

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN L. ANDERSON, SR.,

Defendant-Appellant.

UNPUBLISHED

October 17, 2006

No. 260926

Jackson Circuit Court

LC No. 03-004343-FH

Before: Fort Hood, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals by leave granted his conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim at least 13 and under 16 years of age). Defendant's conviction stems from his guilty plea after the complainant reported defendant's sexual contact with her to the police. The trial court sentenced defendant as a second-offense habitual offender, MCL 769.11, to 9 to 30 years in prison. We affirm.

Several months after he was sentenced, defendant moved to withdraw his guilty plea on the basis that the complainant recanted her allegations against him and because he received ineffective assistance of counsel. After hearing oral argument on the matter, the trial court denied the motion. Defendant filed an application for leave to appeal that was granted by this Court. This Court then granted defendant's motion for remand to conduct a *Ginther*¹ hearing concerning defendant's ineffective assistance of counsel claim and an evidentiary hearing on the motion to withdraw his guilty plea. After conducting the required hearings, the trial court again denied defendant's motion.

On appeal, defendant argues that the trial court abused its discretion by denying his motion to withdraw his plea. "When first made after sentencing, a motion to withdraw a guilty plea addresses itself to the sound discretion of the trial court, and the trial court's decision will not be disturbed unless there is a clear abuse of discretion resulting in a miscarriage of justice." *People v Jones*, 190 Mich App 509, 512; 476 NW2d 646 (1991).

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

After defendant was sentenced, the complainant signed an affidavit indicating that she had not had sexual contact with him. On remand, the complainant began to testify that her initial statements to the police were not accurate. However, fearing that she might be incriminating herself, the trial court interrupted the complainant's testimony so that she could be represented by counsel. Thereafter, the prosecution obtained an order granting the complainant immunity to testify truthfully. At a second evidentiary hearing, the complainant testified that she lied in her affidavit and at the previous hearing. She testified that her initial reports to the police were correct and that she had engaged in sexual contact with defendant. She further testified that she had previously indicated that she had not engaged in sexual contact with defendant because defendant's wife had bribed her to change her story. Nevertheless, defendant testified that he had not engaged in sexual contact with the complainant. He testified that he pleaded guilty and admitted having sexual intercourse with the complainant at his plea hearing because he feared that the complainant's father would hurt her if he did not take responsibility and that he "gave up" because of health problems he was having. He further testified that he had previously confessed to the police because they kept "pushing him" and he did not believe he would receive a fair trial in any event.

“[W]here newly discovered evidence takes the form of recantation testimony, it is traditionally regarded as suspect and untrustworthy.” *People v Patmore*, 264 Mich App 139, 153; 693 NW2d 385 (2004), quoting *People v Canter*, 197 Mich App 550, 559; 496 NW2d 336 (1992). Here, the fact that the recantation itself was subsequently recanted renders the initial recantation particularly dubitable. In analyzing defendant's motion to withdraw his guilty plea, the trial court found that although it doubted the veracity of both the complainant's and defendant's testimony, it concluded that the complainant was telling the truth when she testified that defendant's wife bribed her to change her story. The trial court reasoned that the testimony of defendant's trial counsel evidenced the high level of involvement defendant's wife had in the proceedings and supported the complainant's testimony that it was defendant's wife who was "pulling [the complainant's] strings." Giving deference "to the trial court's superior opportunity to appraise the credibility" of the witnesses in this matter, *Canter, supra* at 560, the trial court's conclusion that the complainant was telling the truth when she testified that defendant's wife bribed her to change her story was not clearly erroneous. In light of defendant's confession and guilty plea, the veracity of defendant's claim of innocence is dubious at best and no miscarriage of justice will result from the trial court's decision to deny defendant's motion to withdraw his guilty plea.

Nevertheless, defendant asserts that the trial court's ruling was erroneous because the complainant's recantation constitutes newly discovered evidence that warrants vacating his conviction so that a trial may be held. "For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) 'the evidence itself, not merely its materiality, was newly discovered'; (2) 'the newly discovered evidence was not cumulative'; (3) 'the party could not, using reasonable diligence, have discovered and produced the evidence at trial'; and (4) 'the new evidence makes a different result probable on retrial.'" *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003), quoting *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996); MCR 6.508(D).

Considering the fact that the complainant's recantation is undermined by her subsequent testimony affirming the sexual nature of her relationship with defendant, defendant's own videotaped confession to the police, and the trial court's assessment of the witnesses' credibility, a different result is not probable if this case were to proceed to trial. Accordingly, the trial court did not abuse its discretion by refusing to permit defendant to withdraw his guilty plea, and a miscarriage of justice will not result if the trial court's decision is affirmed.

Defendant also asserts that by failing to give him an opportunity to be heard on the matter before granting the order of immunity to the complainant or making findings of fact on the record regarding the same, he was denied due process of law. However, because this assertion of error was not raised in the trial court it is not preserved for review. *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005). Further, defendant has cited no authority in support of this assertion of error thereby abandoning this claim. *People v Huffman*, 266 Mich App 354, 371; 702 NW2d 621 (2005).

Defendant next argues that he should be permitted to withdraw his guilty plea because he was denied effective assistance of counsel. Determination of whether a defendant has been denied effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel. *Id.* We review for clear error the trial court's factual findings, while we review de novo its constitutional determinations. *Id.* We also review for clear error the trial court's factual findings at sentencing. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

Where a defendant has pleaded guilty, to establish ineffective assistance of counsel he "must show a very serious error, must overcome the presumption that the challenged action might be considered sound trial strategy, and must prove prejudice." *People v Jackson*, 203 Mich App 607, 613-614; 513 NW2d 206 (1994). Moreover, it must be determined whether the defendant tendered his plea voluntarily and understandingly. *People v Thew*, 201 Mich App 78, 89; 506 NW2d 547 (1993). "The question is not whether a court would, in retrospect, consider counsel's advice to be right or wrong, but whether the advice was within the range of competence demanded of attorneys in criminal cases." *Id.* at 89-90.

Here, defendant first complains that his attorney failed to proceed with a *Walker*² hearing to attempt to have his confession suppressed before he pleaded guilty. However, defendant has made no showing that had such a hearing been held there is a reasonable chance that his confession would have been suppressed. In fact, defense counsel testified that after viewing a videotape of the confession he did not believe the motion to suppress the confession would succeed. He further testified that he feared the plea offer would be withdrawn if they went forward with the hearing, and that it was defendant's decision to waive the hearing. Considering these facts, defendant has failed to establish that waiving the hearing was not sound strategy to

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

keep the plea offer open, let alone that he was prejudiced by the failure to hold the hearing. Accordingly, defendant has failed to show that he was denied effective assistance of counsel on this basis.

Defendant next argues that he was denied effective assistance of counsel because defense counsel failed to review the sentencing guidelines with him before he pleaded guilty. However, notes contained in defense counsel's file showing several sets of guideline calculations that are dated before the plea hearing support defense counsel's assertion that he did discuss the guidelines with defendant before he pleaded guilty. This conclusion is further supported by defendant's testimony that he understood his sentencing range. Moreover, while defendant may have misunderstood how the guidelines worked, defense counsel testified that defendant never indicated to him that he believed the maximum end of the guideline range was a maximum sentence. "Defense Counsel must explain to the defendant the range and consequences of available choices in sufficient detail to enable the defendant to make an intelligent and informed choice." *Jackson, supra* at 614. "Defense counsel, however, can only provide information; counsel 'cannot possibly ensure comprehension.'" *Id.*, quoting *Thew, supra* at 97.

In this case, the evidence indicates that defense counsel explained the range of possible outcomes under the sentencing guidelines to defendant, and while defendant may not have fully comprehended the guidelines, he failed to communicate that misunderstanding to defense counsel. Moreover, when asked at the plea hearing whether anybody had promised him anything about the sentence that would be imposed, defendant responded in the negative. Defendant also testified at the plea hearing that he understood that he was facing a maximum sentence of 30 years in prison. In fact, the trial court twice asked defendant whether he understood that he was facing up to 30 years in prison by pleading guilty and he answered affirmatively on both occasions. Defendant's plea was voluntary and understanding, and the advice defense counsel gave to defendant concerning the guidelines was within the range of competence demanded of attorneys in criminal cases.

Defendant further argues that he was denied effective assistance of counsel because defense counsel failed to interview the complainant before he pleaded guilty. Defense counsel testified that he chose not to interview the complainant for several reasons including that he did not want to harden her testimony, he did not want to create problems that might lead the prosecutor to withdraw the plea offer, and defendant had not denied being with the complainant at the time in question so he was unsure about what he was supposed to interview her. Thus, defense counsel considered it trial strategy not to interview the complainant, and defendant has failed to establish that this strategy was not sound. The implication of defendant's argument is that if defense counsel had interviewed the complainant, she would have recanted the charges she made against him. However, there is no evidence supporting that conclusion in light of the complainant's reaffirmation under oath of the charges she made against defendant. Thus, defendant has failed to show that the alleged deficiency in defense counsel's performance was prejudicial. Accordingly, defendant has failed to meet the burden necessary to establish that he was denied effective assistance of counsel on this basis.

Defendant also alleges that defense counsel rendered ineffective assistance of counsel because the plea agreement was illusory, where defendant pleaded guilty to one count of CSC

III, in exchange for a second count of CSC III being dropped. On this point defense counsel testified that he believed the trial court judge would issue a sentence at the high end of the guidelines if he were apprised of the complete history of alleged sexual contact between defendant and the complainant at trial. Further, if defendant had been convicted of a second count of CSC III, he would have received a higher score for prior record variable seven, MCL 777.57, thereby increasing his total prior record variable score and placing him in a higher grid level with a lengthier minimum sentence. MCL 777.63. Accordingly, the plea agreement was not illusory, and defense counsel had sound reasons for recommending that defendant accept the deal. Defense counsel's advice on this subject was within the range of competence demanded of attorneys in criminal cases, and defendant has failed to establish that he was denied effective assistance of counsel on this basis.

Finally, defendant contends that he was denied effective assistance of counsel because defense counsel failed to object to the scoring of offense variable 11, for which defendant was scored 50 points. MCL 777.41. "A score of fifty points for OV 11 correlates with two or more criminal sexual penetrations having occurred during the incident underlying the sentence." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). However, points may not be scored under OV 11 "for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense." MCL 777.41(2)(c). "Accordingly, the evidence must establish at least three sexual penetrations during the incident to support scoring OV 11 at fifty points." *Matuszak*, *supra* at 61.

Here, the Presentence Investigation Report (PSIR) indicates that the last time the complainant and defendant were together, he penetrated her digitally and with his penis, and that they had oral sex. In reviewing the PSIR at sentencing, defendant denied having oral sex with the complainant. Although the trial court was not explicit in its rejection of defendant's challenge, the court did not agree to change the PSIR and the tone of the trial court's comments indicates that the complainant's statements to the police about what occurred were sufficient for the court to find that the oral sex did occur. This was not clear error: scoring decisions for which there is any support will be upheld. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Accordingly, defendant cannot be said to have received ineffective assistance of counsel because he cannot show that an objection to the scoring of OV 11 would have succeeded, and, therefore, cannot show that he was prejudiced by the failure to specifically object to the scoring of 50 points for OV 11.³

³ At oral argument, there was some discussion regarding whether our Supreme Court's recent decision in *People v Johnson*, 474 Mich 96, 99-102; 712 NW2d 703 (2006) would alter the trial court's assessment of 50 points for OV-11. However, the sexual encounters in this case occurred over a two-year period, culminating in the final encounter where, as noted above, oral, digital, and penile penetration of the victim occurred. Employing the final encounter as the sentencing offense, the trial court properly assessed 50 points for OV-11; under MCL 777.41(2)(a), all sexual penetrations arising out of the sentencing offense are to be scored—three—but no points are to be assessed for the one penetration that forms the basis of the third-degree CSC offense, MCL 777.41(2)(c)—leaving two penetrations warranting a score of 50 points, MCL

(continued...)

We affirm.

/s/ Karen M. Fort Hood
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio

(...continued)

777.41(1)(a).