a supplemental information, defendant was charged with being an habitual offender fourth offense. After waiving his preliminary examination without counsel, defendant appeared at the arraignment with his appointed counsel, who informed the trial court that he had read the police report of the incident and that he had spoken with defendant's parole officer. Defendant's counsel also stated that he had told defendant that he wanted to look into his possible defenses because he was intoxicated at the time of the incident, and that he wanted defendant to submit to a competency examination, but that defendant had refused and wished to plead nolo contendere to all the charges. Defendant then addressed the court stating that "I'm very competent on knowing what I did" and that he knew "what the charges

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

carry." He also stated that he knew what his attorney was saying and the penalties he faced because "I've been through it before." Defendant stated that he wanted to plead nolo contendere rather than waste the court's time "because I knew the charges, I know what's pending, I know what I'm facing." Defendant further stated that he studied law in prison, having "done 13 years up in Jackson." After questioning defendant about his understanding of a no contest plea, the trial court took a recess to allow defendant an opportunity to converse with his counsel and to give the court time to read the police report. Following the recess, defense counsel informed the court that he advised defendant not to enter a plea to these charges, but to wait one week, stating that he did not know what the guidelines were for these offenses and that he did not "know anything about this case." Defendant, however, wanted to proceed over defense counsel's objections and plead no contest to these charges "[to] avoid going through a long drawed (sic) out process for the county and state, and taking the taxpayer's money."

After being sworn, defendant stated that he was not on any medication and felt "fine." After the charges were read, defendant stated that he understood the charges and that his plea was voluntary, but against the advice of his attorney, and that no one had made any promises or threats to induce his plea. The trial court also advised defendant that by pleading guilty to the supplemental information, he was subject to an "enhanced possible maximum sentence." When the trial court stated that "so far you seem to know what you're talking about [regarding the proceeding]," defendant remarked that he had educated himself by taking legal courses while incarcerated, and defendant replied affirmatively when asked if he understood all the consequences of the plea. When the trial court remarked to defendant that his appointed counsel advised against the plea, defendant replied: "I respect Mr. Schlee's opinion on what he's saying, but on the same thing (sic) I wish he'd respect mine on what I'm trying to do and save time and effort here on everybody's part . . . But, if a person knows what they did was wrong why drag it out through the courts."

Whereupon the trial court observed:

> All right. First, I'll state generally, for the record, that I'm aware of the fact that these are serious charges. Mr. Schlee is a very competent defense attorney. . .
>
> He has advised Mr. DeHollander not to enter the pleas that Mr. DeHollander says he wants to enter. So, that's the situation on one hand.
>
> On the other hand I have before me an individual who's been to prison, who has studied some courses concerning court proceedings, who is able to articulate his desires, who's a rational, intelligent person, and who says he doesn't want to - -
>
> Well, you didn't really say that that you don't want to have a trial, but you said that you want to enter the plea because you know what you did and -- and you want to acknowledge what you did by way of a no contest plea, rather than reciting the details.

> And, that leads me to this thought process, and again, I'm saying all this for the record because I know, in all probability, this is going to be reviewed some day, the attorney is the representative of the client. The client is the principle. And if -- if someone who voluntarily wants to offer a plea without the assistance of Counsel, and in this case even against the advice of Counsel, because someone says, I -- I know what I did and I'm responsible for it, and I just want to acknowledge my responsibility. -- I don't think there's anything wrong with that.

The trial court then proceeded to read the charges, advising defendant of the maximum penalty for each and the corresponding rights that defendant waived by pleading no contest. In response, defendant stated that it was his decision to tender a no contest plea without a plea or sentence agreement. When the trial court again questioned him whether there had been any threats or promises to induce his plea, defendant repeated that it was his decision to enter the plea.

The trial court relied upon the police report to establish a factual basis for the plea. When defense counsel objected that the police report did not provide a factual basis for the two CSC-2nd charges, the trial court asked defendant if he wanted to continue with his plea of no contest to all the counts. Defendant replied that he wanted to change his plea to "not guilty" with respect to the two counts of CSC-2nd [Counts III and IV], but that he still wanted to plead no contest to CSC-1st [Count I] and unarmed robbery [Count II]. In accepting the plea of not guilty to the CSC-2nd charges, the trial court remarked:

> [H]aving observed everything that I've seen for the past however many minutes we've been doing this I'm satisfied that Mr. DeHollander understands the consequences of a plea. I've advised him of the maximum penalty and the consequences there in (sic) connected with Count I and Count II. He's astute enough to recognize that Mr. Schlee knows more about these situations than he does. And, when Mr. Schlee raised the legal objection to III and IV, although Mr. DeHollander interpreted it differently than I would've interpreted Mr. Schlee's comments, he still, he, Mr. DeHollander, still wanted to change his plea, based upon what he heard here.
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> The reason why I say all this is it indicates to me that he's - - he's entering the pleas voluntarily. He's entering them understandingly. And, no one has coerced him. No one's promised him anything. No one's threatened him in any way.
>
> I'm satisfied that what he's doing is what he says. And, he -- he understands that what he did was wrong, and he understands the consequences, and he wants to plead no contest, recognizing that there will be a conviction on I and II.

Have I accurately stated what you're trying to say here?

DEFENDANT: Yes, sir.

Thereafter, the following colloquy occurred between the trial court and defendant:

> BY THE COURT: I want to ask you this question, with reference to Count I and II: Do you have any impression, any understanding, any belief or any opinion from anyone, by that, I mean, the Prosecutor, your own attorney, the police, or even this Court, or anyone at all, as to what you think your sentence, in fact, may be in this case?
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> [DEFENDANT]: No, sir. That would be left up to the guidelines of the Court, basically, and yourself.

After pleading guilty to the habitual offender charge, defendant acknowledged that he was subject to a life term or any term of years for the CSC-1st conviction and that, as a habitual offender, he would have to serve his "calendar minimum." Defendant also stated that he understood that the habitual offender conviction enhanced the maximum penalty for unarmed robbery "up to life."

At the close of the plea hearing, the trial court remarked:

> The record may reflect that this was an unusual proceeding. By unusual I mean by having the Defendant offer a plea of no contest to the serious charges that are contained in this Information and to being a fourth offender. The record may also reflect that all through this proceedings (sic) Mr. Schlee has been here, available to talk to Mr. DeHollander.
>
> I have questioned Mr. DeHollander extensively. He knows. I think Mr. Schlee is advising him not to do this. But, he's stated to the Court that he's aware of what he did and that he wants to plead no contest.

Thereafter, in a colloquy with the trial court, defendant denied that he was intoxicated at the time of the offense, stating that "I was very well aware of what was going on," that "I'm not claiming that alcohol had anything to do with what happened," and that "I went in [the store] and knew what I was doing when I went in to do it."

Subsequently, at a hearing on the trial court's own motion to supplement defendant's no contest plea, the trial court found that defendant was permitted to enter a plea of nolo contendere because he wanted to accept responsibility for the offenses without stating all the details of the incident and because he wanted to avoid civil liability. In addition, the following exchange occurred between the trial court and defendant:

THE COURT: Now, one other thing I want to clear up with you, as I thought about this, when I was taking the plea to the Supplemental Information, at one point in time you made a statement, something about, You just work it out on the guidelines. And, Go [sic] ahead and do the sentence. If the -- as a Supplemental -- well, as a habitual offender that takes the -- the case out of the guidelines. Do you understand that?

MR. DEHOLLANDER: Yes, sir. I do.

THE COURT: Okay. You understand that?

MR. DEHOLLANDER: Right. I mean, it -- at that time, I was basically saying that you, yourself, impose the sentence.

THE COURT: Okay. Knowing all that, by that, I mean, I've now put the reasons for a no contest plea on the record and indicated to you that as a habitual offender the guidelines are not applicable, do you want to continue with your pleas?

MR. DEHOLLANDER: At the time? Yeah.

The Sentencing Information Report prepared for defendant's CSC-1st conviction recommended a minimum sentence of 15 to 30 years' imprisonment or life. In preparing the Presentence Report, the probation agent recommended that the trial court impose concurrent terms of 45 to 90 years' imprisonment.

At sentencing, when the trial court asked defendant if he had a chance to read the Presentence Report, defendant responded:

Yeah, I have. Well, I can understand in wanting to give me time for that.

* * *

I can understand on want 'til -- to otherwise slam me with this -- with as much time as they can. But, the reason this -- that the recommendation of 45 to 90 years is -- it's something I ain't never seen in my . . case. I know it's -- that I pled guilty to the charges, which I did, plus the fourth habitual . . . and I think you got the letter that I wrote you where I wrote that I know I wouldn't get off easy. And, I think I asked for, I think it was 15 to 40, 45. I'm not sure. And, I look at this report here, and it says 45 to 90 years. I have nothing to say.

THE COURT: Pardon?

MR. DEHOLLANDER: I have nothing else to say (S Tr, pp 3-4).

The trial court then asked defense counsel if he had a chance to read the report:

> MR. SCHLEE: Yes, I have, Your Honor. I -- I've received some letters from Mr. DeHollander indicating -- and he's also sent letters to the Court, Mr. Gregart, personally; and, myself, and indicating that he would like to withdraw his plea.
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> And, I came here this morning, or this afternoon expecting a motion to withdraw, making a motion to withdraw his plea. I talked with my client earlier this afternoon, and . . he indicated at that time to me that he wanted to withdraw his plea.
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> I just talked to him a moment ago, and I told him that the Court wants to hear his reason for withdrawing his plea, and he indicated to me that he was not going to give the Court any explanation, that he was going to stand mute if the Court would ask him such a question.
>
> So, I guess I'm asking for him to have his plea withdrawn.
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> THE COURT: Mr. DeHollander, do you want to withdraw your plea?
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> MR. DEHOLLANDER: I can't . . .
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> THE COURT: Pardon?
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> MR. DEHOLLANDER: I can't say nothing at this time.. . .
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> THE COURT: You what?
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> MR. DEHOLLANDER: I cannot say nothing at this time.
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> THE COURT: You're not gonna (sic) say anything.
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> MR. DEHOLLANDER: No, sir.
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> THE COURT: Well, all right. There's no motion before me to withdraw the plea. When and if he wants to file a motion that will let the Court know why he wants to withdraw the plea I'll consider it then.

The trial court then imposed a sentence of 33 to 60 years' imprisonment.

Subsequently, pursuant to this Court's order, the trial court held an evidentiary hearing on defendant's motion to withdraw his plea. Defendant testified that he was intoxicated at the time of the offenses and at the plea hearing. He claimed that he did not remember anything about the incident and believed that he had a defense of intoxication to the charges. Defendant also stated that he was not

taking Sinequan, a psychotropic medication prescribed for mood elevation that defendant claimed controlled his hyperactivity and impulsivity, at the time of the offenses or at the plea hearing. As a result, defendant claimed that "I acted irrational" and "I wasn't thinking correctly" or "rationally" at the plea hearing. Defendant stated that he began taking Sinequan in 1979 while he was in the Kalamazoo Psychiatric Hospital, but that he ceased taking the medication after he was released on parole on July 28, 1993 because he could not afford it. After his arrest and detention in the county jail, defendant asked jail officials for Sinequan and informed them that he was suicidal. At the time of the evidentiary hearing, defendant had resumed taking Sinequan.

Defendant also testified that he believed that he would not receive a sentence "higher than 15 to 30 years" based on his counsel's representation before entering the plea. Defendant also claimed that he was under the impression that the court had to follow the sentencing guidelines because he was never told that the guidelines did not apply to habitual offenders.

At the evidentiary hearing, William Schlee, defendant's trial counsel, testified that defendant entered the plea against his advice. Schlee also stated that he advised defendant to submit to a competency examination based on information indicating that defendant had mental problems and based on the circumstances of the offense, but that defendant refused because "he wanted to get it over with" rather than "languish in jail." Schlee further stated that before defendant entered the plea, he did not discuss sentencing with him because he had not yet computed the guidelines. Schlee admitted that it made "[n]o sense at all" for defendant to reject a competency hearing but then plead nolo contendere to a life offense with no sentence agreement. However, defendant told Schlee that it would be a "waste of time" to talk to the prosecutor about a sentencing agreement. Schlee also denied that he told defendant that his sentence would not exceed 15 to 30 years' imprisonment.

B.

On appeal, defendant claims that the trial court abused its discretion in denying defendant's motion to withdraw his plea. We disagree.

Although defendant did not file a written motion before sentencing, the trial court treated defendant's motion as one to withdraw before sentencing because defense counsel had raised the matter before sentencing. On review, we will likewise consider that defendant moved to withdraw his plea before sentencing. The trial court has discretion to allow the withdrawal of the plea before sentencing if withdrawal is in the interest of justice and the withdrawal does not substantially prejudice the prosecutor because of reliance on the plea. MCR 6.310(B); *People v Spencer*, 192 Mich App 146, 150; 480 NW2d 308 (1991).

(i)

In claiming that he was entitled to withdraw his plea, defendant first argues that his plea was not voluntary or understandingly given because he was not competent to plead to the charged offenses.

MCR 6.302 provides that a trial court may not accept a plea of guilty unless it is convinced that the plea is understanding, voluntary, and accurate. In *In re Valle*, 364 Mich 471, 477; 110 NW2d 673 (1961), the Supreme Court stated:

> In order to be accepted, a plea of guilty in a criminal case must be entirely voluntary by one competent to know the consequences, and should not be induced by fear, misapprehension, persuasion, promises, inadvertence or ignorance.

In *People v Harris*, 185 Mich App 100, 102; 460 NW2d 239 (1990), this Court observed:

> A criminal defendant is presumed competent to stand trial absent a showing that "he is incapable because of his mental condition of understanding the nature and object of the proceedings against him or of assisting in his defense in a rational manner." MCL 330.2020(1); MSA 14.800(1020)(1). An incompetent defendant "shall not be proceeded against while he is incompetent." MCL 330.2022(1); MSA 14.800(1022)(1). The issue of a defendant's competence to stand trial may be raised by either party or the court. MCL 330.2024; MSA 14.800(1024). Although the determination of a defendant's competence is within the trial court's discretion . . . a trial court has the duty of raising the issue of incompetence where facts are brought to its attention which raise a "bona fide doubt" as to the defendant's competence. . . . However, the decision as to the existence of a "bona fide doubt" will only be reversed where there is an abuse of discretion. (Citations omitted).

In this case, the trial court did not abuse its discretion in failing to order a competency examination. Although defendant claims that his competence was at issue because defense counsel requested a competency examination at the plea hearing and because the Presentence Report indicated that defendant has had a history of mental problems, the trial court properly found that there was no evidence of incompetence. As the trial court observed, defendant's decision to enter a not guilty plea to the two counts of CSC-2nd "[was] not an indication of a man who is not competent and who doesn't understand the nature and object of the proceedings, and who cannot rationally assist an attorney." Further, defendant's history of mental problems did not establish that he was incompetent at the time of the plea hearing. As the trial court properly noted, "people's mental condition, like their physical condition, can change." While noting that evidence of defendant's previous mental condition was "significant," the court properly concluded that it was not dispositive of his mental condition at the time of the plea hearing.

(ii)

Defendant also contends that the plea was not voluntary or understandingly given because he was intoxicated at the time of the plea hearing and "wasn't thinking correctly" because he was not taking his medication. We again disagree. As the trial court noted, before entering the plea, defendant stated that he was feeling "fine" and did not mention that he was not taking his medication. Further, at the hearing on the court's motion to supplement the plea, defendant acknowledged that he wanted to continue with his plea and did not claim that he was intoxicated or was not taking his medication at the plea hearing.

(iii)

The trial court also properly rejected defendant's contention that his plea was not voluntary or understandingly given because he misunderstood the sentencing consequences of the plea. Although defendant claims that his plea was induced by defense counsel's assurance that he would not be sentenced to more than 15 to 30 years' imprisonment, the trial court found:

> [T]hat claim is flatly contradicted by the Defendant's statements made under oath at the time of the plea-taking proceedings.
>
> Mr. DeHollander says he was told by his attorney that he would be sentenced to not more than 15 to 30 years. And, I note for the record, it's of interest to the Court, that Mr. DeHollander's letter to the Court was asking for a 15 to 30-year sentence.
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> Mr. DeHollander testified at this evidentiary hearing, on remand, that he was shocked or flabbergasted, or some other term, by the recommendation of the pre-sentence investigator for 45 years. Now, that sentence was not imposed but that was his testimony.
>
> And, [defense counsel] Mr. Schlee testified , and I could observe him here, and he was very emphatic with his voice inflection. He was asked, Did you tell Mr. DeHollander he would receive a sentence of 15 to 30? And, Mr. Schlee emphatically denied that.
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> * * *
>
> He was not told by his attorney that he'd receive a 15 to 30-year sentence. He may have wanted that sentence . . . and he articulated that to the Court in a letter prior to sentencing.

(iv)

Defendant is also not entitled to withdraw his plea on the grounds that he had an intoxication defense to CSC-1st and unarmed robbery, and that his counsel's failure to seek an adjournment of the plea hearing resulted in the denial of effective assistance of counsel. We note that while voluntary intoxication is a defense to the specific intent crime of unarmed robbery, it is not a defense to the general intent crime of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). *People v Bell*, 101 Mich App 779; 300 NW2d 691 (1980); *People v Brown*, 197 Mich App 448; 495 NW2d 812 (1992).

(v)

Further, there is no merit to defendant's claim that he was entitled to withdraw his guilty plea because the trial court did not take a sufficient waiver of his right to counsel. MCR 6.005(D) provides that a court may not permit a defendant to waive the right to be represented by a lawyer without first:

> (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and
>
> (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

In *People v Anderson*, 398 Mich 361, 366-368; 247 NW2d 857 (1976), the Court set forth three requirements for a proper waiver. First, defendant's request to represent himself must be "unequivocal." Second, defendant must assert his right to proceed in propria persona knowingly, intelligently, and voluntarily after a colloquy in which the trial court advises the defendant of the disadvantages of self-representation. Third, the trial court must determine whether the defendant will disrupt, unduly inconvenience and burden the court and the administration of justice by acting as his or her own counsel. See also *People v Dennany*, 445 Mich 412; 519 NW2d 128 (1994).

Here, the trial court properly found that the case did not involve a self-representation issue. Defendant continued to be represented by counsel throughout the plea proceeding, but simply refused to follow the advice of his counsel not to enter a no contest plea to all the charges, although he followed counsel's advice not to enter a plea with respect to the two counts of CSC-2nd. See *People v Effinger*, 212 Mich App 67, 71; 536 NW2d 809 (1995).

C.

Finally, defendant's sentence does not violate the principle of proportionality. A sentence constitutes an abuse of discretion if it violates the principle of proportionality by being disproportionate

to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). Review of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality without reference to the guidelines. *People v Cervantes*, 448 Mich 620; 532 NW2d 831 (1995); *People v Gatewood (On Remand)*, 216 Mich App 559; 550 NW2d 265 (1996). In this case, defendant's sentence of 33 to 60 years' imprisonment was proportionate in light of the seriousness of the offenses and his criminal background. In imposing the sentence, the trial court noted that its greatest concern was the protection of society and that rehabilitation was "not a realistic goal" as defendant was on parole when he committed the instant offenses. Although defendant argues that the absence of a weapon and the fact that no one was injured were mitigating factors, the record reveals that defendant threatened to stab the victim with a knife and that she has experienced panic attacks since the incident and must have someone working with her in the store at all times.

Defendant's sentence also does not exceed his life expectancy. *People v Martinez (After Remand)*, 210 Mich App 199, 203; 532 NW2d 863 (1995); *People v Love (After Remand)*, 214 Mich App 296, 302; 542 NW2d 374 (1995). Although defendant, who was thirty-four years old at sentencing, must also serve eight years remaining on a previous sentence, it is reasonable to expect him to live to be seventy-five years old. Contrary to defendant's contention, the trial court was not required to evaluate the health histories of defendant's family in determining whether the sentence exceeded his life expectancy. *People v Moore*, 432 Mich 311, 329; 439 NW2d 684 (1989).

Affirmed.

/s/ Janet T. Neff
/s/ Joel P. Hoekstra
/s/ Gerald D. Lostracco