STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 23, 2010
V	No. 294347 Arenac Circuit Court
JEREMY LEBELLE LUTZE, Defendant-Appellant.	LC No. 08-003375-FC

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant pleaded nolo contendere to first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under 13 years of age), and was sentenced, pursuant to a plea agreement, to 25 to 37½ years' imprisonment. He appeals by delayed leave granted, challenging the trial court's denial of his motion to withdraw his plea. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's plea arose from an allegation by his seven-year-old daughter that he had sexually abused her. One day after being released from a psychiatric hospital where he had been treated following an attempted suicide, defendant appeared with his family at the Department of Human Services (DHS) office to complete a psychological evaluation for the family's on-going case. At the office, defendant's daughter told the psychologist that her father had sexually abused her. The Michigan State Police were called, and during an interview with a state trooper, defendant admitted to sexually abusing the girl. At the conclusion of the interview, defendant was arrested. Following his arrest, defendant appeared in court regarding a petition to remove his children from the home. At this hearing, he admitted to sexually abusing his daughter. Defendant made similar statements to a DHS employee who visited him in jail at his request.

Pursuant to a plea agreement, defendant pleaded no contest to one count of CSC I with a recommended sentence of 25 to 37½ years. In exchange, the prosecutor agreed to dismiss two additional counts of CSC I and one count of CSC II, MCL 750.520c(1)(a). If the trial court exceeded the recommended sentencing range, defendant would be allowed to withdraw his plea. During the plea colloquy with the trial court, defendant acknowledged that he was satisfied with his attorney, and that other than the plea agreement, no other promises or threats had been made to him. Defendant was told that, by accepting the plea, he would be giving up his right to appeal and would have to appeal by leave of the court if he wished to appeal. Defendant acknowledged

that he understood this consequence of accepting the plea. The court also asked defendant the following:

> *Q*. Have you taken any--have you taken any medicines, drugs, or intoxicants which are affecting you today, or affecting your thinking today?
>
> *A*. No.
>
> *Q*. Are you taking some medicine?
>
> *A*. Yes.
>
> *Q*. All right. But do you clearly understand what's going on here today?
>
> *A*. Yes.

The trial court relied on the police report as the factual basis for the plea. The trial court also found that the plea was "accurate, knowing and voluntary, and that there ha[d] been no undue influence, compulsion, or duress, and that no promises ha[d] been made except those stated in the plea agreement." Lastly, the trial court found that defendant understood the nature of the convicted offense and the maximum sentence that could be imposed.

Before sentencing, defendant moved to withdraw his plea. Defense counsel argued that withdrawal was proper because defendant "was reluctant to enter a plea" and entered the plea "[o]nly after discussions with . . . his mother and grandmother." The trial court denied the motion.

On appeal, defendant contends that he is entitled to withdraw his plea because of his "state of mind" at the time the plea was taken. Specifically, defendant contends that he did not understand what he was doing because of the influence of his family and his admissions occurred one day after his release from a psychiatric facility. Further, he asserts that the trial court failed to determine if the plea was intelligent and voluntary after learning of defendant's mental illness and use of prescription medication.

The trial court's denial of a motion to withdraw plea is reviewed for an abuse of discretion. *People v Parker*, 275 Mich App 213, 217; 738 NW2d 257 (2007). A plea of nolo contendere is an admission of the essential elements of the charged offense and is equivalent to an admission of guilt in the criminal case. *People v Patmore*, 264 Mich App 139, 149; 693 NW2d 385 (2004). Once a guilty plea has been accepted, there is no absolute right to withdraw it. *Id*. MCR 6.310(B)(1) addresses withdrawal of a plea after acceptance, but before sentencing, and provides in relevant part:

> After acceptance but before sentence … a plea may be withdrawn on the defendant's motion or with the defendant's consent, 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.

To support the assertion that withdrawal of the plea is "in the interest of justice," the defendant bears the burden of establishing a fair and just reason for withdrawal of the plea. *People v Wilhite*, 240 Mich App 587, 596-597; 618 NW2d 386 (2000). If the defendant establishes a fair and just reason for withdrawal of the plea, the prosecutor then bears the burden of showing substantial prejudice that would result from allowing the plea withdrawal. *Patmore*, 264 Mich App at 150. Fair and just reasons to withdraw include where the plea was a product of fraud, duress, or coercion, *People v Jackson*, 203 Mich App 607, 613; 513 NW2d 206 (1994), or where the defendant was intoxicated or otherwise impaired when the plea was entered. See *People v Stewman*, 36 Mich App 643, 644-645; 194 NW2d 146 (1971).

Although defendant claims on appeal that his family improperly coerced him into accepting the plea agreement, there is no record evidence to support such an assertion. Rather, before the trial court, defense counsel asserted that "discussions" with defendant's mother and grandmother lead to the decision to accept the plea. The transcripts from the petition to terminate defendant's parental rights to his three children were filed in the criminal case. In the termination proceedings, defendant admitted his abuse of his daughter, testified that he was abused and threatened as a teenager by his father and stepmother, but testified that he trusted his mother. In light of the lack of evidence of coercion by defendant's mother and grandmother, defendant failed to demonstrate that withdrawal of his plea was in the interest of justice. *Jackson*, 203 Mich App at 613. Additionally, although defendant made multiple admissions in various proceedings following his release from a psychiatric facility, defendant failed to present any evidence that his recent hospitalization had any bearing on his state of mind. *Wilhite*, 240 Mich App at 597.

Defendant also maintains that he did not give an understanding, voluntary and accurate plea because he was medicated at the time of the plea hearing. He further argues that the trial court should have asked what specific medications he was taking to determine whether the plea was intelligent and voluntary. This basis for withdrawal of the plea was not raised, addressed, and decided in the trial court. Therefore, it is not preserved for appellate review. MCR 6.310(D). However, if the issue had been raised in the trial court, defendant failed to establish entitlement to relief. Review of the record reveals that a *Walker*[1] hearing was held on October 17, 2008. Defendant testified he was taking four different medications when he was released from the mental health unit. At the time of the *Walker* hearing, he was taking two medications. He testified that the medication made him happy and calm; he was not depressed. At the conclusion of defendant's testimony, the hearing adjourned for lunch to be followed by argument and the court's ruling. However, when the proceeding resumed, defendant pleaded nolo contendere to one count of CSC I. Although defendant faults the trial court for failing to determine the type of medication that he was taking and the effects at the time of the plea, defendant testified regarding the impact of his medication in the hearing held earlier that day. In light of the earlier testimony, the evidence fails to support the contention that defendant's plea was not intelligent and voluntary.

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[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Affirmed.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood