

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN GEORGE RUSIECKI,

Defendant-Appellant.

UNPUBLISHED

April 12, 2002

No. 236651

Midland Circuit Court

LC No. 84-004791-FH

Before: K.F. Kelly, P.J., and Doctoroff and Cavanagh, JJ.

PER CURIAM.

This case has been remanded by our Supreme Court for consideration as on leave granted. Defendant appeals the trial court's order denying his motion for relief from judgment. We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with three counts of larceny over \$100, MCL 750.356, resulting from an incident in which he drove away a truck that towed a trailer that carried a bulldozer. He pleaded guilty of two counts of larceny in exchange for dismissal of the third count. On November 9, 1984 the trial court sentenced defendant to concurrent terms of one and one-half to five years in prison. Defendant did not appeal these convictions. Subsequently, defendant pleaded guilty of criminal sexual conduct in the third degree, MCL 750.520d, and on March 21, 1997 was sentenced to seven to fifteen years in prison.

In February 1999 defendant filed a motion for relief from judgment in the trial court, arguing that the plea agreement that resulted in his convictions of two counts of larceny over \$100 was illusory because the circumstances of the incident actually supported only one such charge. He contended that his convictions of two counts of larceny violated the state and federal prohibitions against double jeopardy. Finally, defendant asserted that trial counsel rendered ineffective assistance by recommending that he accept the plea agreement. The trial court denied the motion, reasoning that while defendant raised a meritorious legal argument, his convictions of two counts of larceny were moot and were not prejudicial for the reasons that he had completely served the sentences for those convictions and had not been sentenced as an habitual offender in the subsequent case.

A defendant seeking relief from judgment has the burden of establishing entitlement to the relief requested. A court may not grant relief if the motion alleges grounds for relief, other than jurisdictional defects, that could have been raised on appeal or in a prior motion, unless the

defendant demonstrates good cause for failure to raise the grounds in a previous proceeding and actual prejudice from the alleged irregularities. In the context of a conviction following a plea, actual prejudice means that the defect was such that it rendered the plea involuntary to a degree that would make it manifestly unjust to allow the conviction to stand. MCR 6.508(D)(3)(b)(ii). A defendant seeking relief from judgment based on a jurisdictional defect need not establish good cause or actual prejudice. *People v Carpentier*, 446 Mich 19, 27; 521 NW2d 195 (1994).

We reverse. Defendant is entitled to relief from judgment. The plea agreement that led to defendant's plea of guilty was illusory in that it was based on the erroneous assumption that defendant could be tried on three charges of larceny over \$100 based on his taking of the truck, the trailer, and the bulldozer. The proper unit of prosecution for the offense of larceny is a taking at a single time and place, regardless of the number of items actually taken. *People v Wakeford*, 418 Mich 95, 112; 341 NW2d 68 (1983). Defendant was charged with taking three items from the same place at the same time. As a matter of law, he could not properly be charged with three counts of larceny over \$100. *Id.* Because there was a legal bar to conviction on the charge that was dismissed pursuant to the plea agreement, and because defendant's plea was induced by a promise to dismiss that charge, defendant was misinformed regarding the benefit of his plea. The plea was not understandingly and voluntarily made. *People v Graves*, 207 Mich App 217, 219-220; 523 NW2d 876 (1994).

Moreover, defendant's conviction of two counts of larceny over \$100 under circumstances where the theft of three items could result in only one charge constituted multiple punishments for the same offense, and thus violated the federal and state constitutional guarantees against double jeopardy. US Const, Am V; Const 1963, art 1, § 15. Contrary to the trial court's assertion, the error cannot be considered moot simply because defendant has served the sentences imposed on the two convictions of larceny over \$100. Those convictions remain a part of defendant's record, and could have a detrimental effect on parole considerations, etc. See *People v Martin*, 398 Mich 303, 310-311; 247 NW2d 303 (1976). The violation of defendant's right to be free from double jeopardy constitutes a jurisdictional defect that obviates the need to show good cause or actual prejudice under MCR 6.508(D)(3). *Carpentier, supra*.

Reversed.

/s/ Kirsten Frank Kelly
/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh