# STATE OF MICHIGAN

# COURT OF APPEALS

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IN RE ERNEST ALBERT BURESH, a minor.

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PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

ERNEST ALBERT BURESH,

Respondent-Appellant.

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UNPUBLISHED
November 24, 1998

No. 205883
Macomb Juvenile Court
LC No. 96-042694 DL

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Before: Smolenski, P.J., and McDonald and Doctoroff, JJ.

PER CURIAM.

Respondent appeals as of right a June 30, 1997, order of disposition committing respondent to the Family Independence Agency for placement pursuant to the Youth Rehabilitation Services Act, MCL 803.301 *et seq*.; MSA 25.339(51) *et seq*. We affirm.

Respondent was involved in an incident at school in which he pulled a knife on two boys who had started a physical altercation with respondent. At the January 9, 1997, adjudication hearing, a plea agreement was placed on the record indicating that an allegation that respondent had committed assault with intent to do great bodily harm less than murder would be dismissed and that respondent would plead no contest to felonious assault, MCL 750.82; MSA 28.277, and carrying a dangerous weapon with unlawful intent, MCL 750.226; MSA 28.423. The plea agreement was also conditioned, in relevant part, on respondent moving to North Carolina to live with his aunt and not returning to Michigan for at least one year. Respondent pleaded no contest as agreed and a January 9, 1997, order reflecting the terms the plea agreement was entered.

After respondent returned to Michigan approximately four months later, a May 27, 1997, order of adjudication reflecting respondent's no contest plea was entered. On June 30, 1997, the order of disposition committing respondent to the Family Independence Agency was entered. Respondent was subsequently placed at Boysville, Inc.

Respondent first contends that the juvenile court erred in refusing to allow respondent to withdraw his plea by right. We disagree.

MCR 5.941(D) provides as follows:

> The court may take a plea of admission or of no contest under advisement. Before the court accepts the plea, the juvenile may withdraw the plea offer by right. After the court accepts the plea, the court has discretion to allow the juvenile to withdraw a plea.

It is true that in this case the court's January 1, 1997, order stated that "a no contest plea to Counts II and III of Petition B be taken under advisement until [respondent's] 17th birthday." However, the record clearly reveals that the court "accepted" respondent's plea at the January 1, 1997, hearing, and that the matter actually taken under advisement was the disposition of respondent, i.e., whether the court would proceed with respondent's placement. Alternatively, the court accepted the plea at least by May 27, 1997, when it entered the order of adjudication. Respondent did not move to withdraw his plea until June 30, 1997. Accordingly, respondent had no right to withdraw his plea.

Next, respondent argues that where he presented the court with newly discovered evidence of self defense the court abused its discretion in denying respondent's motions to withdraw his plea and for a new trial. However, the evidence was not newly discovered and could have been produced with reasonable diligence. *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995). Specifically, the police report contained in the file below indicates that two witnesses to the incident told the investigating officer that before respondent pulled the knife the two other boys had either "double-teamed" or "kick[ed]" respondent and put him "in a headlock." Respondent informed the officer that a day earlier one of these boys had pulled a knife on him. However, this boy denied respondent's allegation.

Moreover, we cannot say that this evidence would probably have caused a different result had the matter gone to trial where it indicates that respondent responded to the use of nondeadly force with deadly force. *Id*. Accordingly, we conclude that the court did not abuse its discretion in denying respondent's motions to withdraw his plea and for a new trial. MCR 2.613(A); MCR 5.902(A); MCR 5.941(D); MCR 5.992(D); *In re Alton*, 203 Mich App 405, 410; 513 NW2d 162 (1994). We also conclude that the trial court did not abuse its discretion in denying respondent's motion for a rehearing. MCR 5.992; *Cason v Auto Owners Ins Co*, 181 Mich App 600, 605; 450 NW2d 6 (1989).

Next, respondent raises a number of arguments for his contention that his plea agreement was illegal or illusory and therefore unenforceable. We disagree. Specifically, respondent contends that the court had no authority to send respondent to live with his aunt in North Carolina and prohibit his return to Michigan for one year. However, contrary to respondent's contention, these conditions were understood and specifically agreed to by respondent and his parents. Moreover, respondent was not absolutely banished from Michigan, but rather simply could not return to Michigan for one year "without court approval." In any event, after the court accepted respondent's plea at the January 9, 1997, adjudication hearing, the court was then authorized by statute and court rule to place respondent "under

supervision . . . in the home of an adult who is related" to respondent, including an aunt, and to "order the terms and conditions of . . . supervision." MCR 5.943(E)(1); MSA 712A.18(1)(b); MSA 27.3178(598.18)(1)(b). We therefore conclude that the court had the legal authority to order respondent to live with his aunt, who happened to live in North Carolina, and to not return to Michigan for at least one year without court approval. We further find that these terms did not violate respondent's constitutional right to interstate travel. *People v Roth*, 154 Mich App 257; 397 NW2d 196 (1986); *People v Ison*, 132 Mich App 61, 64; 346 NW2d 894 (1984). Finally, the terms of respondent's plea, which provided for the dismissal of an allegation that respondent had committed assault with intent to do great bodily harm less than murder, was not illusory. *People v Gonzalez*, 197 Mich App 385, 391; 496 NW2d 312 (1992).

Next, respondent contends that several defects in the plea taking proceeding rendered his plea involuntary. We disagree. Specifically, respondent contends that the court failed to comply with MCR 5.941(C)(3)(b) where there is no indication that the court reviewed the police report to determine whether the requisite factual support for his plea existed. However, the parties stipulated to the use of the police report in this regard. Thus, we find that the court complied with MCR 5.941(C)(3)(b) by "establishing support for a finding that the juvenile committed the offense . . . by means other than questioning the juvenile when the juvenile pleads no contest." Respondent also contends that the court failed to comply with MCR 5.941(C)(4) by not inquiring whether respondent's parents' supported the plea. However respondent's counsel represented the following to the court:

> I have had an opportunity to discuss [the plea agreement] with [respondent's parents]. We feel that this is in [respondent's] best interest. He's in agreement as is his mom and dad.

Thus, we find no violation of MCR 5.941(C)(4). Finally, respondent contends that the court failed to comply with MCR 5.941(C)(3) by stating "why a plea of no contest is appropriate." However, the court did state that it was convinced that respondent's plea was understanding, voluntary and accurate. The court also stated that it was "further convinced that the offense to which [respondent] has offered his plea of no contest was, in fact, committed . . . ." Thus, although the court did not use the word "appropriate," we find no violation of MCR 5.941(C)(3).

Next, respondent contends that numerous instances of ineffective assistance by the attorney who represented him at the plea proceeding (respondent's first attorney) rendered his plea involuntary. Because respondent failed to move below for a new trial or an evidentiary hearing with respect to his claim of ineffective assistance of counsel, our review is limited to errors on the existing record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995); *People v Oswald*, 188 Mich App 1, 13; 469 NW2d 306 (1991).

Specifically, respondent contends that his plea was involuntary because his first attorney failed to interview witnesses and informed him that he did not have any defenses. However, respondent cites no evidence in support of this claim. Rather, respondent simply cites to arguments made by respondent's second attorney in support of respondent's motion to withdraw his plea or a new trial that he (the second attorney) had interviewed witnesses and concluded that respondent had a meritorious

defense in this case. We decline to infer that respondent's first attorney failed to interview witnesses and discover a defense, thereby rendering respondent's plea unknowing or involuntary, simply from statements by respondent's second attorney that he did interview witnesses and discover a defense. Thus, we conclude that respondent has failed to establish ineffective assistance on this ground. *People v Thew*, 201 Mich App 78, 89; 506 NW2d 547 (1993).

Respondent also contends that his first attorney failed to adequately explain the nature of the plea agreement in this case leading respondent to believe that he would be allowed to go to trial if "the North Carolina effort failed . . . ." However, a review of the plea proceeding indicates that respondent's first attorney informed the court that she had discussed the plea agreement with respondent and his parents, that respondent understood that he had a right to a jury trial, but that respondent had chosen to avail himself of the plea bargain. Moreover, any prejudice arising from any error on counsel's part in failing to explain the consequences of the plea agreement was alleviated by the court, which informed respondent that if he pleaded no contest he would be giving up the right to go to trial and that if he violated the terms of "the advisement," i.e., returned to Michigan within one year, he could be placed in a juvenile institution until age nineteen. The record also reveals that respondent replied affirmatively when asked by the court if he understood the consequences of his plea agreement. Accordingly, we conclude that respondent has failed to establish that his plea was rendered involuntary or unknowing because of ineffective assistance of counsel. *Id*.

Next, respondent contends that the trial court erred at the June 30, 1997, dispositional hearing when it denied respondent's attorney the right to cross-examine the juvenile court probation officer concerning her report. However, respondent's attorney had no right to cross-examine the probation officer. Rather, MCR 5.943(C)(2) provides that a juvenile's attorney, "in the court's discretion, may be allowed to cross-examine individuals making reports when such individuals are reasonably available." Moreover, when counsel asked whether he could ask the probation officer some questions, the court directed counsel to address any questions to the court, which respondent's counsel did without objection. Accordingly, we find no error or abuse of discretion.

Next, respondent takes issue with the court's statement that it had been in contact with the probation officer numerous times about the officer's efforts to obtain education services for respondent in North Carolina. Respondent contends that the court erred in engaging in these ex-parte communications. However, respondent did not object on this ground below and did not request to cross-examine the probation officer concerning these communications. Moreover, on appeal respondent cites caselaw finding ex parte communications inappropriate in the context of a criminal sentencing proceeding. However, this is not a criminal case, but rather is a juvenile delinquency proceeding. Moreover, respondent was not sentenced in this case. Thus, where respondent failed to raise this issue before the court below and fails on appeal to cite appropriate authority for his argument, we conclude that this issue is not preserved for appeal. *Weiss v Hodge (After Remand)*, 223 Mich App 620, 637; 567 NW2d 468 (1997); *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997).

Next, respondent contends that the court violated MCR 5.943(C)(1) when, at the June 30, 1997, dispositional hearing, it refused to allow respondent to provide relevant and material evidence.

However, a review of the transcript of this hearing indicates that respondent wanted to be able to present evidence to the Family Independence Agency screening committee that would be making the recommendation concerning respondent's placement. A caseworker indicated that it would be highly unusual for an attorney to appear before this screening committee and respondent has cited no authority indicating that an attorney may appear before such a screening committee. Moreover, the court and the caseworker informed respondent that the screening committee would accept a paper outlining respondent's position. Thus, we find no error.

Affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Martin M. Doctoroff