

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHADD RICHARD CUPITT,

Defendant-Appellant.

UNPUBLISHED

January 31, 1997

No. 175704

Genesee Circuit Court

LC No. 93-48373

Before: Reilly, P.J., and Wahls and N.I. Holowka,* J.

PER CURIAM.

Pursuant to a plea agreement in which the prosecutor agreed to dismiss a supplemental information charging defendant as an habitual offender, second offense, defendant pleaded guilty of obtaining property under false pretenses, MCL 750.218; MSA 28.415, and was sentenced to a prison term of six years, eight months to ten years. Defendant filed a motion to withdraw the plea or for resentencing, which the trial court denied. He appeals as of right. We affirm.

Defendant first argues that the plea was illusory because as a matter of law, he did not have convictions that could have supported the habitual offender charge. According to defendant, he pleaded nolo contendere to various charges and was placed on five years of probation in Florida in 1991. Pursuant to a procedure available under Florida law, the court withheld the adjudication of guilt. Although defendant's brief asserts that if an adjudication of guilt is withheld in this manner, the offense is not considered a conviction for sentence enhancement purposes, the cases cited by defendant do not support that proposition. *Key v State*, 589 So2d 348 (Fla Dist Ct App 1991), quashed and remanded, 603 So2d 494 (Fla 1992), on remand, 605 So2d 552 (Fla Dist Ct App 1992); *Grant v State*, 611 So2d 110 (Fla Dist Ct App 1992). In fact, the pertinent Florida statute concerning habitual offenders, 775.084(2)(3) states:

* Circuit judge, sitting on the Court of Appeals by assignment.

For the purposes of this section, the placing of a person on probation without an adjudication of guilt shall be treated as a prior conviction if the subsequent offense for which the person is to be sentenced was committed during such probationary period.

Defendant's offense occurred on October 13, 1992, while he was on probation for the Florida offenses. Thus, contrary to defendant's assertions, under Florida law, those offenses would be considered convictions for the purposes of sentence enhancement. Accordingly, we are not persuaded by defendant's argument that the withholding of an adjudication of guilt pursuant to Florida law is necessarily equivalent to receiving youthful trainee status under the Holmes Youthful Trainee Act. Inasmuch as the legal basis for defendant's argument that the plea was illusory is erroneous, defendant has not established a valid basis for withdrawal of the plea. Defendant's assertion that he received ineffective assistance of counsel because counsel did not adequately investigate defendant's prior record and advise him of the value of the plea agreement depends upon the same erroneous legal argument and for the same reason, is rejected.

In a related argument, defendant also contends that PRV 2 was misscored because his prior offenses in Florida law were not convictions for the purposes of scoring the sentencing guidelines and should not have been counted in determining the number of prior low severity felonies. Defendant relies on *People v Hannan (After Remand)*, 200 Mich App 123, 127; 504 NW2d 189 (1993). We conclude that *Hannan* is not controlling in the present case because it is distinguishable on its facts. In *Hannan*, the Florida case against the defendant was dismissed with no adjudication of guilt a few years after the defendant was placed on probation. In the present case, the defendant committed the offense during the probationary term. There is no indication in the record that the cases against defendant in Florida have been dismissed as in *Hannan*.

Furthermore, in our view, defendant's Florida offenses were convictions for the purposes of scoring PRV 2. The second edition of the Michigan Sentencing Guidelines defines "conviction" as "an adjudication of guilt in an adult criminal matter." There is no question in this case that defendant pleaded nolo contendere to felony charges involving worthless checks and obtaining property in exchange for worthless checks and that defendant was placed on probation for the same. Thus, in substance, there were adjudications of guilt that would suffice to meet the definition of "conviction" under the Michigan Sentencing Guidelines. However, defendant claims that, because Florida law provides a procedure whereby an "adjudication of guilt" can be withheld, the felony offenses to which he pleaded nolo contendere and for which he was on probation, do not fall within the definition of "conviction." We disagree. Defendant was adjudicated guilty with respect to these offenses, even though in form, the "adjudication of guilt" was withheld. Our conclusion that the withholding of the adjudication of guilt should not be afforded the favorable treatment sought by defendant finds support in the manner in which these offenses would be treated under the Florida sentencing guidelines. Under the Florida sentencing guidelines, defendant's Florida offenses would be considered "convictions" despite the fact that the adjudications of guilt were withheld. Florida Rule of Criminal Procedure 3.701(d)(2) states in pertinent part:

Conviction means a determination of guilt resulting from plea or trial, regardless of whether adjudication was withheld or whether imposition of sentence was suspended.

Thus, under the Florida sentencing guidelines, the withholding of the adjudication of guilt for the commission of an offense has no bearing on determining how many prior convictions an individual has for the purpose of scoring the guidelines. We discern no reason why we should attach more significance to the procedure of withholding of an adjudication of guilt than Florida does. Because defendant was adjudicated guilty as a result of his nolo contendere pleas, and there is no showing that the cases against him were dismissed as in *Hannan*, the trial court properly included the Florida offense when scoring PRV 2.

Affirmed.

/s/ Maureen Pulte Reilly

/s/ Myron H. Wahls

/s/ Nick I. Holowka