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STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GAVIN WADE WARNER,

Defendant-Appellant.

UNPUBLISHED

April 04, 2025

8:53 AM

No. 369496

Delta Circuit Court

LC No. 21-010615-FH

Before: GADOLA, C.J., and CAMERON and ACKERMAN, JJ.

PER CURIAM.

Defendant appeals by leave granted¹ his plea-based convictions of two counts of assault with intent to commit criminal sexual conduct (CSC) involving sexual penetration, MCL 750.520g(1). He was sentenced to two concurrent terms of 58 months’ to 10 years’ imprisonment for these convictions. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Defendant pleaded no contest to sexually assaulting the then-fifteen-year-old victim. The terms of the agreement provided that defendant plead to two counts of assault with intent to commit CSC charges in exchange for the dismissal of the remaining three third-degree CSC charges. The plea hearing was held remotely, with defendant and his attorney appearing via videoconference technology.

At sentencing, defendant moved for new counsel, arguing that his appointed attorney had failed to adequately communicate the terms of the plea agreement. The trial court took testimony from defendant and defense counsel. The trial court granted defendant’s motion for new counsel because it found that counsel inadequately communicated with defendant. Sentencing was adjourned to give defendant’s new counsel time to review the case. Defendant was later sentenced

¹ *People v Warner*, unpublished order of the Court of Appeals, entered March 20, 2024 (Docket No. 369496).

consistent with the plea agreement. After sentencing, defendant moved to withdraw his plea and to correct his invalid sentence. He also raised a separate issue of judicial reassignment because the trial court judge had represented defendant in proceedings years earlier. The trial court denied defendant's motions. This appeal followed.

II. MOTION TO WITHDRAW PLEA

Defendant first argues that his plea was invalid because trial counsel was ineffective. Therefore, the trial court erred in denying the motion to withdraw his plea. We disagree.

A. STANDARDS OF REVIEW

“After a plea has been accepted by the trial court, there is no absolute right to withdraw the plea.” *People v Haynes*, 221 Mich App 551, 558; 562 NW2d 241 (1997). “When a motion to withdraw a plea is made after sentencing, the decision whether to grant it rests within the discretion of the trial court.” *Id.* “That decision will not be disturbed on appeal unless there is a clear abuse of discretion resulting in a miscarriage of justice.” *Id.* “A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.” *People v Pointer-Bey*, 321 Mich App 609, 615; 909 NW2d 523 (2017) (quotation marks and citation omitted). “Generally, whether a defendant had the effective assistance of counsel is a mixed question of fact and constitutional law.” *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012) (quotation marks and citation omitted). Questions of fact are reviewed for clear error, while questions of law are reviewed de novo. *Id.* “A finding is clearly erroneous if this Court is left with a definite and firm conviction that the trial court made a mistake.” *People v Abcumby-Blair*, 335 Mich App 210, 227–228; 966 NW2d 437 (2020) (quotation marks and citation omitted).

B. LAW AND ANALYSIS

“A defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process.” *People v Brown*, 492 Mich 684, 693; 822 NW2d 208 (2012).

Defendant claims his plea was defective because he received ineffective assistance during plea negotiations. Criminal defendants have the right to effective assistance during plea negotiations. *People v White*, 331 Mich App 144, 148; 951 NW2d 106 (2020). This is to ensure that the defendant “has the ability to make an intelligent and informed choice from among his alternative courses of action.” *Id.* (quotation marks and citation omitted). As such, defense counsel should “properly advise [the] defendant regarding the nature of the charges or the consequences of the guilty plea” and inform the defendant of the “possible defenses to the charges to which the defendant is pleading guilty[.]” *Id.* (quotation marks and citation omitted). “The proper remedy for ineffective assistance of counsel during plea negotiations will depend on the circumstances of the case, but it could potentially entail resentencing or requiring a rejected plea to be reoffered.” *Id.*

“As with any other claim of ineffective assistance, the defendant has the burden of establishing the factual predicate of his ineffective assistance claim.” *Id.* (quotation marks, brackets, and citation omitted). The defendant must show “a reasonable possibility that, but for

counsel's errors," the defendant's choice in the plea process would have been different. *Lafler v Cooper*, 566 US 156, 163-164; 132 S Ct 1376; 182 L Ed 2d 398 (2012) (quotation marks and citation omitted).

A defendant seeking relief for ineffective assistance in this context must meet *Strickland's*^[2] familiar two-pronged standard by showing (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. [*People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014) (quotation marks and citation omitted).]

Counsel's representation may fall below an objective standard of reasonableness if counsel "failed to explain adequately the nature of the charges or the consequences of the guilty plea." *People v Corteway*, 212 Mich App 442, 445; 538 NW2d 60 (1995).

Defendant argues on appeal that his attorney failed to adequately communicate the number of charges to which he was pleading no contest, thereby subjecting him to greater sentencing consequences. He asserts that, had he known he was pleading no contest to two charges, as opposed to one, he would have elected to go to trial. Defendant supports his argument by noting that the trial court granted his request to replace his first attorney because he had inadequately communicated with defendant during the plea negotiations. Defendant's claim of error is not supported by the record. First, even after being appointed new counsel, defendant did not move to withdraw his plea. He only did so after sentencing. Second, defendant explicitly acknowledged during his plea that he understood he was pleading no contest to two charges. Indeed, the trial court questioned defendant about this aspect of his plea:

[*Prosecutor*]: And [defendant] would be entering a plea to two counts of criminal sexual conduct, assault with intent to commit sexual penetration. That's . . . a ten-year felony and a Tier III SORA offense. In exchange, the People would be dismissing the existing counts.

The Court: All right. And, [defense counsel], is that the agreement as you understand it?

[*Defense Counsel*]: Yes, Your Honor.

The Court: And, [defendant], the plea agreement communicated by the prosecutor and confirmed by your attorney, did you hear what it was?

Defendant: Yes, Your Honor.

The Court: And is that the agreement you're asking the Court to accept here today?

² *Strickland v Washington*, 466 US 668, 669; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant: Yes, Your Honor.

The Court: And you understand that the name of the offense you'd be pleading . . . no contest to, is called criminal sexual conduct, assault with intent to commit sexual penetration?

Defendant: Yes, Your Honor.

* * *

The Court. Do you understand that you'd further be pleading no contest to an additional count of criminal sexual conduct, assault with intent to commit sexual penetration and that that offense likewise, is categorized as a felony punishable by up to ten years imprisonment, involving mandatory AIDS and STD testing and that it too is a Tier II [sic] offense under the Sex Offender Registration Act?

Defendant: Yes, Your Honor.

Thus, defendant's argument lacks merit, because his own statements reflect that he understood the number of offenses to which he was pleading.³

Defendant fails to show defense counsel's representation fell below an objective standard of reasonableness. The trial court therefore did not err in denying defendant's motion to withdraw his no-contest pleas.

III. JUDICIAL REASSIGNMENT

Defendant next argues that he is entitled to be resentenced by another judge because the trial court judge should have disqualified himself. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

"To preserve for appellate review the argument that a judge should have recused [themselves], typically a party must timely move for the judge's recusal in compliance with MCR 2.003(D)." *People v Loew*, ___ Mich ___, ___ n 10; ___ NW3d ___ (Docket No. 164133) (2024); slip op at 14 n 10. "[A]ll motions for disqualification [of a judge] must be filed within 14 days of the discovery of the grounds for disqualification." MCR 2.003(D)(1)(a). Because defendant did not timely raise the issue of the trial court judge's conflict based on prior representation, we review the issue for plain error. *Loew*, ___ Mich at ___ n 10; slip op at 14 n 10. To establish a plain error, a defendant must first show that "(1) an error occurred, (2) the error was plain, i.e., clear or obvious,

³ Defendant also suggests that his appearance over videoconferencing technology made it difficult to understand the nature of the charges. We reject this argument because, other than this general assertion, defendant points to no specific instance during the plea hearing showing any such misunderstanding. *People v McPherson*, 263 Mich App 124, 136; 687 NW2d 370 (2004) ("The failure to brief the merits of an allegation of error constitutes an abandonment of the issue.").

and (3) the plain error affected substantial rights, i.e., prejudiced defendant by affecting the outcome of the proceedings.” *People v Anderson*, 341 Mich App 272, 279; 989 NW2d 832 (2022) (quotation marks and citation omitted). “If defendant satisfies those three requirements, we must make a fourth determination: whether the plain error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of defendant’s innocence.” *Id.* at 280.

B. LAW AND ANALYSIS

Under MCR 2.003, disqualification of a judge is warranted if the judge was an attorney for a party “*within the preceding two years.*” MCR 2.003(C)(1)(e) (emphasis added). “A judge must avoid all impropriety and appearance of impropriety.” Code of Judicial Conduct, Canon 2(A). In determining whether a judge has “failed to avoid the appearance of impropriety,” we consider “whether an ordinary person might reasonably question the judge’s integrity, impartiality, or competence on the basis of the judge’s observable conduct.” *Loew*, ___ Mich at ___; slip op at 10.

Here, the trial court judge allegedly represented defendant at least seven years before presiding over this case. This far exceeds the two-year window under MCR 2.003(C)(1)(e). Moreover, defendant has not identified a reason to believe that any impropriety or the appearance of impropriety existed. The trial court judge stated on the record that he did not recall any details from his prior representation of defendant, and that he was not biased personally against defendant in any way. Because an ordinary person could not “reasonably question the judge’s integrity, impartiality, or competence on the basis of [his] observable conduct[.]” *Loew*, ___ Mich at ___; slip op at 10, the trial court judge’s prior representation of defendant did not create the appearance of impropriety in this case under Canon 2(A).

Affirmed.

/s/ Michael F. Gadola
/s/ Thomas C. Cameron
/s/ Matthew S. Ackerman