

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 17, 2016

v

KENNETH WAYNE SPENCER,

Defendant-Appellant.

No. 328254
Arenac Circuit Court
LC No. 08-003371-FC

Before: BECKERING, P.J., and HOEKSTRA and OWENS, JJ.

PER CURIAM.

The basic question presented in this case is whether defendant should be given the opportunity to withdraw his guilty plea in light of the fact that he entered the plea without being informed of the mandatory 25-year minimum sentence applicable to his conviction for first-degree criminal sexual conduct (CSC-I) committed by an individual 17 years of age or older against a victim under 13 years old. See MCL 750.520b(1)(a); MCL 750.520b(2)(b). Procedurally, defendant appeals by delayed leave granted from the trial court's denial of his motion for relief from judgment. Because the failure to inform defendant of a mandatory minimum sentence constitutes an error in the plea proceedings that entitles defendant to have his plea set aside, we vacate the trial court's denial of defendant's motion for relief from judgment and remand for proceedings pursuant to MCR 6.310(C).

In 2008, defendant was charged as a second-offense habitual offender, MCL 769.10, with eight counts of criminal sexual conduct. On May 28, 2008, he pleaded guilty to one count of CSC-I, MCL 750.520b(1)(a) (victim under age 13), and one count of attempted third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(b) (force or coercion); MCL 750.92. In exchange for this guilty plea, the prosecutor agreed to dismissal of the other CSC counts and defendant's habitual-offender status. During the plea proceedings, defendant was informed that CSC-I was punishable by a maximum of life or any term of years. As part of the plea bargain, the prosecutor agreed to recommend a term of years' sentence instead of life in prison; but the agreement contained no cap for that term of years.

Notably, no one informed defendant at the plea hearing that his CSC-I conviction carried a mandatory minimum sentence of 25 years. See MCR 6.302(B)(2); MCL 750.520b(2)(b). It appears that the trial court and attorneys were simply unaware of this mandatory minimum. On June 25, 2008, the court sentenced defendant within the minimum sentence range calculated

under the legislative guidelines to serve concurrent terms of imprisonment of 210 months to 40 years for the CSC-I conviction, and 40 months to 5 years for the attempted CSC-III conviction.

On July 31, 2008, the prosecutor filed a motion for resentencing, stating that it had been informed by the Michigan Department of Corrections (MDOC) that defendant's sentence did not comply with the mandatory 25-year minimum required by MCL 750.520b(2)(b). The trial court granted the prosecutor's motion and resentenced defendant on October 1, 2008. At resentencing, defendant expressed confusion over why his sentence was being changed when he had entered a plea and been sentenced pursuant to a plea bargain. In response, the court acknowledged that the court and attorneys had "missed" the statutory requirement at the initial sentencing; but, according to the court's explanation to defendant, the change in sentence would "still fit within the plea agreement" because the plea bargain was for "any term of years rather than for life." The trial court did not afford defendant an opportunity to withdraw his plea, and defense counsel did not ask that defendant be allowed to withdraw his plea. Ultimately, in compliance with MCL 750.520b(2)(b), the trial court sentenced defendant to 25 to 40 years' imprisonment for his CSC-I conviction. Defendant's sentence for his CSC-III conviction remained unchanged.

Defendant filed a delayed application for leave to appeal, which this Court denied in 2009.¹ Several years later, in May of 2015, defendant filed a motion for relief from judgment and a motion for an evidentiary hearing in the trial court. The trial court denied both motions, holding without explanation that the motions were "without any legal merit." Defendant then filed a delayed application for leave to appeal, which this Court granted.²

On appeal, defendant argues that the trial court abused its discretion by denying his motion for relief from judgment. In particular, defendant asserts that the failure to inform him of the applicable mandatory minimum sentence as required by MCR 6.302(B)(2) rendered the plea proceedings defective to the extent that defendant's plea was involuntary and unknowing. According to defendant, the failure by his trial counsel and previous appellate counsel to raise this argument constituted ineffective assistance, which provides "good cause" within the meaning of MCR 6.508(D)(3)(a) for his failure to raise the issue during earlier proceedings. Given the involuntary nature of defendant's plea, defendant also contends he has demonstrated "actual prejudice" for purposes of MCR 6.508(D)(3)(b). Defendant maintains that the appropriate remedy in this case is to allow defendant an opportunity to withdraw his plea pursuant to MCR 6.310(C). We agree.

We review for an abuse of discretion the trial court's denial of a defendant's motion for relief from judgment under MCR 6.508. *People v Clark*, 274 Mich App 248, 251; 732 NW2d

¹ *People v Spencer*, unpublished order of the Court of Appeals, entered March 4, 2009 (Docket No. 289656). In 2012, defendant filed a motion in the trial court for the appointment of counsel and a motion to have his original sentence reinstated. The trial court denied the motion to appoint counsel and never ruled on defendant's motion for resentencing.

² *People v Spencer*, unpublished order of the Court of Appeals, entered August 28, 2015 (Docket No. 328254).

605 (2007). “An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.” *People v Fonville*, 291 Mich App 363, 376; 804 NW2d 878 (2011). “A trial court also necessarily abuses its discretion when it makes an error of law.” *People v Al-Shara*, 311 Mich App 560, 566; 876 NW2d 826 (2015). Questions of law, including the interpretation of court rules, are reviewed de novo. *Clark*, 274 Mich App at 251. Any factual findings are reviewed for clear error. *Id.*

A defendant seeking to withdraw a plea must file a motion within 6 months after sentencing. MCR 6.310(C). After 6 months, the defendant may seek relief only in accordance with the postjudgment procedures set forth in MCR 6.501 *et seq.* MCR 6.310(C). In order to establish grounds for postjudgment relief when those grounds could have been previously raised on appeal, a defendant must show good cause and actual prejudice. MCR 6.508(D)(3); *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). In particular, in relevant part, MCR 6.508(D) states:

The defendant has the burden of establishing entitlement to the relief requested.
The court may not grant relief to the defendant if the motion

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, “actual prejudice” means that,

(ii) in a conviction entered on a plea of guilty . . . the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

The court may waive the “good cause” requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.³

A defendant may establish good cause under MCR 6.508(D)(3)(a) by showing ineffective assistance of counsel. *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004); *People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995).

In this case, there was an obvious defect in the plea proceedings which rendered defendant’s sentence involuntary and unknowing. Specifically, “[a] defendant pleading guilty must enter an understanding, voluntary, and accurate plea.” *People v Brown*, 492 Mich 684, 688-689; 822 NW2d 208 (2012). For a plea to be understanding and voluntary, a defendant entering a plea must be “fully aware of the direct consequences of the plea.” *People v Cole*, 491 Mich 325, 333; 817 NW2d 497 (2012) (citation omitted). “Absent sufficient information, the plea would be unknowing and, consequently, involuntary.” *Fonville*, 291 Mich App at 384 (citation omitted). Relevant to this case, under MCR 6.302(B)(2), the trial court must inform the defendant of “the maximum possible prison sentence for the offense *and any mandatory minimum sentence required by law*, including a requirement for mandatory lifetime electronic monitoring” (emphasis added).⁴

Unquestionably, an act of CSC-I committed by an individual 17 years of age or older against an individual less than 13 years of age is subject to a mandatory 25 year minimum sentence pursuant to MCL 750.520b(2)(b). See *People v Payne*, 304 Mich App 667, 671-672; 850 NW2d 601 (2014). By failing to inform defendant of this fact at the plea hearing, the trial court failed to comply with MCR 6.302(B)(2). The appropriate remedy for such a violation is to provide defendant with the opportunity to elect between allowing his plea and sentence to stand or withdrawing his guilty plea. See MCR 6.310(C); *Brown*, 492 Mich at 695-696.

We note that, at resentencing, the trial court acknowledged that it had “missed” the mandatory minimum applicable in this case; and, at resentencing, the trial court informed defendant that the mandatory minimum was a statutory requirement. However, this information imparted to defendant after he had already entered a plea, without affording defendant an opportunity to withdraw his plea, did not cure the defect inherent in failing to inform a defendant of the true consequences of his plea. See MCR 6.310(C); *Brown*, 492 Mich at 695, 702. Instead,

³ There is no reason to conclude that defendant is innocent, and thus this provision allowing the waiver of “good cause” does not apply in this case.

⁴ As with the mandatory minimum applicable to his CSC-I conviction, defendant did not learn of the lifetime electronic monitoring requirement applicable to this case until resentencing and, as noted, he was not given the opportunity to withdraw his plea at that time. This too was erroneous. See *Cole*, 491 Mich at 337-338; MCL 750.520n.

the fact remains that the defect in the plea proceedings rendered defendant's plea unknowing and thus involuntary.⁵ See *Fonville*, 291 Mich App at 384.

Despite this obvious and significant defect, neither defendant's trial counsel nor his previous appellate counsel raised this argument on defendant's behalf. Trial counsel had an obligation to bring this defect to the trial court's attention at resentencing to ensure that defendant's rights were protected on the record. See *People v Jaworski*, 387 Mich 21, 33; 194 NW2d 868 (1972). Likewise, given the obvious and serious nature of the error, reasonable appellate counsel would have believed this issue worthy of mention on appeal and, given the meritorious nature of defendant's claim, appellate counsel would have succeeded in obtaining relief for defendant. See *Kimble*, 470 Mich at 313-314; *Reed*, 449 Mich at 391. In light of counsels' ineffectiveness in failing to raise this clear claim of error, we conclude that defendant has demonstrated good cause for not raising the issue of his involuntary plea during his earlier appeal. See MCR 6.508(D)(3)(a); *Kimble*, 470 Mich at 313-314. For purposes of "actual prejudice," we also find that the "defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand." MCR 6.508(D)(3)(b)(iii). Having shown both good cause and actual prejudice, defendant is entitled to relief under MCR 6.508(D)(3), and the trial court abused its discretion by denying defendant's motion for relief from judgment.

Accordingly, we vacate the trial court's denial of defendant's motion for relief from judgment. We remand with instructions that, once fully informed of the consequences of his plea, defendant must be given "the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea." MCR 6.310(C). If defendant elects to withdraw his plea, the case may proceed to trial on the original charges. See MCR 6.312.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering

/s/ Joel P. Hoekstra

/s/ Donald S. Owens

⁵ To be clear, because defendant's original sentence did not comply with the mandatory minimum required by MCL 750.520b(2)(b), the original sentence was invalid. The trial court certainly had the authority to correct this invalid sentence. See MCR 6.429; *People v Comer*, 312 Mich App 538, 545; 879 NW2d 306 (2015). However, the question of whether the sentence was invalid is distinct from the question of whether defendant entered a knowing and voluntary plea. On the facts of this case, the trial court could not correct the invalid sentence without also correcting the error in the earlier plea proceedings, i.e., without informing defendant of the mandatory minimum and offering defendant the opportunity to withdraw his plea. MCR 6.310(C). See, e.g., *Comer*, 312 Mich App at 542.