STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FLOYD ARTHUR BOYCE,

Defendant-Appellant.

UNPUBLISHED
September 17, 2020

No. 350014
Oakland Circuit Court
LC No. 2017-262749-FC

Before: LETICA, P.J., and FORT HOOD and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted[1] his no contest plea to two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a); MCL 750.520c(2)(b) (sexual contact with a person under 13). Defendant was sentenced, as a fourth-offense habitual offender, MCL 769.12, to two terms of 15 to 99 years' imprisonment. Following the entry of defendant's original judgment of sentence, the court amended defendant's judgment of sentence to impose lifetime electronic monitoring. We affirm defendant's convictions, but vacate the court's amended judgment of sentence and remand for the court to reinstate defendant's original judgment of sentence.

This case arises out of multiple instances of sexual abuse perpetrated by defendant against two victims. Defendant was charged with five counts of CSC-I and two counts of CSC-II, and pleaded no contest to the two counts of CSC-II in exchange for dismissal of the other charges. Following entry of his judgment of sentence, defendant filed a motion to withdraw his plea, arguing that his plea was not knowingly and voluntarily made. Specifically, defendant argued that he did not understand the terms of his plea agreement and that trial counsel provided ineffective assistance of counsel during plea negotiations. The court denied defendant's motion to withdraw

[1] *People v Boyce*, unpublished order of the Court of Appeals, entered September 10, 2019 (Docket No. 350014).

his plea but ordered a *Ginther*[2] hearing. Following the *Ginther* hearing, the court concluded that defendant was provided effective assistance of counsel. However, the trial court also entered an amended judgment of sentence following the *Ginther* hearing that added a provision for lifetime electronic monitoring.

I. AMENDED SENTENCE

Defendant argues that the trial court erred in sua sponte resentencing him to lifetime electronic monitoring, and that his original sentence should be reinstated. We agree.

"The proper interpretation and application of statutes and court rules is a question of law, which this Court reviews de novo." *People v Comer*, 500 Mich 278, 287; 901 NW2d 553 (2017). Under MCL 750.520c(2)(b) "the court shall sentence the defendant to lifetime electronic monitoring under section [MCL 750.520n] if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age." Defendant does not dispute that his convictions would ordinarily be subject to lifetime electronic monitoring, nor does he dispute that failing to order monitoring rendered his sentences invalid. See *Comer*, 500 Mich at 292 (holding that failing to order lifetime electronic monitoring that is statutorily mandated renders a sentence invalid). However, at defendant's original sentencing, the trial court did not sentence defendant to lifetime electronic monitoring and the original judgment of sentence was silent as to the same.

After the Michigan Department of Corrections notified the trial court that it omitted lifetime electronic monitoring from defendant's sentence, the court ordered the parties to brief the issue of whether the court could sua sponte resentence defendant. Subsequently, the court sua sponte entered an amended judgment of sentence to include lifetime electronic monitoring. On appeal, the parties dispute whether the trial court had the authority to enter the amended judgment of sentence and to, effectively, resentence defendant.

In *Comer*, the Michigan Supreme Court addressed whether the trial court, after failing to impose lifetime electronic monitoring for a CSC-I conviction, could sua sponte resentence the defendant. *Id*. at 293. The Court concluded that, in order to address this issue, it was necessary to consider two court rules—MCR 6.435 and MCR 6.429. *Id*. First, the Court considered whether, under MCR 6.435, the failure to sentence the defendant to lifetime electronic monitoring was a clerical mistake or a substantive mistake. *Id*. MCR 6.435 provides:

> (A) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.

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

> (B) Substantive Mistakes. After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.

The Court concluded that failing to impose lifetime electronic monitoring on a judgment of sentence, particularly where no mention of the monitoring was made at sentencing, is a substantive mistake, and that a court's ability to correct such a mistake "under MCR 6.435(B) ends upon entry of the judgment." *Comer*, 500 Mich at 292-294.[3]

The Court then turned to MCR 6.429(A), which, at that time, provided:

> (A) Authority to Modify Sentence. A motion to correct an invalid sentence may be filed by either party. The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law.

The Court concluded that "MCR 6.429 authorize[d] either party to seek correction of an invalid sentence upon which judgment has entered, but the rule does not authorize a trial court to do so sua sponte." *Comer*, 500 Mich at 297. "[U]nder MCR 6.435 and MCR 6.429, a trial court may not correct an invalid sentence on its own initiative after entry of the judgment; the court may only do so upon the proper motion of a party." *Id*. at 300. Thus, because neither party had moved to correct the defendant's sentence in *Comer*, the trial court erred by adding lifetime electronic monitoring to the defendant's sentence on its own initiative 19 months after the original sentence was imposed. *Id*. at 300-301.

Following *Comer*, MCR 6.429(A) was amended, effective September 1, 2018. The rule now provides:

> (A) Authority to Modify Sentence. The court may correct an invalid sentence, on its own initiative after giving the parties an opportunity to be heard, or on motion by either party. But the court may not modify a valid sentence after it has been imposed except as provided by law. Any correction of an invalid sentence on the court's own initiative must occur within 6 months of the entry of the judgment of conviction and sentence.

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[3] We are aware that, in other cases, we have held that, where a defendant was informed of lifetime electronic monitoring at sentencing but the provision was erroneously left out of the judgment of sentence, the error constituted a clerical error that the trial court was free to correct pursuant to MCR 6.435(A). See *People v McNees*, unpublished per curiam opinion of the Court of Appeals, entered April 19, 2018 (Docket No. 337426), p 4. In this case, defendant was made aware of lifetime electronic monitoring at his plea hearing, but the same was never mentioned at his subsequent sentencing hearing. Under those circumstances, we would think it problematic to distinguish *Comer*. Accordingly, we conclude that the failure to inform defendant of the mandatory lifetime electronic monitoring provision at sentencing combined with the subsequent failure to include the provision on the judgment of sentence constituted a substantive error akin to the error in *Comer*.

Thus, at present, pursuant to MCR 6.429(A), a trial court may now sua sponte amend an invalid sentence within six months of entering the original judgment of sentence.

The parties dispute which version of MCR 6.429(A) should apply to this case. At the time of defendant's original sentencing—June 28, 2018—the former version MCR 6.429(A) was in effect. At the time defendant was resentenced—February 14, 2019—the current version of MCR 6.429(A) was in effect. Defendant urges this Court to apply the former version of MCR 6.429(A), whereby the trial court's sua sponte resentencing was erroneous. *Comer*, 500 Mich at 297. The prosecution urges this Court to apply the version of MCR 6.429(A) in effect at the time the court resentenced defendant. However, the prosecution fails to address the portion of MCR 6.429(A) which requires the trial court to correct an invalid sentence within six months of entry of the original sentence. In this case, the trial court entered the amended judgment of sentence on February 14, 2019. Thus, even under the amended version of MCR 6.429(A), the court was without authority to sua sponte amend defendant's invalid sentence because more than six months had passed since the entry of the original judgment of sentence. We therefore vacate defendant's amended judgment of sentence and remand for the original judgment of sentence to be reinstated.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that the trial court erred in determining that defendant's trial counsel was effective. We disagree.

"Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v Solloway*, 316 Mich App 174, 187; 891 NW2d 255 (2016). Questions of law are reviewed de novo. *Id*. at 188. A trial court's factual findings are reviewed for clear error and "cannot be disturbed unless the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014) (citation and quotation marks omitted).

"[A] defendant is entitled to the effective assistance of counsel in the plea-bargaining process." *Douglas*, 496 Mich at 591-592. A defendant seeking relief for ineffective assistance must establish "(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." *Id*. at 592 (citation and quotation marks omitted). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Eisen*, 296 Mich App 326, 329; 820 NW2d 229 (2012) (citation and quotation marks omitted). "This presumption can only be overcome by a showing of counsel's failure to perform an essential duty, which failure was prejudicial to the defendant." *People v Hampton*, 176 Mich App 383, 385; 439 NW2d 365 (1989). "In demonstrating prejudice, the defendant must show the outcome of the plea process would have been different with competent advice." *Douglas*, 496 Mich at 592 (citation and quotation marks omitted).

Defendant contends that, during the plea negotiations, defense counsel provided ineffective assistance of counsel by guaranteeing to defendant that defendant would receive jail credit dating back to March 2010, and by telling defendant that he could challenge on appeal the trial court's denial of his motion for a speedy trial violation despite accepting a plea. Defendant claims that, but for his counsel's inaccurate advice, he would not have pleaded no contest and instead would

have proceeded to trial. However, defense counsel disagreed that he made a guarantee that defendant would be granted jail credit. Defense counsel testified that, when he spoke privately with defendant during the plea hearing, defendant asked if he could get jail credit dating back to March 2010, and defense counsel responded that he had a "valid argument," that defense counsel would present the argument to the court, but that it was ultimately the court's decision.[4]

Later, defendant was presented with a letter he wrote to defense counsel on April 29, 2018—prior to the plea hearing—in which defendant told defense counsel that he had concluded that he needed to make a deal. Defendant admitted to the contents of the letter. What is more is that defense counsel testified that defendant was aware that the prosecution had a super-habitual in this case and that, if defendant was convicted at trial of any one of the initial seven charges, he would be sentenced to a minimum of 25 years' imprisonment. Defense counsel testified that he wrote defendant a letter explaining that, with the plea deal, defendant was looking at 15-year minimum sentences. In response, defendant wrote his own letter, stating, "he'll take the 15 years and he'll try to work the system, work to write these motions and try to get the People to overturn it, and try to get him some time."

Ultimately, the trial court found that defendant's testimony was not credible and afforded the testimony "no weight." The court stated that defendant's "feigning of ignorance regarding the true state of affairs was unconvincing," and that defendant's "demeanor nearly almost always undermined his credibility." The trial court also noted that defendant's *Ginther* hearing testimony completely contradicted his plea hearing testimony, wherein defendant acknowledged that he was giving up his right to appeal his convictions and that he was promised nothing in return for his plea. Contrarily, the court found defense counsel's testimony to be credible, stating that he was authentic, forthright, and genuine, and that his demeanor enhanced his credibility. On the basis of these findings, the court concluded that defendant had failed to meet his burden of establishing that defense counsel provided ineffective assistance of counsel because the evidence indicated that defense counsel made no promises to defendant and that defense counsel properly represented defendant during the plea negotiations. With the above testimony in mind, we are not inclined to disturb this finding, particularly in light of the fact that "witness credibility is a question for the fact-finder, and this Court does not interfere with the fact-finder's role." *Solloway*, 316 Mich App at 181-182.

Moreover, even assuming arguendo that defense counsel provided inaccurate advice, it is defendant's burden to establish that the outcome of the proceeding would have been different but for defense counsel's error. The evidence suggests that defendant was well aware that he was facing a minimum of 25 years in prison if he went to trial and that his primary concern was avoiding that sentence. Defendant's own statements suggest that he knew he was to receive 15-year minimum sentences, and it was his plan to accept the plea and try to lessen the sentences at a later

[4] We also note that, when the prosecution questioned defendant at the *Ginther* hearing as to why, during the plea hearing, defendant testified that nobody had promised him anything in exchange for his plea if defense counsel guaranteed him he would receive jail credit from March 2010, defendant could not give an adequate response. Defendant simply explained that he did not tell the court at that time because it "had nothing to do with the plea."

time. Other than defendant's own contradictory statement, there is no evidence defendant would have pleaded differently without having received the allegedly inaccurate advice.

Suffice it to say, the record evidence supports the trial court's ruling. The trial court did not clearly err in concluding that defendant received effective assistance of counsel, nor has defendant established that the ineffective assistance he alleges was prejudicial.

III. MOTION TO WITHDRAW THE PLEA

Defendant lastly contends that the trial court abused its discretion when it denied his motion to withdraw his plea. Specifically, defendant challenges the trial court's denial of his motion to withdraw his plea on the basis that his plea was not made knowingly and voluntarily because his written plea agreement contradicted the plea agreement stated on the record. In addition, defendant contends that the court's own statement during the plea hearing, that defendant could receive "as much as 15 years," confused him. Both arguments are without merit.

"A trial court's decision on a motion to withdraw a guilty plea made after sentencing will not be disturbed on appeal unless there is a clear abuse of discretion." *People v Seadorf*, 322 Mich App 105, 109; 910 NW2d 703 (2017). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id*. (citation and quotation marks omitted).

Under MCR 6.302(A), "[t]he court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate," and under MCR 6.302(D)(1), the court cannot accept a plea unless there is factual "support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading." Once a plea has been accepted by the trial court, "there is no absolute right to withdraw a guilty plea." *Seadorf*, 322 Mich App at 109. "A defendant may file a motion to withdraw the plea within 6 months after sentence," but must "demonstrate a defect in the plea-taking process" in order to be successful. *Id*. (citation and quotation marks omitted).

First, defendant asserts that the written plea agreement defendant signed appears to contradict the terms of his plea to a minimum of 15 years' imprisonment. The document to which defendant is referring is entitled "People's Exhibit No. 1—Per MCR 6.302," and line eight states: "Do you know that the most time you can get is ___ years in jail/ prison; and the minimum is ___ years? ___." Hand written into the first blank is "15," thus reading, "the most time you can get in prison is 15 years," while the blank regarding a minimum sentence was left empty.

MCR 6.302(C)(1) provides:

> The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement. If they have made a plea agreement, which may include an agreement to a sentence to a specific term or within a specific range, the agreement must be stated on the record or reduced to writing and signed by the parties. The parties may memorialize their agreement on a form substantially approved by the SCAO. The written agreement shall be made part of the case file.

Under the rule, the plea agreement may either be stated on the record *or* reduced to a signed writing. During the plea hearing, both parties confirmed that there was a plea agreement. The prosecutor stated the terms of the plea agreement on the record, which included minimum 15-year sentences, and defendant agreed to those terms on the record. There was no mention of a written plea agreement. Moreover, the written plea agreement defendant relies on to contest his plea was not "signed by the parties." Rather, it was signed by defendant and defense counsel and there is no indication that the prosecutor signed the written agreement.

Next, although defendant argues that the trial court's own statement that two counts of CSC-II "are felonies for which you could receive up to 15 years of incarceration," with a minimum of "no term" of incarceration was contradictory to the actual plea agreement, a review of the plea-hearing transcript makes it evident that the court was explaining to defendant the statutory maximum and minimum sentences for CSC-II as it is required to do by law. Under MCR 6.302(B)(1), the court is required to explain to the defendant the "maximum possible prison sentence for the offense and any mandatory minimum sentence required by law, including a requirement for mandatory lifetime electronic monitoring under MCL 750.520b or 750.520c."[5]

We conclude that, on the basis of defendant's testimony on the record, the court did not abuse its discretion in concluding that defendant's plea was made voluntarily and knowingly. The prosecutor clearly placed on the record that defendant was accepting a plea of two counts of CSC-II, as a fourth-offense habitual offender, with minimum sentences of 15 years' imprisonment in exchange for the dismissal of five counts of CSC-I. The court acknowledged that there was a plea agreement on the record as stated by the prosecutor, asked defendant whether he understood the terms of the plea agreement, and defendant responded "yes." In addition, the court asked defendant whether he understood that his plea as a fourth-offense habitual offender carried with it a maximum of life imprisonment, to which defendant stated he understood. With the terms of the agreement being clearly stated on the record, which included 15-year minimum sentences, and with defendant having stated that he accepted the terms of the plea agreement as stated on the record, we discern no abuse of discretion.[6]

We affirm defendant's convictions, but vacate the court's amended judgment of sentence and remand for the court to reinstate defendant's original judgment of sentence. We do not retain

[5] It is also worth noting that "requests to withdraw pleas are generally regarded as frivolous where the circumstances indicate that the defendant's true motivation for moving to withdraw is a concern regarding sentencing." *People v Haynes*, 221 Mich App 551, 559; 562 NW2d 241 (1997).

[6] We note defendant's additional contention that the court erred in denying his motion to withdraw his plea because defense counsel provided ineffective assistance of counsel when he allegedly guaranteed to defendant that he would receive jail credit dating back to March 2010 and that defendant could challenge his speedy trial violation despite pleading no contest. On the basis of the ineffective assistance of counsel analysis above, we need not address the argument further.

jurisdiction.

/s/ Anica Letica
/s/ Karen M. Fort Hood
/s/ Elizabeth L. Gleicher