

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD KEVIN HILL,

Defendant-Appellant.

UNPUBLISHED

March 22, 2007

No. 266744

Berrien Circuit Court

LC No. 2002-406168-FC

Before: O’Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

Defendant Ronald Kevin Hill appeals by delayed leave granted the denial of his motion for relief from judgment of his conviction for first-degree criminal sexual conduct, MCL 750.520b. We affirm.

On November 13, 2002, defendant pleaded guilty to first-degree criminal sexual conduct. On December 9, 2002, defendant was sentenced to 6 to 25 years’ imprisonment. Defendant requested appointed appellate counsel to assist him in appealing the sentence imposed by the trial court, but the trial court denied defendant’s request under MCR 6.425(E)(2). On November 19, 2003, Defendant, in propria persona, applied for leave to appeal to this Court. He asserted that he was denied effective assistance of counsel and that the trial court incorrectly scored his sentencing guidelines. This Court denied defendant’s application for leave to appeal on March 15, 2004, for “lack of merit in the grounds presented.”

On May 11, 2005, defendant moved the trial court for relief from judgment under MCR 6.502. Defendant asserted that he should be granted relief from the judgment against him because he was denied the effective assistance of counsel at his sentencing hearing when his sentence was calculated incorrectly because offense variable (OV) 13, MCL 777.43, was misscored, and because he was “deprived of the right to appeal.” The trial court denied defendant’s motion on October 5, 2005, finding that it properly scored OV 13 and that defendant waived his objection to any errors the trial court made when scoring his offense variables. Therefore, the trial court determined that defendant was unable to show that his plea was involuntary, that defendant’s sentence was invalid, or that the conviction was offensive to the maintenance of a sound judicial process.

On November 28, 2005, defendant, again acting in propria persona, applied for leave to appeal the trial court’s denial of the motion for relief from judgment. Slightly before that,

however, on November 18, 2005, he had again requested an appointed attorney to assist him in pursuing an appeal. The trial court initially denied that request, but it reversed its initial decision on February 1, 2006, and appointed Suzanna Kostovski to represent defendant with his appeal. However, on February 25, 2006, defendant executed the following signed, written statement:

I met with my appellate counsel Suzanna Kostovski to handle my direct appeal. I already filed a direct appeal as well as a 6500 motion on my own. Since I have already filed a direct appeal, I do not need appellate counsel.

On June 9, 2006, this Court granted defendant's delayed application for leave to appeal the trial court's denial of defendant's motion for relief from judgment.

Defendant first argues that the trial court should have granted his motion for relief from judgment because he was denied the effective assistance of counsel at his plea and sentencing hearings. This Court reviews a denial of a motion for relief from judgment for an abuse of discretion. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001).

To establish a claim of ineffective assistance of counsel, defendant must demonstrate: (1) that his counsel's performance fell below an objective standard of reasonableness under current professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the trial would have been different, and (3) the resulting trial was fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Because the trial court did not conduct a *Ginther*¹ hearing, our review is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

Defendant claims that his attorney should have objected² to the trial court's scoring of OV 13, which provides that 50 points may be awarded in this category if:

[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person or persons less than 13 years of age.
[MCL 777.43.]

When determining the appropriate points under this variable, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

² The record clearly shows that defendant himself agreed to not challenge the scoring of OV 13, and defendant was apprised of the ramifications of his assent. The issue is therefore waived, *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000), but we will nevertheless consider the merits of defendant's appeal.

The presentence investigative report contained evidence that established the additional sexual assaults. The trial court was entitled to rely on that information. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). A trial court's scoring decision will be upheld if there is any evidence in the record to support it. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005). Because there was evidence to support the scoring of OV 13 at 50 points, an objection to the scoring of OV 13 would have been futile, and defense counsel is not ineffective for failing to raise a futile objection. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).³ Defendant is not entitled to relief on his ineffective assistance of counsel argument.

Defendant also argues that his attorney's failure to object to the prosecutor's alleged abrogation of the plea agreement at sentencing constituted ineffective assistance of counsel. We disagree. The prosecutor did not violate the plea agreement by requesting a different scoring of OV 13, or recommending a sentence at the higher range within the guidelines. The prosecutor and defendant had previously stated on the record that the prosecutor was not making a specific sentencing recommendation as part of the plea agreement. And, when the trial court asked defendant's attorney to describe the plea agreement, the following exchange occurred:

THE COURT: Mr. Renfro [defendant's attorney], is that the entire plea agreement?

MR. RENFRO: I also understand that the prosecutor is agreeing that the defendant be sentenced within the guidelines.

MR. SEPIC [the prosecutor]: I'm sorry, Judge. That is correct. There has been some tabulation of the guidelines. However, we're not committing ourselves to any particular range at this time.

THE COURT: All right.

MR. SEPIC: I will be recommending a sentence within the guidelines.

Furthermore, the prosecutor explained during the plea hearing about the possibility of a likely dispute about the scoring of OV 13. Thus, resolution of that scoring issue at sentencing was not a violation of the plea agreement.

Because the parties had not agreed to any specific sentence, the prosecutor was free to advise the court of any circumstances the court should consider in tabulating the guidelines or

³ Furthermore, defendant's attorney may have refrained from objecting as a matter of strategy. Both defendant and defendant's attorney emphasized defendant's concern for the well being of the victim during the sentencing hearing. By choosing to spare the victim from testifying about her additional sexual encounters with defendant, defendant's attorney may have caused the trial court to view defendant more favorably within the range determined by the sentencing guidelines than it otherwise would have. This Court will not substitute its judgment for that of counsel on matters of trial strategy or assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

sentencing within the guidelines. It is only in situations where the prosecutor agrees to take a certain position or make a specific recommendation at sentencing that the prosecutor's comments to the court are limited. See e.g., *People v Arriaga*, 199 Mich App 166, 168-169; 501 NW2d 200 (1993). Because the prosecutor did not abrogate the plea agreement, defendant's attorney was not ineffective for refraining from objecting to prosecutor's decision to request a different scoring of OV 13 or recommending a sentence within the guidelines but on the higher end. *Thomas, supra* at 457.

Next, defendant argues that his Fifth and Fourteenth Amendment due process and equal protection rights were violated by the trial court's initial decision to deny defendant an appointed appellate attorney. We hold that any error that initially occurred was rectified by the trial court's decision to appoint counsel for defendant in February 2006, combined with this Court's decision to grant defendant's delayed application for leave to appeal.

In *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005), the United States Supreme held that indigent defendants who pleaded guilty or nolo contendere in a Michigan court had a due process and equal protection right to the appointment of appellate counsel for their first-tier review in this Court. *Halbert, supra* at 609, 624. Here, the trial court remedied any prior error by appointing defendant counsel for the current appeal in February 2006. Defendant raised the same issues in the current appeal as were raised in his original direct appeal. The general remedy for violations of the *Halbert* decision is to remand the defendant's case with an instruction for the trial court to appoint defendant counsel, along with a conditional assumption that this Court will grant an application for appeal. See e.g. *People v James*, 272 Mich App 182, 198-199; 725 NW2d 71 (2006) (Zahra, P.J., concurring). That remedy has occurred, fulfilling defendant's right to appellate counsel.

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Alton T. Davis