

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 30, 2012

v

ANTHONY TERRELL MCGOWAN,
Defendant-Appellant.

No. 299386
Alger Circuit Court
LC No. 2008-001840-FH

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

A jury convicted defendant Anthony Terrell McGowan of assault with intent to do great bodily harm less than murder, MCL 750.84, and prisoner in possession of a weapon, MCL 800.283(4). The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to concurrent sentences of 6 to 15 years for the assault with intent to do great bodily harm and 3 to 7-1/2 years for the prisoner in possession conviction. Defendant appeals as of right, raising several claims of error surrounding his withdrawal of a plea agreement. We affirm.

Defendant was serving a prison sentence for other offenses when he assaulted a fellow inmate. Defendant was charged as a second-offense habitual offender with prisoner in possession of a weapon and assault with intent to do great bodily harm less than murder. Defendant negotiated a plea agreement with the prosecutor, wherein defendant agreed to plead guilty to attempted assault to commit great bodily harm. In exchange, the prosecutor dropped both the prisoner-in-possession charge and the habitual-offender status. As a result, defendant's statutory maximum would be reduced. Defendant's minimum guidelines were expected to be from 12 to 24 months. At the plea hearing, defendant pleaded guilty to attempted assault to commit great bodily harm, and the trial court accepted the plea.

Before defendant was to be sentenced, he moved *in propria persona* to withdraw his plea. At the hearing on the motion, defendant was represented by substitute counsel. The trial court granted the motion. Defendant was unable to negotiate another plea with the prosecutor and proceeded to trial. The jury then convicted defendant of assault with intent to do great bodily harm and prisoner in possession of a weapon. This appeal followed.

Defendant first argues on appeal that his Sixth Amendment right to counsel was violated because the trial court erroneously allowed him to represent himself and withdraw the favorable plea. Defendant maintains that the trial court failed to follow the proper counsel waiver

procedures. We disagree. Contrary to defendant's contention, he was in fact represented by counsel throughout the proceedings below, including during the hearing on his motion to withdraw his plea. Defendant's personal choice to withdraw his plea does not change this fact. This issue is thus without merit.

Next, defendant argues that he was denied the effective assistance of counsel because he was not advised on his motion to withdraw his plea. We disagree.

An ineffective-assistance-of-counsel claim has a mixed standard of review. *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859 (2008). "This Court reviews a trial court's factual findings for clear error and reviews de novo questions of constitutional law." *Id.* "A finding is clearly erroneous if this Court is left with the definite and firm conviction that a mistake has been made." *People v Allen*, 295 Mich App 277, 281; 813 NW2d 806 (2011). The defendant has the burden of overcoming the presumption that counsel rendered effective assistance. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). When raising a claim of ineffective assistance of counsel, the defendant must show (1) that counsel's performance fell below an objective standard of reasonableness and (2) a reasonable probability that, but for counsel's ineffectiveness, the ultimate result would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

A defendant does not have an absolute right to withdraw a guilty plea, and the trial court has discretion to either allow or deny a motion to withdraw a plea. *People v Williams*, 288 Mich App 67, 71; 792 NW2d 384 (2010). When dealing with an ineffective-assistance-of-counsel claim that concerns a guilty plea, this Court has stated the following:

The decision to plead guilty is the defendant's, to be made after consultation with counsel and after counsel has explained the matter to the extent reasonably necessary to permit the client to make an informed decision. While an attorney may elect to offer a client a specific recommendation whether to go to trial or to plead guilty in the course of that consultation, we decline to hold that such a recommendation is required or that the failure to provide such a recommendation necessarily constitutes ineffective assistance of counsel. The test is whether the attorney's assistance enabled the defendant to make an informed and voluntary choice between trial and a guilty plea. Absent unusual circumstances, where a counsel has adequately apprised a defendant of the nature of the charges and the consequences of a plea, an informed and voluntary choice whether to plead guilty or go to trial can be made by the defendant without a specific recommendation from counsel. [*People v Corteway*, 212 Mich App 442, 446; 538 NW2d 60 (1995) (internal citations omitted).]

Given the record before this Court, we conclude that defendant's ineffective-assistance-of-counsel claim fails because, even assuming that defendant received deficient assistance from counsel at the plea-withdrawal hearing, defendant has not established "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. More specifically and contrary to defendant's argument

on appeal, defendant has not established a reasonable probability that he would have withdrawn his motion and definitively accepted his guilty plea had counsel “advised [him] not to withdraw the highly favorable plea because of the high risk of conviction at trial combined with the high probability of a significantly increased sentence.”

After the *Ginther*¹ hearing in this case, the trial court made the following factual findings:

Defendant/Appellant was, at all stages of the proceedings, engaged in his defense to the point of articulating alternate charges for his benefit to his counsel. At no time during the proceeding did the Court observe or believe that the Defendant/Appellant was misunderstanding the direction of the proceedings. . . . Further, the Court finds that the consequences of his withdrawal of his plea were well understood by the Defendant/Appellant, given all the debate that led up to that point.

* * *

As the People stated, he decided he wanted a chance for a second bite at the apple, got the same, and apparently now doesn’t like the aftertaste of the fruit based on his own menu selection.

Given the evidence of record, we are not left with a definite and firm conviction that the trial court mistakenly found these facts.² See *Allen*, 295 Mich App at 281.

First, the record evidence supports the trial court’s finding that defendant was engaged in his defense and understood the direction of the proceedings. Second, the evidence supports the trial court’s finding that defendant moved the trial court to withdraw his guilty plea because “he wanted a chance for a second bite at the apple,” i.e., a chance to either go to trial or negotiate a better plea agreement, not because he did not understand the plea agreement because he was under the influence of medication during the plea hearing. Specifically, defendant’s initial counsel discussed at length at the *Ginther* hearing the assistance that he provided defendant before defendant pleaded guilty. Defendant’s initial counsel believed that it was very likely that a jury would convict defendant of the crimes charged if defendant went to trial, and counsel communicated this to defendant. Defendant’s initial counsel “spent a lot of time on the [sentencing] guidelines with [defendant].” Counsel told defendant that the prosecution’s plea offer was an excellent offer, and he urged defendant to accept it. When discussing with defendant the concept of accepting a plea agreement, counsel advised defendant and defendant, according to counsel, understood that he would be “giving up his ability to go through a trial and potentially . . . his right to withdraw the plea.” These occurred before the plea hearing where

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

² Indeed, defendant insists on appeal that his guilty plea was “validly entered,” which is consistent with the trial court’s finding that defendant understood the direction of the proceedings.

defendant alleges he was under the influence of medication. Defendant's initial counsel described defendant as a "smart" and "articulate" person who "knew his way through the criminal justice system." Indeed, when discussing plea negotiations with his initial counsel, defendant suggested a felonious-assault plea that would have limited his minimum sentence further than the prosecution's plea offer. When defendant ultimately pleaded guilty, he acknowledged to the trial court that the plea agreement stated on the record was the plea agreement as he understood it. Finally, defendant believed at the plea hearing that he could "very well probably . . . go in and beat it at trial"

This record evidence does not demonstrate a reasonable probability that defendant would have retracted his motion to withdraw had substitute counsel provided further assistance. Before he pleaded guilty, defendant received all the information needed to determine whether to accept the prosecution's plea offer or go to trial: the strength of the case against him and the likelihood that he would succeed at trial, the favorableness of the plea offer, the ramifications of accepting and rejecting the plea offer, and an explanation of sentencing considerations. Nevertheless, defendant wanted a better plea offer than what the prosecution offered. Furthermore, defendant believed that he could prevail at trial. Defendant sought to withdraw his guilty plea to get a "second bite at the apple," i.e., to do what he considered doing before pleading guilty: to try to obtain a better plea agreement or go to trial. It is not reasonably probable that further explanation of the strength of his case, plea-agreement ramifications, and sentencing principles would cause defendant to revoke his motion to withdraw because he already understood these considerations. This is especially true where effective assistance by substitute counsel would not require a recommendation to defendant to revoke his motion to withdraw his guilty plea.³ See *Corteway*, 212 Mich App at 446. Given this record, it would be speculative to conclude that it is reasonably probable that defendant would have retained his guilty plea instead of withdrawing it.

Accordingly, defendant has not established his claim of ineffective assistance of counsel.

Finally, defendant argues that the trial court failed to follow MCR 6.310(B) when allowing defendant to withdraw his plea. Specifically, defendant contends (1) that the trial court employed the wrong legal standard when determining whether to permit defendant to withdraw his plea and (2) that his assertion to the trial court that he was heavily medicated when he entered the plea and, thus, could not fully understand the plea proceedings and recall the plea agreement was not a fair and just reason to withdraw his plea. Defendant asserts that this issue is subject to plain-error review.

At the outset, we note that there is merit to defendant's claim that the trial court employed the wrong legal standard when determining whether to permit defendant to withdraw his plea. As previously discussed, a defendant does not have an absolute right to withdraw a guilty plea, and the trial court has discretion to either grant or deny a motion to withdraw a plea. *Williams*, 288 Mich App at 71. Furthermore, to withdraw a guilty plea before sentencing under

³ Furthermore, we note that "Michigan law does not require that defense counsel vigorously oppose an accused's decision" in regards to his plea. *People v Effinger*, 212 Mich App 67, 71; 536 NW2d 809 (1995).

MCR 6.310(B), “the defendant must first establish that withdrawal of the plea is supported by reasons based on the interests of justice. If sufficient reasons are provided, the burden then shifts to the prosecution to demonstrate substantial prejudice.” *People v Spencer*, 192 Mich App 146, 151; 480 NW2d 308 (1991). Thus, if a defendant moves to withdraw a plea before sentencing, the trial court should only grant the defendant’s motion if the defendant is able to demonstrate that withdrawal is “in the interest of justice,” MCR 6.310(B)(1), “meaning that the defendant has to articulate ‘a fair and just reason’ for withdrawing the plea.” *People v Fonville*, 291 Mich App 363, 377-378; 804 NW2d 878 (2011) (citation omitted). In this case, the trial court did not address whether defendant demonstrated that withdrawal of his plea was in the interest of justice; instead, the court opined that it needed to “look at these matters in a relatively liberal way for the benefit of defendants who are facing serious consequences, given the charges before the Court. So the court would agree to allow the motion to stand, and an order will be entered allowing withdrawal of the plea to take effect.” The court’s liberal consideration of defendant’s motion to withdraw his plea—instead of considering the interests of justice—was improper. See *People v Gomer*, 206 Mich App 55, 57; 520 NW2d 360 (1994) (“The Supreme Court in promulgating MCR 6.310(B) of the Rules of Criminal Procedure . . . discarded the ‘great liberality’ standard in favor of a more restrictive standard that considers the interests of justice and potential prejudice to the prosecution.”).

But, notwithstanding this error, we conclude that defendant has waived this issue. “[A] party cannot request a certain action of the trial court and then argue on appeal that the action was error.” *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995). “To hold otherwise would allow defendant to harbor error as an appellate parachute.” *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Here, defendant moved the trial court to withdraw his plea, arguing that it was in the interest of justice because he was heavily medicated when he entered the plea and, thus, could not fully understand the plea proceedings and recall the plea agreement. Defendant cannot now argue on appeal that the trial court’s action of granting his request to withdraw his plea was error. See *McCray*, 210 Mich App at 14.

Defendant’s contention that this issue is merely unpreserved as opposed to waived and, thus, subject to plain-error review lacks merit. Defendant’s request for withdrawal of his plea coupled with defendant’s failure to object to the trial court’s favorable ruling induced a belief that it was his intention and purpose to waive any error. See *Book Furniture Co v Chance*, 352 Mich 521, 526-527; 90 NW2d 651 (1958). Moreover, “forfeiture necessarily requires that there be a specific point at which [a] right must be asserted or be considered forfeited.” *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 69; 642 NW2d 663 (2002). Defendant’s receipt of the favorable ruling on his motion to withdraw his plea does not provide such a specific point in time as the trial court’s ruling afforded defendant the precise relief that he requested.

Affirmed.

/s/ Jane M. Beckering
/s/ E. Thomas Fitzgerald