

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 28, 2012

v

JULIUS DEMARIO ROLLAND,
Defendant-Appellant.

No. 300067
Kalamazoo Circuit Court
LC No. 2009-001989-FC

Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

SHAPIRO, J. (*dissenting*).

I respectfully dissent because I conclude that defendant did not receive effective assistance of counsel.

Defendant initially pleaded guilty to armed robbery in exchange for dismissal of all other charges. He thereafter moved to withdraw his plea on the grounds that he was innocent of all charges. The trial court allowed defendant to withdraw his plea, though on other grounds, and the case proceeded to trial.

MRE 410(1) provides that evidence of “a plea of guilty which was later withdrawn” is not admissible against the defendant who made the plea. MRE 410(3) provides that “any statement made in the course of any proceeding under 6.302,” i.e. “Pleas of Guilty and Nolo Contendere,” is also not admissible.

It is not contested that these rules would have completely shielded defendant from admission of his guilty plea or statements he made during that plea proceeding. *People v Trombley*, 67 Mich App 88, 92; 240 NW2d 279 (1976). The underlying policy behind this rule is not difficult to understand. A guilty plea is a form of confession, and the Supreme Court has stated, “A confession is like no other evidence. Indeed, the defendant’s own confession is probably the most probative and damaging evidence that can be admitted against him[.]” *Arizona v Fulminante*, 499 US 279, 296; 111 S Ct 1246; 113 L Ed 2d 302 (1991) (quotation omitted). “The withdrawal of a plea of guilty is a poor privilege, if, notwithstanding its withdrawal, it may be used in evidence.” *Kercheval v United States*, 274 US 220, 224; 47 S Ct 582; 71 L Ed 1009 (1927).

Despite the rule protecting his client and the immeasurable effect upon a jury of learning that the defendant pleaded guilty to the charged armed robbery, defense counsel began his direct

examination of the defendant by asking him whether it was true that he had earlier pleaded guilty in this case. The next seven pages of transcript are completely taken up with questions and answers intended to explain to the jury why defendant pleaded guilty. The 19 page cross-examination dealt almost exclusively with defendant's guilty plea and seeks to undermine his explanation of that plea. Indeed, the cross-examination does not contain a single question about the events of the charged crime. This is followed by a three page redirect exam dealing exclusively with the plea issue, a brief re-cross examination on that issue and a brief redirect examination on the issue.

After conviction, defendant claimed ineffective assistance of counsel and a *Ginther*¹ hearing was held. At that hearing, trial counsel was unable to articulate any strategic basis for his actions. He testified that he was aware of MRE 410, but that he was concerned that the defendant might have made inculpatory statements at his plea withdrawal hearing and that MRE 410 might not serve to exclude those statements.

However, counsel conceded that he had not obtained a copy of the transcript of the plea withdrawal hearing and that he was unaware of any specific inculpatory statements. The transcript was subsequently obtained and in fact it does not contain any inculpatory statements. Even assuming it had, defense counsel could surely have brought a motion under MRE 410 or MRE 403 to exclude those statements. The worst outcome would have been that he lost the motion and had to employ the "strategy" that he ultimately did employ—trying to explain the plea to the jury. Counsel gained absolutely nothing for his client by assuming there were inculpatory statements and that the court would deny a motion to exclude them. Counsel also expressed concern that the plea or related statements might be introduced for purposes of impeachment. However, it could not have been admitted for that purpose. As noted in *Trombley*, the effect of admission of a guilty plea "would be highly prejudicial" even if "used only for impeachment purposes. . . . A guilty plea is a complete confession and verdict combined. We do not believe that once before the jury, it would not be considered as substantive evidence of guilt." 67 Mich App at 92. Counsel's decision to introduce such "highly prejudicial" evidence without even moving to exclude it where it was plainly inadmissible is not strategy; it is ineffective performance by counsel.

Where there is ineffective assistance of counsel, we do not reverse unless we conclude that there is "a reasonable probability that the, but for counsel's unprofessional errors, the results of the proceeding would have been different." *People v Toma*, 462 Mich 281, 303 (2000). Given the fact that counsel's actions led to the jury learning that he had pleaded guilty to the charged offense and had several prior criminal convictions,² it is difficult to see how we could conclude that there is not a reasonable probability of a different outcome. Defendant presented alibi witnesses, the robber was wearing a full face mask at the time of the crime making identification difficult, the victims did not initially identify defendant as the robber and at trial

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

² In order to "explain" the plea, defendant testified that he was unfamiliar with the criminal justice system, a statement that allowed the prosecutor to then impeach him with reference to his multiple prior convictions including a juvenile charge of assault with intent to commit great bodily harm, and adult convictions for domestic violence, malicious destruction of property and resisting arrest.

their identifications were equivocal at best. One testified that he could not identify defendant as the robber. The other testified that defendant was the robber, but was impeached with his statement to the investigating detective that he did not believe it was defendant because he did not see defendant's distinctive tattoo.

“[C]onfessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.” *Fulminante*, 499 US at 296. Indeed, “[t]here are few other types of evidence more prejudicial than a reading of the plea transcript.” *Trombley*, 67 Mich App at 93. In an otherwise close case, defense counsel deliberately elicited evidence that defendant had previously confessed to the crime. There is certainly a reasonable probability that the outcome would have been different if counsel had not unnecessarily introduced such prejudicial evidence.

For these reasons I would hold that defendant was denied effective assistance of counsel, and that the trial court erred by denying defendant's motion for a new trial.

/s/ Douglas B. Shapiro