STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 28, 2010
v	No. 293560 Washtenaw Circuit Court
AFSHIN JADIDNOURI, Defendant-Appellant.	LC No. 09-000046-AR

Before: MURPHY, C.J., and BECKERING and M.J. KELLY, JJ.

PER CURIAM.

Defendant appeals by leave granted the circuit court's order denying defendant's application for leave to appeal the district court's order denying defendant's motion to withdraw his guilty plea to assault, MCL 750.81. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with assault and disturbing the peace arising out of an incident in which he apparently became angry with a store manager concerning a phone purchase and, among other actions, slammed his palm pilot on the counter. On the day trial was set to begin, defendant was offered a plea bargain in which he was to plead guilty to the assault charge in return for dismissal of the disturbing the peace charge. The prosecutor also added that, for purposes of sentencing, the matter would be referred to a probation officer who "will likely recommend the deferred program, whereby, the defendant will be placed . . . [on] probation[,] [a]nd after a successful probationary term, . . . the matter will be taken off the record[.]" The prosecutor later explained that a deferred sentence meant that, if defendant successfully completed his term of probation, the plea conviction would be "set aside," "dismissed," or "expunged." [1] The prosecutor clearly articulated that he himself was not guaranteeing a deferred

[1] It was never made entirely clear what specific statutory mechanism was to be employed to clear defendant's record on successful completion of terms set by the court had the court imposed a deferred sentence. However, it appears that MCL 771.1(2) was being invoked, which provides that, "[i]n an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to

sentence; it would be up to the probation department to recommend such a sentence, a supervising prosecutor would then have to approve it, and finally the court would have the discretion to impose the deferred sentence. But the prosecutor also added that "there's a decent chance you'll have that happen." The district court emphasized that there was no guarantee that defendant would receive a deferred sentence. In the discussion, and based on statements made by defendant on the record, it is quite evident that it was important to defendant that there would be at least a chance that "[t]here's no record of [the conviction] left behind[.]" But defendant acknowledged that there was no guarantee that a deferred sentence would be imposed, and he acknowledged that the plea agreement was not contingent on the court imposing a deferred sentence.

The district court found, after taking testimony from defendant, that there existed a sufficient factual basis for the plea. We shall discuss the factual basis for the plea in more detail below in our analysis, as defendant raises an appellate argument challenging the court's finding on the matter.

Subsequently, the probation department did not recommend a deferred sentence because it was discovered that defendant had entered a plea to resisting and obstructing an officer in 2001. As suggested by the record and as indicated in the prosecutor's appellate brief, defendant was not eligible and did not qualify for a deferred sentence recommendation given the prior plea-based conviction. Apparently, the local deferred sentencing program does not allow for a deferred sentence recommendation relative to a defendant who either had a past conviction or had previously received the benefit of a deferred sentence. Defendant moved to withdraw his plea on various grounds prior to sentencing. Defendant, however, was not permitted to withdraw his plea, either by the district court or the circuit court. He was sentenced to a fine of $750, five consecutive Saturdays in a jail work program, and ordered to complete an anger management program. Defendant was also given a suspended 93-day jail sentence, along with probation for 12 months.

On appeal, defendant argues that the trial court erred when it refused to allow him to withdraw his plea. He contends that he received confusing and misleading information relative to the plea agreement, and he claims that counsel pressured him into taking the plea. Defendant further argues that he should be allowed to withdraw his plea due to the lack of a factual basis for the plea in regard to the element of intent.

A trial court's denial of a defendant's motion to withdraw a guilty plea is generally reviewed for an abuse of discretion. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997). An abuse of discretion occurs when the trial court's decision falls outside a range of

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prove to the court his or her eligibility for probation *or other leniency compatible with the ends of justice and the defendant's rehabilitation*[.]" (Emphasis added.) We also note that, while the prosecutor spoke about defendant having to successfully complete probation for purposes of deferred sentencing, a deferred sentence is not the equivalent of being placed on probation but simply means that no sentence is initially imposed even though the court may impose conditions. *People v Hacker*, 127 Mich App 796, 799; 339 NW2d 645 (1983). "The imposition of those conditions is not construed as tantamount to placing the defendant on probation." *Id.*

principled outcomes. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact, if any, for clear error, and review the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo. *Id*. However, because no *Ginther*[2] hearing was held, our review of defendant's claim is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

After a thorough review of the record, we find that defendant cannot show that the district court abused its discretion when it refused to allow him to withdraw his guilty plea.

"The court may not accept a plea of guilty . . . unless it is convinced that the plea is understanding, voluntary, and accurate." MCR 6.302(A). After acceptance of a plea but prior to sentencing, "a plea may be withdrawn on the defendant's motion . . . only in the *interest of justice*, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea." MCR 6.310(B)(1) (emphasis added). When invoking the interest-of-justice provision in MCR 6.310(B)(1), a defendant has the burden to establish a fair and just reason to withdraw a plea. *People v Patmore*, 264 Mich App 139, 149; 693 NW2d 385 (2004). This Court has invalidated pleas where the underlying bargain is illusory. *People v Graves*, 207 Mich App 217, 218; 523 NW2d 876 (1994); *People v Gonzalez*, 197 Mich App 385, 391; 496 NW2d 312 (1992). Once a guilty plea or a plea of nolo contendere has been accepted by the trial court, the defendant has no absolute right to withdraw it. *People v Eloby (After Remand)*, 215 Mich App 472, 474-475; 547 NW2d 48 (1996); *People v Gomer*, 206 Mich App 55, 56; 520 NW2d 360 (1994).

To the extent that defendant's claim rests on an assertion that his plea was due to ineffective assistance of counsel, the proper focus is on whether the plea was made voluntarily and understandingly. *In re Oakland Co Prosecutor*, 191 Mich App 113, 120; 477 NW2d 455 (1991). "Whether a plea is unintelligently made depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases, not on whether counsel's advice was right or wrong." *People v Haynes*, 221 Mich App 551, 558-559; 562 NW2d 241 (1997), citing *Oakland Co Prosecutor*, 191 Mich at 122. In addition, "requests to withdraw pleas are generally regarded as frivolous where the circumstances indicate that the defendant's true motivation for moving to withdraw is a concern regarding sentencing." *Haynes*, 221 Mich App at 559, citing *People v Holmes*, 181 Mich App 488, 492; 449 NW2d 917 (1989). Therefore, counsel's incorrect prediction concerning a defendant's sentence is generally regarded as insufficient to support a claim of ineffective assistance of counsel, or to establish good cause for withdrawal of a plea. *Haynes*, 221 Mich App at 559.

Defendant first argues that the trial court should have allowed him to withdraw his plea because the court failed to establish a factual basis for the plea. Defendant is mistaken. When determining whether the trial court has established a factual basis for the plea, we review the

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[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

record to determine "whether the trier of fact could properly convict on the facts as stated by the defendant." *People v White*, 411 Mich 366, 381-382; 308 NW2d 128 (1981), quoting *Guilty Plea Cases*, 395 Mich 96, 128-132; 235 NW2d 132 (1975), and *People v Haack*, 396 Mich 367, 376-377; 240 NW2d 704 (1976). "A simple assault is either an attempt to commit a battery or an unlawful act that places another in reasonable apprehension of receiving an immediate battery." *People v Terry*, 217 Mich App 660, 662; 553 NW2d 23 (1996). A simple criminal assault requires proof of "an intent to injure or an intent to put the victim in reasonable fear or apprehension of an immediate battery." *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979). Defendant contends that the factual basis was not established because the trial court did not specifically ask defendant whether he had the intent to create in the mind of the victim the fear of a battery.

In *People v McKnight*, 102 Mich App 581, 584-585; 302 NW2d 241 (1980), this Court faced a similar argument and held:

> Lastly, defendant contends that there was insufficient factual basis to support a finding that defendant had the requisite wilful and malicious intent to kill the dog. However, a factual basis for acceptance of a plea exists if an inculpatory inference can reasonably be drawn by a jury from the facts admitted by defendant even if an exculpatory inference could also be drawn and defendant asserts the latter is the correct inference. A jury could properly infer wilful and malicious intent to kill, even where defendant disclaims such intent, from evidence that he intentionally set in motion a force likely to cause death or grievous bodily harm here kicking the dog. [Citations omitted.]

In this case, defendant told the trial court that he argued with the manager of the phone store, that he raised his voice, and that he hit the table with his palm pilot. He also conceded that given his actions, the manager reasonably could have feared that defendant might hit her, i.e., commit a battery. A reasonable inference of these admissions by defendant, and his actions in the store, was that he intended that the clerk actually fear an imminent battery. Thus, we find that the trial court did not abuse its discretion in denying defendant's motion to withdraw his plea on the ground that the court did not establish an adequate factual basis for the plea.

Defendant next argues that the trial court erred in denying his motion to withdraw his guilty plea, where there was confusion regarding the distinction between simple assault and a battery, regarding defendant's initial attempt to plead no contest, and confusion regarding the deferred sentence as discussed in the plea negotiations and placed on the record. Defendant argues that this confusion resulted in a plea agreement that was not voluntary, intelligent, and understanding; rather, the agreement was illusory and the product of confusion. Defendant also argues that his attorney pressured him into accepting the plea offer.

With respect to the distinction between simple assault and a battery, defendant showed some concern about any plea that would indicate that he actually struck the victim. However, it was explained to him that a plea to simple assault did not mean that he was admitting that he struck the victim. And defendant then felt comfortable in proceeding with the plea. Accordingly, any confusion on the matter was addressed, and addressed properly legally speaking, to defendant's satisfaction. Reversal on this ground is unwarranted.

With respect to the initial attempt to plead no contest, the court indicated that it would not accept a no contest plea where a deferred sentence was a possibility. The court allowed defendant to confer with counsel, and they stepped outside for 15 minutes to discuss the matter. Defendant returned to the courtroom and indicated the desire to plead guilty to the assault charge. A factual basis for the plea was then elicited by defense counsel and the district court. We find that defendant was treated fairly on this matter and that it does not form a basis to allow withdrawal of the plea. Nothing in the record suggests that defendant's decision to plead guilty, as opposed to no contest, was involuntary, unintelligent, or the result of confusion.

With respect to the deferred sentence aspect of the plea, in response to questions and statements by the prosecutor and the district court, defendant *repeatedly* acknowledged that there was no guarantee that defendant would receive a deferred sentence and that the plea agreement was not conditioned on the actual imposition of a deferred sentence. Defendant confirmed and reconfirmed that he understood that there was no guarantee. The following colloquy took place:

The Court. All right. There has been some talk about the Prosecutor's Delayed in this case. I do have to advise you that this Court is not guaranteeing that to you. Do you understand that?

Defendant. Yes Sir.

The Court. Do you understand your plea is not contingent upon the Court granting you that status?

(NO AUDIBLE RESPONSE)

The Court. Yes?

Defendant. Yes, I – Yes.

The Court. Okay. Now understanding all of that, you still wish to plead guilty?

Defendant. Yes, I do.

In *People v Johnson*, 105 Mich App 614, 615-616; 307 NW2d 385 (1981), this Court found no basis for allowing the defendant to withdraw his plea under the following circumstances:

> The plea was offered and accepted pursuant to a plea bargain agreement in which the prosecutor agreed to recommend to the court, upon acceptance of the plea to the offense as charged, that sentence be deferred for one year with the understanding that the defendant, if he completed the appropriate probation period, would then be allowed to plead to a misdemeanor.

As in the present case, the trial court in *Johnson* told the defendant that it was not bound by the prosecutor's recommendation, and the trial court declined to follow the prosecutor's recommendation. *Id.* at 616. The *Johnson* panel ruled:

> The defendant was clearly advised, prior to the acceptance of the plea, that the court was not bound by the prosecutor's recommendation and could impose any sentence within the limitations set by statute. Moreover, defendant indicated that he understood the court's advice on that point. We find no basis for setting aside the defendant's plea. [*Id*. at 616-617 (citation omitted).]

Under *Johnson*, defendant is not entitled to withdraw his plea, as defendant knew that there was no guarantee of a deferred sentence. We recognize that in the case at bar the prosecutor, defense counsel, defendant, and the district court all proceeded on the mistaken belief that a deferred sentence recommendation was within the realm of possibility and could be made on the exercise of discretion by the probation department and the prosecutor's office. There is nothing in the record indicating that defendant was aware that the local deferred sentencing program precluded him from receiving a deferred sentence recommendation by the probation department and prosecutor's office. Thus, at first glance, the plea agreement would appear to be predicated on an illusion, i.e., that a deferred sentence recommendation might be forthcoming. However, while a deferred sentence *recommendation* may have been an impossibility, the district court indicated that the ultimate decision to impose a deferred sentence rested with the court. Indeed, the prosecutor stated that, even with the lack of recommendations from the probation department and the prosecutor's office, the court could ignore the absence of recommendations and still impose a deferred sentence. We note that MCL 771.1(2) does not preclude a court, in cases where a defendant committed a prior crime or previously received the benefit of a deferred sentence, from imposing a deferred sentence and then entering an order reflecting leniency compatible with the ends of justice, i.e., vacating the conviction. Defendant on appeal provides no argument that the district court lacked the ability to impose a deferred sentence under the circumstances, even absent a deferred sentencing recommendation. The court, exercising its discretion, clearly chose not to do so. Accordingly, the plea agreement was ultimately not illusory, and *Johnson* directs that we affirm the rulings by the district and circuit courts.

With respect to defendant's complaint that the prosecutor created confusion by suggesting that expungement under MCL 780.621 was part of the deal, the argument lacks merit. The expungement statute clearly was not implicated. MCL 780.621(3) provides that "[a]n application shall not be filed until at least 5 years following imposition of the sentence for the conviction that the applicant seeks to set aside or 5 years following completion of any term of imprisonment for that conviction, whichever occurs later." Also, the Attorney General has the authority to contest an application for expungement. MCL 780.621(7). Clearly, deferred sentencing under MCL 771.1(2) was at play here, not MCL 780.621.

Furthermore, we find no support in the record for the argument that defense counsel pressured defendant into accepting the plea offer.

Finally, given our findings on the issues above, and declining to fault defense counsel for not knowing that a deferred sentencing recommendation could not be made, especially where the prosecutor indicated that a recommendation was possible, we reject defendant's claim of ineffective assistance of counsel.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Michael J. Kelly