

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH ALLEN POOLE,

Defendant-Appellant.

UNPUBLISHED

October 1, 1996

No. 183217

LC Nos. 94-069868-FH;

94-070605-FH

Before: J.H. Gillis, P.J., and G.S. Allen and J.B. Sullivan, JJ.*

MEMORANDUM.

Defendant pleaded nolo contendere to two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and guilty to habitual offender, third offense, MCL 769.11, MSA 28.1083, in LC No. 94-069868-FH. He pleaded nolo contendere to third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), and guilty to habitual offender, third offense, MCL 769.11, MSA 28.1083, in LC No. 94-070605-FH. He was sentenced to concurrent terms of ten to thirty years' imprisonment for all three CSC convictions, as enhanced by the habitual offender convictions. He appeals as of right. We affirm defendant's convictions and sentence in LC No. 94-070605-FH, but remand for a determination whether the trial court resolved defendant's motion to withdraw his no contest pleas in LC No. 94-069868-FH. This case has been decided without oral argument pursuant to MCR 7.214(E)(1)(b).

Defendant argues that the trial court erred in failing to consider his motion to withdraw his no contest pleas to CSC II prior to sentencing. Although there is no absolute right to withdraw a guilty plea once it has been accepted by the trial court, *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995), MCR 6.310(B) allows a defendant to move to withdraw a plea before sentencing.

*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.

Where a defendant files a motion and supporting affidavit claiming that his plea was induced by his attorney's faulty advice and a proffer of proof is made on the record, the defendant is entitled to an evidentiary hearing. *People v Jackson*, 203 Mich App 607, 612; 513 NW2d 206 (1994).

In moving to set aside the pleas, defendant claimed that his appointed counsel did not adequately inform him of all possible alternatives, that the witnesses he wanted subpoenaed were not subpoenaed and he felt forced to plead no contest, that he felt hurried, that he continued to assert he did not commit the crimes charged, and that he only pleaded no contest because he was advised he may have to serve a life sentence. A hearing scheduled on the motion was not held, and no mention of the motion was made at sentencing. Because the record does not indicate whether a ruling was made on the motion, the case is remanded to the trial court for a determination whether defendant's motion to withdraw was resolved; if not, a hearing on the motion should be held.

Defendant's sentences do not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990); *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995). In sentencing defendant, the trial court properly considered the predatory nature of defendant's conduct, his criminal history of four prior felonies, and his substance abuse, as well as the goals of rehabilitation and the protection of society. Moreover, as a third habitual offender, defendant was subject to a minimum sentence of up to twenty years in prison. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a); MCL 750.520d(1)(a); MSA 28.788(4)(1)(a); MCL 769.11; MSA 28.1083; *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). Under the circumstances, defendant's ten-year minimum sentences are not disproportionate.

We affirm defendant's convictions and sentence in LC No. 94-070605-FH, and remand for further proceedings consistent with this opinion in LC No. 94-069868-FH. We do not retain jurisdiction.

/s/ John H. Gillis

/s/ Glenn S. Allen, Jr.

/s/ Joseph B. Sullivan