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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 17, 2020
v	No. 350109 Emmet Circuit Court
SHAWN FRANCIS READER, Defendant-Appellant.	LC No. 18-004755-FC

Before: RONAYNE KRAUSE, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendant-appellant appeals by delayed leave granted the trial court's order denying his motion to withdraw his guilty plea. For the reasons set forth in this opinion, we affirm.

I. BACKGROUND

Defendant pleaded guilty to two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(d), as a third habitual offender, MCL 769.11. Defendant's status as a third habitual offender stemmed from his previous convictions of possession of child sexually abusive material and failure to register as a sex offender as required by the Sex Offenders Registration Act (SORA), MCL 28.721 *et seq*. The trial court sentenced defendant to serve two concurrent terms of 15 to 30 years in prison.

Because defendant was previously convicted of an offense requiring registration under SORA as a Tier I offender (registration for 15 years), his convictions in this case required him to maintain lifetime registration as a Tier III offender. The requirement to register as a sex offender for life prompted defendant to move to withdraw his plea. He claimed that neither his trial counsel nor the trial court advised him that his guilty plea would carry with it the lifetime registration requirement, and thus he did not knowingly and voluntarily plead guilty, entitling him to withdraw his plea. He further claimed that the alleged failure of his trial counsel to advise him of the lifetime SORA registration requirement constituted ineffective assistance of counsel.

The prosecution responded with an affidavit from defendant's trial counsel stating that counsel advised defendant of the SORA-registration implications of pleading guilty. Specifically,

trial counsel stated in his affidavit that he provided defendant with a copy of the amended information which contained all the penalties "attendant to the plea agreement, including the SORA ramifications." The amended information referred to by counsel in his affidavit and given to defendant reads:

> **SORA NOTICE**
> This is a Tier III Offense under the Sex Offender Registration Act (SORA) MCL 28.722(w)(iv). (Bold in original)

Although not specifically mentioned in the amended information, as defined in MCL 28.722(w)(iv), Tier III offense means 1 or more of the following:

> (iv) A violation of section 520b, 520d, or 520(g) of the Michigan penal code, 1931 PA 328, MCL 520.520b, 750.520d, and 750.520g…

In his affidavit, trial counsel further asserted that he "discussed the implications of a tier III offense under SORA, its ramification and its requirements, during my representation of the [d]efendant." The ramifications alluded to by trial counsel are found in MCL 28.725(12) which states: "Except as otherwise provided in this section and section 8c, a tier III offender shall comply with this section for life."[1]

The trial court denied defendant's motion, reasoning that (1) Michigan law does not require a trial court to advise a defendant offering a guilty plea of the SORA registration requirements resulting from the plea, (2) there was no evidence of, and no request for a *Ginther*[2] hearing to develop a record about ineffective assistance of counsel, and (3) defendant received the amended information putting him on notice that he was pleading guilty to "Tier III" offenses.

Defendant filed a delayed application for leave to appeal, which this Court granted. *People v Reader*, unpublished order of the Court of Appeals, entered October 25, 2019 (Docket No. 350109).

II. ANALYSIS

A trial court's decision on a motion to withdraw a plea is reviewed for an abuse of discretion. The proper interpretation and application of a court rule is a question of law that is reviewed de novo. To the extent that this case implicates constitutional issues, they are likewise reviewed de novo. *People v Cole*, 491 Mich 325, 329; 817 NW2d 497 (2012) (internal citations omitted). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *People v Buie*, 491 Mich 294, 320; 817 NW2d 33 (2012).

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[1] There is no dispute that defendant is required to register as a sex offender for the remainder of his life.

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

Courts will only grant motions to withdraw guilty pleas filed after sentencing if there was an "error in the plea proceeding that would entitle the defendant to have his plea set aside." MCR 6.310(C)(4). "The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate." MCR 6.302(A).

In this case, defendant raises two distinct forms of error which he argues mandate withdrawal of his plea. First, defendant argues that trial counsel was ineffective for failing to properly advise him of the consequences of his plea, specifically, that by pleading guilty defendant would be subjected to lifetime reporting requirements under SORA.

This Court has held that ineffective assistance of counsel in relation to a plea proceeding can support a motion to withdraw the plea. See *People v Haynes*, 221 Mich App 551, 558-559; 562 NW2d 241 (1997). Additionally, the United States Supreme Court held that counsel has a duty to advise clients of the "clear" consequences of their guilty pleas. *Padilla v Kentucky*, 559 US 356, 359; 130 S Ct 1473; 176 L Ed 2d 284 (2010). Based in large part on the holding in *Padilla*, this Court held that trial counsel has the duty to advise a client of the consequence of having to register with the sex-offender registry as the result of a guilty plea. *People v Fonville,* 291 Mich App 363, 394-395; 804 NW2d 878 (2011): "We recognize a significant parallel to be drawn from the Supreme Court's rationale in *Padilla* to the circumstances of this case. Similar to the risk of deportation, sex offender registration 'as a consequence of a criminal conviction is, because of its close connection to the criminal process, ... difficult to classify as either a direct or a collateral consequence' and that therefore '[t]he collateral versus direct distinction is ... ill-suited to evaluat[e] a *Strickland*[3] claim′ concerning the sex-offender-registration requirement." *Id.* at 391. As previously noted, defendant argues his trial counsel did not advise him that his guilty plea would carry with it the consequence of lifetime registry as a sex offender. Defendant did not request a *Ginther* hearing, hence our review of defendant's assertion of ineffective assistance of counsel is limited to counsel's performance as revealed on the existing record. *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Review of the record reveals the previously discussed affidavit provided by trial counsel asserts that counsel discussed the amended information with defendant which set forth, partially in bold print, that if guilty of the crime for which he ultimately pled, defendant was subject to a SORA Tier III offense. In addition, the affidavit clearly indicates that trial counsel specifically informed defendant of the ramifications of a Tier III offense. Defendant disputes these assertions, contending simply that trial counsel failed to advise him of the lifetime sex-offender-registry consequence of his guilty plea. We note that unlike trial counsel's sworn affidavit, defendant's contrary assertions are not presented to this Court in a manner that comports with our court rules regarding admissible evidence. As a consequence, the only record evidence on this point is the affidavit the prosecution submitted by defendant's trial counsel. As our Supreme Court has stated, a "defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel…" *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). On this record we conclude that defendant has failed to meet his burden of establishing the factual predicate to his claim of ineffective assistance of counsel. Additionally, we conclude that defendant has failed to

[3] *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed2d 674 (1984).

establish that trial counsel performance was deficient. Here, trial counsel provided an affidavit attesting that he informed defendant of the lifetime reporting requirements if defendant pled guilty. Additionally, and as quoted above, defendant was placed on notice by receipt of the amended felony information that he faced a Tier III SORA offense, which meant lifetime reporting. MCL 28.725(12). Trial counsel asserted in his affidavit that he and defendant discussed the implications of this printed notice. Based on these facts, defendant is not entitled to relief on his claim of ineffective assistance of counsel.

Defendant's second allegation of error is that the trial court was required to inform him that his plea would result in the "punishment" of defendant being required to register under SORA for the remainder of his lifetime. He argues that caselaw and applicable court rules make clear that a trial court must inform a defendant of any possible punishment, specifically the maximum prison sentence and any mandatory minimum sentence required by law, including lifetime electronic monitoring they face as a result of their plea. See, MCR 6.302(B)(2). Failure by the trial court to have informed defendant of the requirement of SORA lifetime reporting, he argues, violates MCR 6.302(A) because it renders his plea unknowing, involuntary and inaccurate.

The crux of defendant's arguments relative to the failure by the trial court to specifically advise him that he would be required to report under SORA for the remainder of his lifetime rests on two principles. First, defendant argues that the requirement to register as a Tier III sex offender for life constitutes punishment which the trial court was required to, but did not, advise defendant. Defendant's argument on this point relies almost exclusively on our Supreme Court's opinion in *People v Cole*, 491 Mich 325, 817 NW2d 497 (2012). In *Cole*, our Supreme Court held that due process requires a court to advise a defendant of a consequence of a guilty plea that constitutes "punishment." The Court further held that the lifetime electronic monitoring mandated by the first- and second-degree CSC statutes constitutes punishment because the Penal Code makes the monitoring a part of a sentence for first- or second-degree CSC. *Id.* at 335-336. The Court also noted that lifetime electronic monitoring was intrusive because of the equipment that must be attached to the body for the rest of the subject's life, allowing the government to track his or her every movement. *Id*. By contrast, registration on the SORA registry is not 'punishment.' " *People v Costner*, 309 Mich App 220, 232-33; 870 NW2d 582 (2015), citing *Fonville*, 291 Mich App at 381. While we recognize defendant's citations to *Does #1-5 v Snyder*, 834 F3d 696, 705-706 (CA 6, 2016) as standing for a different proposition, to be precise, that SORA registration is a form of punishment, those lower federal court decisions are not binding precedent in this Court." *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 59; 760 NW2d 811 (2008). *Costner* and *Fonville*, on the other hand, are published opinions of this Court that are binding. See MCR 7.215(C)(2). Because this Court has held in binding precedent that SORA registration is not punishment, we reject defendant's argument that lifetime SORA registration was part of the punishment of which the trial court was required to advise defendant before accepting his plea.

Next, defendant argues that the trial court's failure to inform him of the lifetime reporting requirement meant his plea was not made "understanding, voluntary and accurate," in contravention of MCR 6.302(A) and the Due Process Clause of the Fourteenth Amendment. Here, again, defendant places great emphasis on our Supreme Court's opinion in *Cole*. In *Cole*, our Supreme Court concluded that when pleading guilty, a "defendant must be aware of the immediate consequences that will flow directly from his or her decision. Without information about a consequence of a sentence deemed by our Legislature to be punishment…it cannot be said that a

defendant was aware of the critical information necessary to access the bargain being considered." *Cole*, 491 Mich at 337-338.

However, our Supreme Court's conclusion in *Cole* is inapplicable to the arguments presented by defendant. As previously discussed, mandatory reporting under SORA, contrary to mandatory electronic monitoring, is not punishment, (See, *Costner* and *Fonville*). In addition to the legal differences between lifetime electronic monitoring and lifetime reporting, the facts presented in this case are unique and distinct form those facing our Supreme Court in *Cole* or this Court in *Fonville*. In those cases, there was no evidence that defendant was specifically informed, in bold print on an amended felony information, that he faced a Tier III SORA violation. Additionally, those prior cases did not have an affidavit presented by defendant's trial counsel indicating that counsel had specifically informed defendant of the consequences of his plea relative to SORA. As such, unlike the defendants in *Cole* and *Fonville*, here, the record evidence reveals that defendant was made aware that as a result of his plea, he would be subjected to lifetime reporting under SORA. Consequently, defendant's plea was in conformity with MCR 6.302(A) as it was understanding, voluntary and accurate.

Accordingly, on the facts presented in this case, defendant is not entitled to relief.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Jane E. Markey
/s/ Stephen L. Borrello