STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 28, 2011
v	No. 297328 Oakland Circuit Court
STEVEN WILLIAM NORTHRUP, Defendant-Appellant.	LC No. 2007-216908-FC

Before: METER, P.J., and CAVANAGH and SERVITTO, JJ.

PER CURIAM.

Defendant entered a plea of no contest to two counts of second-degree criminal sexual conduct (CSC) involving a child under thirteen years of age, MCL 750.520c(1)(a), and three counts of third-degree CSC, MCL 750.520d. He was sentenced as an adult to concurrent terms of 95 months to 15 years for all of the convictions. This Court granted defendant's delayed application for leave to appeal. We affirm, but remand for correction of the judgment of sentence.[1]

Defendant first argues that he was entitled to a juvenile sentencing hearing. He did not raise this issue below. In *People v Williams*, 245 Mich App 427, 430-431; 628 NW2d 80 (2001), the Court presumed without deciding that such an unpreserved issue amounted to a constitutional challenge because it deals with the "process to which [the defendant] was due under the court rules and state statutes." Accordingly, review is for plain error affecting his substantial rights. *Id.*[2] "To establish that a plain error affected substantial rights, there must be a showing of

[1] The judgment of sentence, found in the record supplied to this Court, erroneously indicates that defendant pleaded guilty to the two second-degree CSC charges involving a child under thirteen years of age.

[2] It is noted that defendant stipulated to the waiver of a juvenile sentencing hearing. Generally, a party cannot stipulate to a matter and then raise a claim of error on appeal. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). However, here the waiver was ineffective. MCL 769.1(4) provides that a defendant can only waive the hearing if he is sentenced as a juvenile.

prejudice, i.e., that the error affected the outcome of the lower-court proceedings." *People v Jones*, 468 Mich 345, 356; 662 NW2d 376 (2003). Defendant has shown the required error, but he has not established the requisite prejudice.

MCL 769.1(3) provides:

> Unless a juvenile is required to be sentenced in the same manner as an adult under subsection (1) [which would include first-degree CSC but not the crimes for which defendant was convicted], a judge of a court having jurisdiction over a juvenile *shall conduct a hearing at the juvenile's sentencing* to determine if the best interests of the public would be served by placing the juvenile on probation and committing the juvenile to an institution or agency described in the youth rehabilitation services act, . . . or by imposing any other sentence provided by law for an adult offender. Except as provided in subsection (5), the court shall sentence the juvenile in the same manner as an adult unless the court determines by a preponderance of the evidence that the interests of the public would be best served by placing the juvenile on probation and committing the juvenile to an institution or agency described in the youth rehabilitation services act . . . .

MCR 6.931 also addresses sentencing for juveniles. It mirrors the statute in relevant part but subsection (C) also provides:

> If a juvenile sentencing hearing is required, the prosecuting attorney, the juvenile, and the attorney for the juvenile must be advised on the record immediately following conviction of the juvenile by a guilty plea or verdict of guilty that a hearing will be conducted at sentencing, unless waived, to determine whether to sentence the juvenile as an adult or to place the juvenile on juvenile probation and commit the juvenile to state wardship as though a delinquent. . . .

The statute is unambiguous. It indicates that a juvenile sentencing hearing is required except when an adult sentence is made mandatory or, as previously noted, the defendant waives the hearing and a juvenile sentence is imposed. The court rule indicates that the hearing must be held even when a conviction is pursuant to a guilty plea. There is nothing in the statute or court rule that makes an exception for a juvenile who has pleaded guilty as part of a sentencing agreement. Because there was an adult sentence, neither the stipulation nor the sentence agreement will excuse the need for a hearing.

Nonetheless, the court could impose a juvenile sentence only if it were to determine "by a preponderance of the evidence that the interests of the public would be best served by" doing so. See MCL 769.1(3). It is clear on this record that the court would not have done so. Both parties agreed the appropriate sentence would be an adult sentence. Moreover, although the juvenile justice worker opined that a juvenile sentence should be imposed, the probation agent who prepared the presentence investigation report reached the opposite conclusion. Notably, he analyzed factors that were required to be analyzed by MCL 769.1(3) in reaching this result. He noted that "defendant displayed predatory behavior and admitted . . . that the young victim ceased to be an 8 year old boy; he was seen as an object to satisfy [defendant's] sexual urges." The original charges in this case included three counts of first-degree CSC and the admitted facts

indicated that defendant was culpable of the greater offense. In addition, at sentencing the court indicated that if the victim's parents had desired a higher sentence, it would have let the matter proceed to trial on the first-degree CSC charges where a conviction was likely given defendant's admissions. These facts indicate that a juvenile sentence would not have been contemplated.

We note that if defendant were to have a juvenile sentencing hearing resulting in a determination to sentence him as a juvenile, he would not be entitled to serve the juvenile sentence. In *People v Siebert*, 450 Mich 500, 510; 537 NW2d 891 (1995), the Court noted that prosecutors have "a constitutional interest at stake insofar as [they] are constitutionally entrusted with authority to charge defendants." The Court concluded:

> In a case where the prosecutor has lowered the charges against the defendant—reducing either the number of counts charged or the level of those charges—with the understanding of a certain minimum sentence, the agreement is conditioned upon imposition of the specified sentence. Were a court allowed to maintain its acceptance of the plea over the prosecutor's objection, it would effectively assume the prosecutor's constitutional authority to determine the charge or charges a defendant will face.
>
> Therefore, the trial court's exclusive authority to impose sentence does not allow it to enforce only parts of a bargain. A court may not keep the prosecutor's concession by accepting a guilty plea to reduced charges, and yet impose a lower sentence than the one for which the prosecutor and the defendant bargained. Accepting a plea to a lesser charge over the prosecutor's objection impermissibly invades the constitutional authority of the prosecutor. When a court receives information that in its judgment dictates a lower sentence, it must alert the prosecutor of the sentence it intends to impose and allow the prosecutor to withdraw from the plea. [*Id*. at 510-511 (citations omitted).]

If defendant's sentence were to vary from the sentence agreement and defendant were to receive a lesser sentence as a juvenile, the prosecutor would have been entitled to withdraw from the sentence agreement and prosecute defendant as originally charged.

Defendant next argues that the trial court was required to make inquiries of defendant's mother at the plea proceeding to establish that his plea was knowing, voluntary, and intelligent. Defendant did not move to withdraw his plea or otherwise raise this issue below. MCR 6.310(D) provides:

> A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

MCR 6.001(A) provides that MCR 6.000 to MCR 6.500 apply to criminal circuit court cases. However, MCR 6.001(C) and MCR 6.901(B) provide that the rules in subchapter 6.900 govern criminal circuit court cases for juveniles being charged as adults. Subchapter 6.900 does not

address the taking or withdrawal of pleas, or the appellate consequences of failing to move for withdrawal. However, MCR 6.901(A) provides that subchapter 6.900 rules "take precedence over, but are not exclusive of, the rules of procedure applicable to criminal actions against adult offenders." This indicates that the MCR 6.000 rules for circuit courts apply when subchapter 6.900 is silent, and that the MCR 6.310(D) motion for withdrawal requirement therefore applies to defendant so as to bar appeal of this issue.

Defendant next argues that he was denied the effective assistance of counsel. Because he did not raise this issue below, our review is limited to the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). "Generally, to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, but for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Seals*, 285 Mich App 1, 16; 776 NW2d 314 (2009), citing *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). "Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). "Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases." *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). "When reviewing a claim of ineffective assistance arising from a guilty plea," we focus on "whether the plea was made voluntarily and understandingly. The pertinent question is not whether counsel's advice was right or wrong; rather, it is whether counsel's advice was within the range of competence for attorneys in criminal cases." *People v Lucey*, 287 Mich App 267, 275; 787 NW2d 133 (2010) (citations omitted).

Defendant first argues that counsel erred when she stipulated to waive the juvenile sentencing hearing. As noted above, he was entitled to the hearing. However, if counsel had pushed for a hearing defendant would have run the risk of having the agreement fall apart and being tried on the first-degree CSC charges, of which he would likely have been convicted given his admissions to the allegations. Under these circumstances, defendant has failed to show that counsel's advice was not "within the range of competence for attorneys in criminal cases."

Defendant also argues that counsel should have challenged inflammatory language and questionable conclusions in the PSIR. However, he has not identified any specific language or conclusions he finds objectionable, and we will not search the record for a factual basis to sustain or reject his position. *Petri*, 279 Mich App at 413, quoting *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

Affirmed but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto