

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES LEWIS III,

Defendant-Appellant.

UNPUBLISHED

April 12, 1996

No. 178591

LC No. 87-000594-FC

Before: Fitzgerald, P.J., and O’Connell and C.C. Schmucker,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of more than 650 grams of cocaine, MCL 333.7401(20(a)(i); MSA 14.15(7401)(2)(a)(i), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424. He was sentenced to a mandatory prison term of life without possibility of parole for the murder conviction and to a mandatory prison term of two years for the felony-firearm conviction. On appeal, this Court affirmed defendant’s convictions, but remanded the case for an evidentiary hearing regarding defendant’s claims of ineffective assistance of counsel.¹ Following a *Ginther*² hearing on remand, the trial court determined that defendant was not denied the effective assistance of counsel. Defendant appeals as of right from that determination. We affirm.

Defendant first claims that a conflict of interest was created when defense counsel represented both defendant and Richard Wershe, who defendant asserts was “being prosecuted as the kingpin of a large organized crime network involved in the distribution of drugs.” Defendant claims that defense counsel undertook the representation of defendant to serve the interests of Wershe, and that this conflict compromised defense counsel’s representation of defendant. To succeed on a claim of ineffective assistance of counsel based on a conflict of interest, the defendant has the burden of showing that an actual conflict of interest existed and adversely affected the adequacy of his representation. *People v Lafay*, 182 Mich App 528, 530; 452 NW2d 852 (1990).

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

Here, defendant has not alleged any facts showing a conflict of interest. Defendant has also failed to offer any support for his contention that Wershe's best interests were served at defendant's expense. Defendant and Wershe were not tried together and were not codefendants. See *People v Anway (After Remand)*, 189 Mich App 706, 708; 473 NW2d 804 (1991). Indeed, Wershe had already been convicted of a drug-related crime at the time defense counsel was retained by defendant. Therefore, no testimony relating to defendant's case could have served to further incriminate Wershe. Indeed, defense counsel testified at the *Ginther* hearing that, although he advised defendant that it was not in his best interests to testify, the ultimate decision was left to defendant. Defendant has failed in his burden of proving that an actual conflict of interest existed. Nonetheless, any possible conflict of interest was waived by defendant's acknowledgment that at the time he retained counsel he was aware that counsel represented Wershe. *People v Barclay*, 208 Mich App 670, 672-673; 528 NW2d 842 (1995).

Defendant also claims that he was denied the effective assistance of counsel by counsel's inaccurate advice regarding a July 1988 plea offer that would have allowed him to plead guilty to the offense of delivery of between 225 and 649 grams of cocaine, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). Defense counsel informed defendant that the mandatory minimum sentence for the offense was twenty years. Defendant contends that counsel failed to inform him that § 7401 was amended, effective March 1, 1988, to reduce the mandatory minimum sentence to ten years.³ At the *Ginther* hearing, defense counsel testified that he was aware of the effective date of the amendment, but was unaware that the amendment would be applied retroactively. Therefore, he believed that he correctly advised defendant that he would be sentenced in accordance with the version of the statute that was in effect at the time of defendant's arrest.

At the time of the plea offer, defense counsel's advice was legally sound. See, e.g., *People v Sinistaj*, 184 Mich App 191, 202-203; 457 NW2d 36 (1990), wherein this Court held:

Generally, a criminal defendant is sentenced according to the statute in force at the time he committed the crime. *People v Osteen*, 46 Mich App 409, 413; 208 243; 151 NW2d 365 (1967). An amendment to a criminal statute which concerns sentences or punishment is not retroactive. *Osteen, supra; Poole, supra*. The Legislature's failure to expressly provide otherwise in amending § 7403(2)(a)(iii) validates defendant's sentence under the version of the sentence in effect at the time he committed the crime. (Citations omitted.)

Because defendant committed the crime in 1987, and the amendment did not take effect until March 30, 1988, counsel's advice was correct at the time it was rendered. Defendant points out, however, that in *People v Schultz*, 435 Mich 517; 460 NW2d 505 (1990), the Court held that the amendment was retroactive. Unfortunately, *Schultz* was not decided until more than two years after defense counsel advised defendant regarding the plea. As the trial court correctly articulated, "this Court can hardly fault

defendant's trial counsel for his advice at the time defendant was offered the plea." Accordingly, defendant's claim of ineffective assistance of counsel must fail.

Defendant argues that he is nonetheless entitled to specific performance of the plea offer. We disagree. Based upon counsel's accurate advice, defendant elected to reject the plea offer and proceed to trial. He is therefore not entitled to specific performance of the agreement. Cf. *People v Carter*, 190 Mich App 459, 462-463; 476 NW2d 436 (1993)(the appropriate remedy in a situation where counsel has failed entirely to convey an offered plea would be for this Court to specifically enforce the agreement).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Peter D. O'Connell

/s/ Chad C. Schmucker

¹ *People v Lewis*, Unpublished opinion per curiam of the Court of Appeals (Docket No. 116515, issued January 10, 1994).

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³ 1987 PA 275.