STATE OF MICHIGAN

IN THE COURT OF APPEALS

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

LARRY ROBERT HALE,

Defendant-Appellant.
_____/

Court of Appeals No. 315722

Lower Court No. 2012000595 FC

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PEOPLE'S ANSWER TO APPLICATION FOR LEAVE TO APPEAL

Because defendant's application for leave to appeal is from a plea, the People submit a truncated answer pursuant to Court of Appeals Internal Operating Procedure 7.205(C)(2).

Defendant pled no contest to one count of third-degree criminal sexual conduct (CSC 3), MCL 750.520d (P Tr,[1] 3). He was originally charged with six counts of CSC 1, MCL 750.520b, and two counts of CSC 2, MCL 750.520c, all involving either then eight-year-old McKyndsie Kaeding or her then five-year-old sister, Angelique (A Tr, 3-6; PE Tr, 7-8, 15). Because Angelique could not sufficiently articulate the acts against her at the preliminary examination, defendant was bound over only on the four counts of CSC 1 and one count of CSC 2 for which McKyndsie was the victim (PE Tr, 41-42, 47).

At the plea hearing defendant's attorney, Mr. Tat Parish, stated the plea agreement: Defendant would plead no contest to one count of CSC 3, all other charges would be dismissed, and the agreed-upon sentence was 10 to 15 years' imprisonment (P Tr, 3). Defendant said he understood this and that it was what he wanted to do. *Id.*, 3, 9-10. He understood the charge against him and the rights he was giving up by pleading no contest. *Id.*, 6-9.

After pleading no contest, defendant retained his current counsel, Mr. Martin Kirk, and moved to withdraw his plea. Having listened to a recording of most of the plea proceeding, the trial court found defendant's claim that he did not understand his plea to be without merit (M Tr, 12). The court also said that allowing defendant to withdraw his plea would subject the People to prejudice in the form of trauma to the young victims who would have to revisit the matter. *Id.*, 12-13. The court therefore denied the motion to withdraw the plea. *Id.*, 14.

[1] "P Tr" refers to the plea transcript, "A Tr" to the arraignment transcript, "PE Tr" to the preliminary examination transcript, "M Tr" to the transcript of defendant's motion to withdraw his plea, and "S Tr" to the sentencing transcript.

At sentencing, Mr. Kirk successfully argued for reductions in the scoring of two offense variables (S Tr, 4-13). This did not change the guidelines range, which remained 36 to 60 months. *Id.*, 3, 13-14. Because Mr. Kirk had not negotiated the 10-year minimum sentence that was part of the plea bargain, and because he contended that defendant had not understood the plea bargain, he argued for a minimum sentence within the guidelines range. *Id.*, 18-19. The court, however, stated that defendant had opted for the 10-year minimum sentence as part of an agreement that enabled him to avoid the danger of life in prison. *Id.*, 20-21. The court sentenced defendant to 10 to 15 years in accordance with the plea agreement. *Id.*, 21.

Additional facts will be set forth as necessary in the argument.

I. The trial court did not abuse its discretion or deny defendant's constitutional rights in denying defendant's motion to withdraw his plea [Defendant's Issues I, II, III].

This Court reviews for an abuse of discretion a decision whether to allow a defendant to withdraw a no contest plea before sentencing. *People v Patmore*, 264 Mich App 139, 148-149; 693 NW2d 385 (2004). An abuse of discretion occurs "when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling." *Id.*, 149. Defendant has failed to show an abuse of discretion here.

A defendant has no absolute right to withdraw a guilty plea after it has been accepted by the trial court. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Instead, the trial court "in the interest of justice may permit an accepted plea to be withdrawn before sentence is imposed unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea." MCR 6.310(B). The defendant bears the burden of showing that

withdrawal of the plea is in the interest of justice. *People v Gomer*, 206 Mich App 55, 57; 520 NW2d 360 (1994). This Court will not set aside a guilty plea that was "knowingly, intelligently, and voluntarily given." *People v Graves*, 207 Mich App 217, 218; 523 NW2d 876 (1994), lv den 448 Mich 876 (1995), quoting *People v Gonzalez*, 197 Mich App 385, 391; 496 NW2d 312 (1992), lv den 442 Mich 920 (1993).

A defendant can show that the interest of justice supports the withdrawal of his guilty plea in various ways. For example, the defendant can show (1) that his plea was the product of fraud, duress, or coercion; (2) that the plea may have been induced by inaccurate legal advice and that the defendant refuses to or is unable to personally recount a sufficient basis to substantiate the charge; or (3) that the defendant received ineffective assistance of counsel, but has a meritorious defense to the charge. *Gomer*, 206 Mich App at 57; *People v Jackson*, 203 Mich App 607, 613; 513 NW2d 206, lv den 445 Mich 879 (1994). Where the defendant has received effective assistance of counsel, however, the fact that defendant may have had a meritorious defense does not justify setting aside the plea. *Effinger*, *supra*, 212 Mich App at 70-71.

Defendant frames his argument in several ways, but essentially makes only two basic assertions: (1) He did not enter his no contest plea with a sufficient understanding of what was happening or the consequences it entailed, and (2) the case was defensible had he proceeded to trial. The record does not support the first assertion, and the second is not a reason to allow withdrawal of a plea.

Defendant has failed to show that his plea was not knowingly and understandingly made.

The record belies defendant's first assertion. Defendant repeatedly confirmed at his arraignment that he understood each charge against him (A Tr, 3-6). He also understood his right to a court-appointed attorney and even asked the court for one "[f]or my safety" despite the fact that his wife was seeking to retain counsel for him. *Id.*, 6-7.

Defendant said at the plea hearing that he understood the plea agreement – which was twice stated to include a minimum sentence of 10 years – and wanted to take it (P Tr, 3, 9-10). He affirmed that he understood the charge to which he was pleading no contest. *Id.*, 6. He understood the rights he was giving up. *Id.*, 7-8. No one had used any other promises, tricks, or threats to get him to enter the plea, and he understood that he could not claim otherwise later. *Id.*, 8-10. At no point did defendant indicate that he was confused about why he was there or what the purpose of the proceeding was.

Finally, defendant's presentence investigation report makes no mention of any sort of mental incapacity or limited functioning on defendant's part. And neither defendant nor Mr. Kirk objected at sentencing to the absence of this information.

The various points defendant makes in his application for leave to appeal do not establish that the trial court abused its discretion. For example, defendant notes that he is illiterate. But both the trial court and Mr. Parish were aware of this, and they arranged to have important information read aloud to defendant for that reason (P Tr, 4, 5, 7-8).

Defendant also claims he did not understand that what he was pleading no contest to was a sexual act against a child. But the acts defendant was accused of were described graphically to him at arraignment (A Tr, 3-6). And at the plea, the court explained to him that he was alleged to have committed criminal sexual conduct by engaging in "penetration, penis to vagina, with

McKyndsie Kaeding, a person under 13 years of age" (P Tr, 6). Defendant acknowledged that he understood this. *Id.* At no point did he protest that he did not know the meaning of those words.

Similarly, the record is devoid of any support for defendant's suggestion that he repeatedly claimed to understand what was going on merely to mask an alleged intellectual disability. Instead, defendant has tried to expand the record by attaching to his application for leave to appeal a forensic examination report and a Department of Corrections treatment plan, both of which were generated months after the plea. This Court generally allows no such enlargement of the record, but limits its review to the material presented to the trial court. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), reversed in part on other grounds 462 Mich 415; 615 NW2d 691 (2000).

Defendant points to an allegedly irrelevant remark he made at the end of his arraignment (A Tr, 8-9). Even if defendant's comment was not material to his arraignment,[2] however, that in no way indicates that defendant did not understand the charges against him at the time, much less that he did not understand the plea agreement months later.

Defendant also notes his momentary misunderstanding that his bond was $5,000 instead of $500,000, which the court corrected (A Tr, 9). All this exchange shows is that defendant was capable of seeking and obtaining clarification when he desired.

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[2] Actually, the record does not make clear that the remark was irrelevant. Defendant said, "I bought the vans under his father. Now, we owe him payments. So I have to have my wife deal with that" (A Tr, 9). The record does not show who defendant meant by "his father." The court had just finished setting a $500,000 bond and admonishing defendant that he could not have contact with McKyndsie Kaeding or Angel Kaeding or members of their family. *Id.*, 7-8. Defendant may have been concerned that either his incarceration or the prohibition of contact with members of the Kaeding family would affect his ability to pay this debt.

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In short, the record simply does not uphold defendant's claim that, contrary to his repeated statements to the trial court, he did not understand his plea agreement. At the very least, it cannot be said that "an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse" for the trial court's rejection of this claim. *Patmore*, *supra*, 264 Mich App at 149.

That defendant had possible defenses to the charges is not a sufficient reason to set aside the plea.

Defendant devotes considerable space to pointing out weaknesses in the prosecution's case and facts that allegedly support a theory of innocence. But that defendant may have had viable defenses does no, in and of itself, mean his plea is not valid. If only defendants with no chance of success at trial could tender guilty or no contest pleas, the practice of plea bargaining would come to an end. Why would a prosecutor offer any consideration for a plea bargain to a defendant who was guaranteed to be convicted as charged if he went to trial?

II. The trial court did not abuse its discretion by imposing the precise sentence to which the parties had agreed as part of the plea bargain [Defendant's Issues IV, V].

The imposition of a sentence is reviewed for an abuse of discretion. *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008). A court does not abuse its discretion in the sentencing context when it selects from within the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269, 274; 666 NW2d 231 (2003).

Defendant contends that the trial court erred by failing to articulate substantial and compelling reasons for imposing a minimum sentence above the guidelines range. Our Supreme

Court has squarely addressed this argument where the minimum sentence has been agreed upon by the parties:

> We hold that a sentence that exceeds the sentencing guidelines satisfies the requirements of MCL 769.34(3) when the record confirms that the sentence was imposed as part of a valid plea agreement. Under such circumstances, the statute does not require the specific articulation of additional "substantial and compelling" reasons by the sentencing court. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 256-258; 666 NW2d 231 (2003).
>
> Furthermore, a defendant waives appellate review of a sentence that exceeds the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence. MCR 6.302. [*People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005) (footnote omitted).]

Because defendant understandingly and voluntarily entered into a plea agreement that included a minimum sentence of exactly 10 years, he has waived appellate review of the sentence.

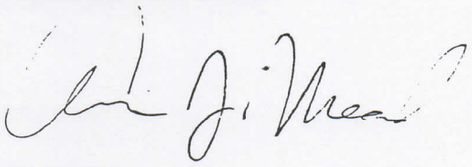
Defendant also claims that the trial court should nonetheless have taken into account the reduction in offense variable scoring that occurred at sentencing. This argument is waived as well under *Wiley*. And in any event, the trial court could not have imposed a lower minimum sentence; the court would have had to allow the prosecution to withdraw from the plea agreement. *People v Siebert*, 450 Mich 500, 504 (Boyle, J.), 519 (Weaver, J.); 537 NW2d 891 (1995).

REQUEST FOR RELIEF

For these reasons, this Court should deny defendant's application for leave to appeal.

DATED: 5/03/13

Respectfully submitted,



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