

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BENNY MAHONE,

Defendant-Appellee.

UNPUBLISHED

December 12, 1997

No. 194590

Berrien Circuit

LC No. 95-002145-FC

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Defendant was sentenced to three to fifteen years' imprisonment, and now appeals as of right. We affirm.

This case arises out of an incident that occurred on or about April 28, 1995, in which an eight-year-old girl, whose family was living with defendant and his wife, reported that defendant put his finger inside her vagina twice. Defendant admits being in the girl's room that night, but alleges that he was intoxicated and accidentally went into the wrong room, and denies that any sexual activity took place.

I

Defendant first argues that the trial court erred in denying his request for substitute counsel.¹ We review the trial court's decision for an abuse of discretion. *People v Tucker*, 181 Mich App 246, 255; 448 NW2d 811 (1989).

Defendant argued before the trial court that he desired a new attorney because his attorney had not been in touch with him from the date of the preliminary examination, June 29, to the date of trial, December 19, and that every time that they talked, it was regarding plea bargains; defendant stated that plea discussions were unnecessary because he had not done anything wrong. Defendant's trial attorney acknowledged that he and defendant, as well as defendant's family, spent a lot of time arguing, but also stated that he was prepared to proceed with the trial.

The trial court noted that defense counsel had received the entire prosecution file including the police reports and had ample opportunity to review the case file. It further noted that the jury had already been brought in and that a delay for substitute counsel would result in substantial cost. The court stated that it was not required that defendant like his attorney, only that his attorney was competent to represent him in the matter. The court denied defendant's request for substitute counsel "for lack of any meritorious reason" and gave defendant and his counsel a brief recess to confer in private.

Defendant maintains that an indigent defendant is entitled to substitute counsel if the defendant and his counsel disagree over the use of a substantial defense or a fundamental trial tactic, citing *Tucker, supra* at 255. Defendant argues that such a disagreement was evident because no exchanges between counsel and client occurred in the “critical pretrial period.” However, as this Court stated in *Tucker*, “a mere allegation that a defendant lacks confidence in his attorney, unsupported by a substantial reason, does not amount to adequate cause, particularly when the request is belated.” *Id.*

In the present case, the trial court noted that defendant’s request was belated, coming the morning of trial after the jury had already been impaneled. Further, the gravamen of defendant’s argument that his trial counsel was inadequate for failing to meet with defendant more frequently before trial is that his attorney should have spent more time getting to know members of defendant’s family who were to be defense witnesses. However, defendant fails to present any substantial reason how defense counsel’s trial preparation was inadequate or what information defense counsel failed to gain from these witnesses; indeed, defendant fails to identify the defense witnesses who could have provided more information had defense counsel met with him more frequently.

Defendant insists that his request was more important because he was not only asking for substitute counsel but also asking to retain private counsel. While it is true that a criminal defendant who has expressed the desire and financial ability to retain counsel must be given a reasonable opportunity to do so, *People v Arquette*, 202 Mich App 227, 231; 507 NW2d 824 (1993), a defendant’s right to counsel of his choice must be balanced against the public’s interest in the prompt and efficient administration of justice. *People v Kryzstopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988). Here, defendant waited almost six months from the preliminary examination date to the morning of trial to announce his desire for substitute counsel. In light of this delay, coupled with a complete lack of adequate cause, we agree with the trial court that the substitution of counsel would have been unreasonably disruptive to the judicial process. *People v Flores*, 176 Mich App 610, 613-614; 440 NW2d 47 (1989), *Kryzstopaniec, supra* at 598.

We find nothing in the record before us to evidence an abuse of the trial court’s discretion in denying defendant’s request for substitution of counsel.

II

Defendant next argues that the trial court erred in denying his motion to specifically enforce a prior plea agreement and to set aside the verdict on the grounds of double jeopardy. We disagree.

A

When the victim was initially interviewed by the police, she reported the alleged sexual incident, the subject of the present case, and also mentioned that defendant owned a gun. Defendant was subsequently arrested and charged with possession of a short-barreled shotgun. This case was prosecuted by Henry Ruis; defendant hired attorney L. Michael Renfro to defend him.

Ruis and Renfro met and discussed the possibility of defendant pleading guilty to attempted possession of a short-barreled shotgun in exchange for dropping the charge of actual possession of the gun. Concerned that defendant may still be charged with criminal sexual conduct, Renfro made an agreement with Ruis that if further charges later arose, defendant could withdraw his guilty plea on the gun charge. Pursuant to this agreement, defendant pleaded guilty to attempted possession of a short-barreled shotgun.

Meanwhile, a warrant was issued for defendant's arrest regarding the criminal sexual conduct charge, but Ruis, Renfro, and defendant were unaware of the additional charge at that time. On May 22, 1995, proceedings were held in which defendant pleaded guilty to attempted possession of a short-barreled shotgun. When defendant appeared for sentencing on the pleaded gun charge, the prosecutor asked for a continuance and defendant was arrested on the criminal sexual conduct charge. Subsequently, Ruis and Renfro filed a stipulation stating that they had agreed that because the criminal sexual conduct charge was filed, defendant was entitled to withdraw his plea to the weapons charge; the court issued an order allowing defendant to withdraw this plea.

After defendant was tried and found guilty of criminal sexual conduct, the prosecutor dismissed the charge of possession of a short-barreled shotgun. Defendant filed a motion to adjourn sentencing and to set aside the verdict based on a violation of his plea agreement; he also filed amendments to the motion for judgment notwithstanding the verdict based on violation of double jeopardy and prosecutorial misconduct. Defendant's argument regarding the plea agreement was based on his erroneous interpretation that part of the original plea agreement was that the prosecutor would not prosecute the criminal sexual conduct charge and that defendant did not intend to withdraw the plea; therefore, the plea should be specifically enforced and the criminal sexual conduct charge dropped. His alternative argument regarding double jeopardy was that both charges, the possession of a shotgun and criminal sexual conduct, arose out of the same transaction and bringing the criminal sexual conduct charge in a separate case after his plea to the gun charge violated the principles of double jeopardy. The trial court denied defendant's motion.

B

Defendant first argues that the trial court erred in denying specific enforcement of the plea agreement, as it was understood by defendant, including a promise not to prosecute defendant on criminal sexual conduct charges. We disagree.

In this case, both the defense attorney and the prosecutor who discussed the plea agreement testified that they never understood the agreement to include a promise that defendant would not be charged with criminal sexual conduct, only that if such a charge arose, they would renegotiate defendant's plea regarding the gun charge or allow him to withdraw the plea. Further, the plea agreement, as read into the record from the plea proceedings, did not include any such promise, and defendant and his attorney stated on the record that the plea agreement was completely stated. Finally, although defendant now asserts that he understood the agreement to contain such a promise, he did not raise the issue at the plea proceedings and testified at the evidentiary hearing that he did not at any time discuss the matter with a prosecutor. We find no clear error in the trial court's finding that the plea agreement did not consist of a promise not to prosecute defendant for criminal sexual conduct. *People v Truong (After Remand)*, 218 Mich App 325, 330; 553 NW2d 692 (1996).

More importantly, as stated by our Supreme Court in *People v Siebert*, 450 Mich 500, 513, n 8; 537 NW2d 891 (1995), "Even if a defendant established that he relied on incorrect information in deciding to plead guilty, he would only be entitled to withdraw his plea." This is precisely what happened in this case.

C

Defendant next argues that because he pleaded guilty to the gun charge and it arose out of the same transaction as the sexual conduct charge, defendant's subsequent conviction of criminal sexual conduct in a separate case violated the principles of double jeopardy. We disagree.

It is axiomatic that for double jeopardy protections to apply, a defendant must first be put in jeopardy by a criminal prosecution in a court of justice. *People v Burks*, 220 Mich App 253, 256; 559 NW2d 357 (1996). This Court has held that when a defendant pleads guilty, jeopardy attaches when sentence is imposed. *People v Johnson*, 396 Mich 424, 431, n 3; 240 NW2d 729 (1976); *People v Siebert*, 201 Mich App 402, 418-419; 507 NW2d 211 (1993), affirmed with disapproval in part on other grounds 450 Mich 500; 537 NW2d 891 (1995). In the present case, defendant's guilty plea on the gun charge was withdrawn before sentencing; therefore, the trial court correctly stated that jeopardy never attached to the gun charge.

Likewise, the trial court correctly stated that double jeopardy does not apply in this case because the two charges did not arise out of the same transaction. Both the United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Torres*, 452 Mich 43, 63; 549 NW2d 540 (1996). The validity of multiple prosecutions under the Michigan double jeopardy provision is measured by the same transaction test, which requires that prosecutors join in one trial all the charges against a defendant

stemming from a single “criminal act, occurrence, episode, or transaction.” *People v White*, 212 Mich App 298, 305-306; 536 NW2d 876 (1995). The same transaction test requires a close, unified purpose and a direct, factual connection between the offenses. *People v Jackson*, 153 Mich App 38, 46; 394 NW2d 480 (1986).

Although both the allegations of criminal sexual conduct and possession of a short-barreled shotgun were reported by the same person at essentially the same time, the crimes themselves were entirely unrelated. The victim of the sexual assault parenthetically reported that defendant had a gun that scared her; however, she did not in any way indicate that defendant possessed the gun at the time of the sexual assault or that he used it in any way to threaten her. The coincidental timing of the reports, without more, is insufficient to support the conclusion that the two crimes occurred at the same time or were part of one criminal transaction.

The trial court correctly stated that jeopardy had not attached in the charge of possession of a short-barreled shotgun where defendant pleaded guilty but never reached sentencing and that the two charges were not part of the same criminal transaction. Therefore, double jeopardy principles did not apply and the trial court properly denied defendant’s motion for judgment notwithstanding the verdict.

Affirmed.

/s/ Janet T. Neff

/s/ Kathleen Jansen

/s/ Jane E. Markey

¹ Defendant briefly argues that the trial court erred “in not giving a hearing to defendant’s legitimate desires.” In order to properly review and rule on a defendant’s request for new counsel, the trial court need not hold a full adversarial hearing; rather, review is sufficient where the trial court elicits testimony from both the attorney and client to gauge the truth of the matter. *People v Ceteways*, 156 Mich App 108, 119; 401 NW2d 327 (1986). This is what was done in the present case.