STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 17, 2004
v	No. 247871 Lenawee Circuit Court
JIMMIE DEE KOBY, Defendant-Appellant.	LC No. 02-009807-FC

Before: Cavanagh, P.J., and Jansen and Saad, JJ.

PER CURIAM.

I. FACTS AND PROCEDURAL HISTORY

Defendant Jimmie Dee Koby pled nolo contendere to one count of second-degree criminal sexual conduct (sexual contact involving a person aged less than thirteen years) ("CSC-II"),[1] and the trial court sentenced him to 38 to 180 months in prison. Defendant appeals the trial court's order that denied his motion to withdraw his nolo contendere plea after sentencing, and we affirm.

On the evening of March 29, 2002, Lenawee County Sheriff's deputies and Cambridge Township Police officers questioned defendant in connection with defendant's daughter's complaint that defendant sexually molested her. The police gave defendant a *Miranda*[2] warning and defendant waived his rights and gave a written statement in which he admitted to having engaged in sexual intercourse and oral sex with his daughter, the victim, on four to five occasions. Defendant also admitted that he inappropriately touched the victim on several occasions.

On April 24, 2002, the prosecution charged defendant with six counts of first-degree criminal sexual conduct (sexual penetration involving a person aged less than thirteen years)

[1] MCL 750.520c(1)(a)

[2] *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966)

("CSC-I")[3] and two counts of third-degree criminal sexual conduct (sexual penetration involving a person aged thirteen to fifteen years) ("CSC-III").[4]

On July 15, 2002, defendant filed a motion with the trial court that sought to suppress his confession as involuntarily given because he claims he was intoxicated when he wrote his confession. The trial court heard defendant's motion on July 24, 2002, and found that the prosecution had proven that defendant voluntarily gave his statement, and therefore, the trial court denied defendant's motion to suppress the statement. Later that same day, defendant informed the trial court that he wished to enter into a plea agreement.

At a hearing held on July 25, 2002, defendant stated that he wished to plead nolo contendere to one count of CSC-II. In exchange, the prosecution dismissed the original six CSC-I counts and the two CSC-II counts. Defendant testified that the basis for his plea was that he suffered from "alcoholic blackouts" and allegedly had no memory of the alleged events from which this case arose. The trial court sentenced defendant on August 23, 2002.

On October 3, 2002, claiming his plea was involuntary and due to ineffective assistance of counsel, defendant filed his motion to withdraw his nolo contendere plea. The trial court heard defendant's motion on November 8, 2002. The trial court correctly ruled that defendant's plea was made voluntarily, and denied defendant's motion. This Court granted leave to appeal on August 4, 2003.[5]

Defendant says, erroneously, that his nolo contendere plea was made involuntarily because of the ineffective assistance of counsel, and accordingly, that the trial court erred when it denied defendant's motion to withdraw his plea.

MCR 6.311 governs motions to withdraw pleas after sentencing. There is no absolute right to withdraw a plea after a trial court accepts it. *People v Haynes (After Remand)*, 221 Mich App 551, 558; 562 NW2d 241 (1997), citing *People v Eloby (After Remand)*, 215 Mich App 472, 474; 547 NW2d 48 (1996). "When a motion to withdraw a plea is made after sentencing, the decision whether to grant it rests within the discretion of the trial court. That decision will not be disturbed on appeal unless there is a clear abuse of discretion resulting in a miscarriage of justice." *Id.* (internal citations omitted).

We review a claim of ineffective assistance of counsel arising from a plea to determine "whether the defendant's plea was made voluntarily and understandingly." *Haynes (After Remand)*, *supra* at 558. Defendant argues that the trial court should have held an evidentiary hearing with respect to his claim that trial counsel provided materially incorrect advice that induced defendant's plea. However, with respect to claims of ineffective assistance of counsel that arise from a defendant's plea, the correct inquiry is not whether the advice was right or

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[3] MCL 750.520b(1)(a)

[4] MCL 750.520d(1)(a)

[5] *People v Jimmie Dee Koby*, unpublished order of the Court of Appeals, entered August 4, 2003 (Docket No. 247871)

wrong, but rather, whether the advice "was within the range of competence demanded of attorneys in criminal cases." *Id.* Here, defendant contends that he agreed to his plea because trial counsel gave him incorrect advice. Were we to agree, we would nevertheless be precluded, under *Haynes (After Remand), supra,* from disturbing the trial court's decision on that basis.

Furthermore, to prevail on a claim of ineffective assistance of counsel, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that counsel's substandard performance substantially prejudiced defendant. *People v Sabin (On Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). There exists a "strong presumption" that counsel's assistance was effective. *Id.* Here, defendant fails to overcome this "strong presumption." Defendant confessed to committing several acts of criminal sexual conduct. When defendant entered his plea of nolo contendere to one count of CSC-II, the prosecution dismissed all eight of the original counts against him, including six counts of CSC-I that each carried a maximum possible penalty of life in prison. CSC-II, on the other hand, carries a maximum sentence of fifteen years in prison. In light of this, and defendant's voluntary confession to police, we cannot conclude that defendant showed that his trial counsel's performance fell below an objective standard of reasonableness, or that defendant was prejudiced by trial counsel's conduct here. Indeed, it would appear that defense counsel vigorously and effectively represented his client's interests.

Moreover, our review of the record shows no error in the plea proceeding. See MCR 6.311(B). After defendant's trial counsel and the prosecution announced the terms of the plea agreement, and the trial court accepted it, the trial court then placed defendant under oath and examined him to determine whether he understood and voluntarily accepted the terms of the agreement. Defendant expressed his satisfaction with his trial counsel and the advice he was given. Defendant stated on the record that he understood that neither he, nor his counsel, nor the prosecutor, had discussed a possible sentence with the trial court, that he could be sentenced to a maximum of fifteen years in prison, that he was relinquishing his right to either a jury trial or a bench trial, that he had the right to remain silent, to question witnesses, and to testify at trial, and that his right to appeal would be limited Defendant testified that his plea was not induced by threats and that there were no promises made to him to induce his plea save for the terms of the plea bargain. Significantly, at his sentencing hearing, defendant again expressed his satisfaction with his trial counsel and the advice he received.

Therefore, we hold that the trial court did not err when it denied defendant's motions to withdraw his plea and for an evidentiary hearing.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Henry William Saad