

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CINDA BERNIECE BACH,

Defendant-Appellant.

UNPUBLISHED

October 30, 2007

No. 268633

Hillsdale Circuit Court

LC No. 04-280493

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant plead guilty to operating a motor vehicle while intoxicated, third offense (OWI 3d), MCL 257.625(1) (having a blood alcohol content of .08 or higher), and was sentenced to 23 to 60 months' imprisonment. The trial court denied defendant's subsequent motion to withdraw her guilty plea, and we then granted defendant's application for leave to take a delayed appeal. We now affirm.

Defendant argues that her first OWI conviction was obtained in violation of her right to counsel because she was denied her request for court appointed counsel and the conviction subsequently led to five days' imprisonment. Therefore, defendant argues that the prior conviction could not be used to support her OWI 3d conviction,¹ and the trial court erred when it

¹ We reject the trial court's rationale that defendant's questioned conviction could be used to support her OWI 3d conviction because defendant's five days' imprisonment was a result of violating her probation, and not a result of the questioned conviction. See, *Alabama v Shelton*, 535 US 654, 658, 662, 667; 122 S Ct 1764; 152 L Ed 2d 888 (2002) (holding that once a "prison term is triggered, the defendant is incarcerated not for the probation violation, but for the underlying offense," and therefore, a conviction that is obtained after an improper denial of a defendant's right to appointed counsel, which later leads to a term of imprisonment because of a probation violation, violates a defendant's constitutional right to counsel despite the fact that the defendant subsequently had a probation violation hearing). However, for the reasons discussed *infra*, we conclude that the trial court did not err when it denied defendant's motion to withdraw her plea. "This Court will not reverse a trial court decision when the lower court reaches the correct result even if for a wrong reason." *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005).

denied her motion to withdraw her plea. We disagree. When a motion to withdraw a guilty plea is made after sentencing, we review a trial court's decision on the motion for an abuse of discretion, *People v Adkins*, 272 Mich App 37, 38; 724 NW2d 710 (2006), reviewing all applicable questions of law de novo, *People v Alexander*, 234 Mich App 665, 670; 599 NW2d 749 (1999).

“A collateral attack on a prior conviction underlying a present charge may not be made after a defendant's plea of guilty to the present charge is accepted.” *People v Roseberry*, 465 Mich 713, 723; 641 NW2d 558 (2002). In *Roseberry*, the defendant moved to set aside his conviction for OUIL 3d after his guilty plea had been accepted, arguing that he had not been afforded the right to appointed counsel for his prior OUIL convictions. *Roseberry, supra* at 715. Presented with a legal question identical to the issue in this case, the Court stated the following:

A conviction defective under *Jaworski* can be challenged by a timely motion by the defendant to quash the supplemental information or to strike from the supplemental information the defective conviction. To be timely, such a motion must be made before a defendant's plea of guilty or nolo contendere is accepted. [*Id.* at 717.]

In the case at bar, once the Lenawee transcript was filed in the circuit court, the trial court accepted defendant's guilty plea without any further discussion between the court and the parties. Therefore, even if we were to assume that defendant's first OWI conviction was obtained in violation of her right to counsel, because defendant's plea was accepted without defendant moving to set aside the prior conviction, defendant could no longer make a collateral attack regarding her prior underlying OWI conviction. *Roseberry, supra* at 723. We therefore hold that the trial court did not abuse its discretion when it denied defendant's motion to withdraw her guilty plea. *Id.*

Defendant's final argument on appeal is that she was denied her constitutional right to the effective assistance of counsel when her trial counsel allowed her to plead guilty to OWI 3d without first challenging her underlying OWI conviction. When reviewing a claim of ineffective assistance of counsel in the absence of an evidentiary hearing, our review is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). We review matters of constitutional law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). When the claim of ineffective assistance of counsel arises out of a guilty plea, the issue is whether the defendant tendered his plea voluntarily and understandingly. *People v Watkins*, 247 Mich App 14, 31; 634 NW2d 370 (2001). Guilty pleas can be involuntary or unknowing on the basis of ineffective assistance of counsel if defense counsel failed to explain the nature of the charges or the consequences of the plea, or if counsel failed to discuss possible defenses to the charges; such failures of counsel deprive a defendant of the ability to make an intelligent and informed

decision. *Id.* In reviewing a claim of ineffective assistance of counsel based upon counsel's advice, a court must consider whether the advice was within the range of competence demanded of lawyers in criminal cases, and not whether, in retrospect, the advice was right. *Id.*

Based upon the record available to us in this case, we conclude that, without the benefit of hindsight, defense counsel did not provide constitutionally deficient assistance when he allowed defendant to plead guilty to OWI 3d without first challenging her underlying OWI conviction. As far as the record discloses, defense counsel was first made aware of a possible challenge to defendant's underlying OWI conviction (Lenawee conviction) at defendant's November 22, 2004, "re-arraignment" when defendant, in response to thorough questioning from the trial court, stated that she was not offered an appointed attorney by the Lenawee court. The trial court subsequently requested the prosecutor to obtain a transcript of the Lenawee proceedings, stating that it would accept defendant's guilty plea "subject to the receipt of the transcript indicating that [defendant] waived or [was] offered counsel on the . . . Lenawee County case."

A review of the Lenawee transcript reveals that although defendant was denied the opportunity for appointed counsel,² she nevertheless agreed to plead guilty to the charge in the absence of counsel once she was informed that the two charges she was concerned about would be dismissed:

THE COURT: Did you wish to plead guilty to driving under the influence?

MISS BACH: I wanted to see if I could get an attorney--

THE COURT: Do you wish to hire an attorney?

MISS BACH: --cause there was, like, three charges. Pardon me?

THE COURT: Do you wish to have the time to hire an attorney?

MISS BACH: Um, I don't have a job.

THE COURT: Ma'am, I can't hear you.

MISS BACH: I do not have a job at this time.

THE COURT: Okay. I'm afraid that we—since there does not appear to be any realistic possibility of a jail sentence, we would not be appointing counsel in this situation. If you wanted to hire an attorney, you'd be more than welcome to do that.

² Since the trial court was not imposing any form of incarceration, it correctly informed defendant at that time that she was not entitled to an attorney at public expense. *Scott v Illinois*, 440 US 367, 373; 99 S Ct 1158; 59 L Ed2d 383 (1979); *Shelton, supra* at 661-662.

MISS BACH: Well, there was, like, two other charges, or somethin', on the ticket, I guess. That's what—I was kinda worried about the other ones.

THE COURT: Well, what they're doing is apparently they're gonna offer to dismiss those other two charges.

MISS BACH: Oh, okay, the—

THE COURT: Do you wish to go ahead and hire an attorney, or do you want to plead guilty, or do you want to plead not guilty, or what do you want to do?

MISS BACH: Yes, sir, that'd be fine.

THE COURT: What would be fine?

MISS BACH: The OUIL plea.

A reasonable reading of the Lenawee transcript, coupled with a review of defendant's PSIR,³ indicate that, under the circumstances, it was not below an objective standard of reasonableness to believe that defendant waived her right to counsel at the Lenawee proceedings, and that defendant's Lenawee conviction was not obtained in violation of her right to counsel. *LaVearn, supra*. Indeed, a reasonable conclusion after reading the transcript is that defendant inquired about obtaining an attorney because of two other charges that apparently came along with the OUIL, but once she realized that those other charges were being dismissed, she agreed to plead without counsel. Accordingly, defense counsel did not provide constitutionally deficient assistance when he allowed defendant to plead guilty to OWI 3d without first challenging her underlying OWI conviction. *Toma, supra* at 302-303.⁴

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Christopher M. Murray

³ Defendant's PSIR states that she "waived" counsel at the Lenawee proceedings.

⁴ Even if we concluded that defendant had not waived counsel at the Lenawee hearing, "[c]ounsel is not ineffective for taking a position that, while objectively reasonable at the time, is later ruled incorrect." *People v Reed*, 449 Mich 375, 396; 535 NW2d 496 (1995).