

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES DOUGLAS HARPER,

Defendant-Appellant.

UNPUBLISHED

August 26, 1997

No. 189115

Livingston Circuit Court

LC No. 94-008525-FH

Before: Sawyer, P.J., and Bandstra and E. A. Quinnell*, JJ.

MEMORANDUM.

Defendant appeals by right his plea-based convictions of four counts of first-degree criminal sexual conduct, one count of child sexually abusive activity, and one count of accosting a child for immoral purposes. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that his plea was not understanding and voluntary because the trial court misadvised him as to the consequences of his plea, suggesting that probation was a possible sentence on the first-degree criminal sexual conduct charges. This issue is not preserved for appellate review. Defendant initially made a motion to withdraw his plea on this basis, but withdrew the motion. Defendant's voluntary withdrawal of his motion bars appellate review by virtue of MCR 6.311(C). *People v Beasley*, 198 Mich App 40, 43; 497 NW2d 200 (1993). Although, after the time for doing so expired, defendant then attempted to file an untimely motion to withdraw his plea, which the trial court lacked jurisdiction to adjudicate because a claim of appeal was pending, such untimely motion likewise fails to preserve the issue for appellate review. *People v Johnson*, 210 Mich App 630, 632; 534 NW2d 255 (1995).

In any event, the issue is without merit. Defendant was on probation for an assaultive crime when convicted of these four capital charges and plea bargained for not more than an eight-year minimum sentence. But for the trial court's misstatement, defendant could hardly have reasonably entertained any expectation of a probationary sentence. Indeed, at sentencing defense counsel noted that defendant refused to take with him copies of a psychologist's report or the presentence report

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

because he was afraid that the authorities would make adverse use of these “while incarcerated”. Where no possibility exists that defendant has been misled to his prejudice, such misadvice does not present a cognizable basis for withdrawal of the plea. *People v Shannon*, 134 Mich App 35; 349 NW2d 813 (1984); *People v Jackson*, 417 Mich 243; 334 NW2d 371 (1983). After an evidentiary hearing on remand from this Court, the trial court found that in fact the defendant had no reasonable expectation of a probationary sentence, and that his trial counsel never suggested such a possibility. Those findings are not clearly erroneous.

After resentencing, defendant received eight to twenty years for child sexually abusive activity, on each of the first-degree criminal sexual conduct charges, and eighty-five days on the accosting charge. At the resentencing, the prosecutor stood by the plea bargain requirement of a recommendation for an eight-year cap on the minimum sentence. The prosecutor likewise stood by that recommendation at the original sentencing, albeit reluctantly. The record provides no support for any assertion by defendant that the plea bargain has been breached by the prosecutor.

Affirmed.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ Edward A. Quinnell