

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
June 28, 2012

v

BRIAN RICHARDSON, a/k/a BRYAN LIGON,
Defendant-Appellee.

No. 306427
Wayne Circuit Court
LC No. 06-002364

Before: K. F. KELLY, P.J., and WILDER and BOONSTRA, JJ.

PER CURIAM.

The prosecution appeals by leave granted¹ a trial court order granting the motion of defendant, Brian Richardson, for relief from judgment and resentencing. We reverse and remand for reinstatement of defendant's original sentence.

On June 15, 2006, defendant was convicted of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv), possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii), felon in possession of a firearm, MCL 740.224f, and possession of a firearm during the commission of a felony (third offense), MCL 750.227b.² Defendant was sentenced on July 5, 2006, as a habitual third offender, MCL 769.11, to concurrent terms of 10 months to 40 years' imprisonment each for the possession with intent to deliver heroin and cocaine convictions, six months to eight years' imprisonment for the possession with intent to deliver marijuana conviction, and 6 months to 10 years' imprisonment for the felon-in-possession conviction, to be served consecutive to 10 years' imprisonment for the felony-firearm conviction. Defendant appealed these convictions, but this Court affirmed.³ Defendant then moved for relief

¹ *People v Richardson*, unpublished order of the Court of Appeals, entered November 23, 2011 (Docket No. 306427).

² Defendant was also charged with maintaining a drug house, MCL 333.7405(1)(d), but the trial court dismissed this charge.

³ *People v Richardson*, unpublished opinion of the Court of Appeals, issued February 5, 2009 (Docket No. 272367).

from judgment and resentencing based on the court's use of a 1995 plea-based conviction to enhance defendant's 2006 sentence. Defendant claimed that, after the 1995 conviction, the sentencing court failed to inform him that he could request counsel to apply for leave to appeal. He asserted that, because he had been denied the opportunity to request appellate counsel, his 1995 conviction was constitutionally infirm and could not be used to enhance his 2006 conviction. The trial court agreed and granted defendant's motion and ordered resentencing.

The prosecution claims on appeal that the trial court abused its discretion in granting defendant's motion for relief because, at the time of defendant's 1995 conviction, Michigan did not recognize a right to counsel to apply for leave to appeal plea-based convictions under either the Michigan or the federal constitution. The prosecution argues the sentencing court's failure to inform defendant of his opportunity to request counsel did not deprive him of his Sixth Amendment⁴ right to counsel and that defendant's 1995 conviction was not constitutionally infirm and can be used to enhance his 2006 sentence. We agree.

This Court reviews a trial court's decision on a motion for relief from judgment for an abuse of discretion. *People v Clark*, 274 Mich App 248, 251; 732 NW2d 605 (2007), quoting *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). "An abuse of discretion occurs only 'when the trial court chooses an outcome falling outside [the] principled range of outcomes.'" *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008), quoting *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A court "by definition abuses its discretion when it makes an error of law." *Koon v US*, 518 US 81, 100; 116 S Ct 2035; 135 L Ed 2d 392 (1996), citing *Cooter & Gell v Hartmarx Corp*, 496 US 384, 405; 110 S Ct 2447; 110 L Ed 2d 359 (1990). Review of factual findings supporting a trial court's grant of relief is for clear error. *Clark*, 274 Mich App at 251, quoting *McSwain*, 259 Mich App at 681.

In a motion for relief from judgment, "[t]he defendant has the burden of establishing entitlement to the relief requested." MCR 6.508(D). Normally, a court may not grant relief if the motion asserts grounds "which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter" unless the defendant can show good cause for his failure to raise such grounds earlier and actual prejudice resulting from the alleged error. MCR 6.508(D)(3). The prosecution argues that defendant has not shown good cause for waiting 12 years to challenge his conviction and sentence or actual prejudice. However, if the defendant can establish a jurisdictional defect, the requirement to show good cause and actual prejudice does not apply. MCR 6.508(D)(3). An alleged Sixth Amendment right-to-counsel violation is a jurisdictional defect negating that requirement and allowing collateral attack of a conviction wrongly obtained for lack of counsel. *People v Carpentier*, 446 Mich 19, 29-30; 521 NW2d 195 (1994). Therefore, defendant need not show good cause or actual prejudice as prerequisites to a grant of relief. Defendant nonetheless has the burden of establishing entitlement to relief.

Before 1994, criminal defendants in Michigan who were convicted based on their pleas of guilty or nolo contendere were entitled to appeal those convictions as of right. Const 1963, art. 1, § 20 Historical Notes; *People v Smith*, 402 Mich 72, 73; 259 NW2d 558 (1977). Section

⁴ US Const, Am VI.

20 of the Michigan Constitution also stated that such defendants were entitled, “as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.” Const 1963, art. 1, § 20. This language was interpreted to mean that the right to appeal plea-based convictions included a right to the appointment of appellate counsel. *People v Gazaway*, 35 Mich App 39, 40-41; 192 NW2d 122 (1971). In 1994, section 20 was amended to provide that defendants who pleaded guilty or nolo contendere could only appeal their convictions by leave of the court. Const 1963, art. 1, § 20 Historical Notes.

After the 1994 constitutional amendment, our Supreme Court adopted MCR 6.425(F)(1)(c), which provided that, for indigent defendants seeking to apply for leave to appeal plea-based convictions, the court should liberally grant requests for counsel if made within 42 days of sentencing. *People v Bulger*, 462 Mich 495, 505; 614 NW2d 103 (2000), abrogated by *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). In other words, appointment of counsel to apply for leave to appeal a plea-based conviction was now within the discretion of the court. In 2000, the Michigan Supreme Court, in *Bulger*, 462 Mich at 521, explicitly held that defendants applying for leave to appeal plea-based convictions were not entitled to appointment of appellate counsel under the Michigan or federal constitution. The Court also held in *Bulger* that it had lacked the authority to adopt MCR 6.425(F)(1)(c), explaining that the Court “could not use its rulemaking powers to provide for appointed appellate counsel in the absence of legislative action.” *Bulger*, 462 Mich at 510. *Bulger* was decided in 2000, but the defendant in that case was convicted and sentenced in 1995, and the case accurately reflects the state of the law at the time of defendant’s conviction. Under *Bulger*, defendant cannot claim he was deprived of his constitutional rights when he was not informed of his right to request counsel because he was not constitutionally entitled to appointment of counsel.

In 2005, the United States Supreme Court, in *Halbert*, 545 US at 610, abrogated *Bulger*, holding that “the Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals.” However, the Michigan Supreme Court has since held that *Halbert* is not to be applied retroactively and, therefore, defendants who were denied appellate counsel after the 1994 amendment, but before the 2005 *Halbert* decision, cannot collaterally attack their convictions based on a denial of appointment of appellate counsel. *People v Maxson*, 482 Mich 385, 402-403; 759 NW2d 817 (2008). Accordingly, defendant cannot claim any relief under *Halbert* because its holding does not operate retroactively. When the trial court held that defendant’s 1995 conviction was unconstitutional based on his lack of appellate counsel and that it could not, therefore, be used to enhance his 2006 sentence, the trial court retroactively applied *Halbert* contrary to *Maxson*.

Defendant, rather than claiming reliance on *Halbert*, bases his argument on a court rule in place at the time of his conviction. MCR 6.425(E) provided, as of January 1, 1995:

- (2) In a case involving a conviction following a plea of guilty or nolo contendere, immediately after imposing sentence, the court must advise the defendant, on the record, that
 - (a) the defendant is entitled to file an application for leave to appeal;

- (b) if the defendant is financially unable to retain a lawyer, the defendant may request appointment of a lawyer to represent the defendant on appeal; and
- (c) the request for a lawyer must be made within 42 days after sentencing. [1994 Amendments to the Michigan Court Rules of 1985, 447 Mich cliv (1994).]

Defendant argues that his conviction was constitutionally infirm because, after its entry, he was not informed that he could ask for counsel to apply for leave to appeal, which may or may not have been granted. The record shows that after entry of defendant's conviction in 1995, the trial court told defendant: "You waived your right to appeal as of right your conviction and sentence. But if you like, you can still appeal your case by way of leave to the Court of Appeals within twenty-one days of today's date."

The trial court's failure to follow the guidelines set forth in MCR 6.425(E)(2) was not a constitutional violation. The requirement that a court inform a defendant who was convicted based on a plea of an opportunity to request appellate counsel was, at the time, set forth only in the court rule and was not recognized under the Michigan or federal constitution or any other law. While the 1995 sentencing court may have erred by failing to follow the court rule, this error did not fall within the constitutional realm. Even if defendant had been afforded notice that he could request counsel, for the trial court to have then denied counsel would not have violated defendant's constitutional rights according to *Bulger*. The trial court held that, although "the issue of right to counsel on appeals from pleas was in a state of flux, the controlling law at the time required a trial court to provide specific information about a defendant's appellate rights, which were enshrined in the Michigan Constitution." However, the trial court offered no authority for this holding and, based on the rationale stated above, the trial court's legal conclusion was erroneous.

Defendant also argues that defendants, before *Halbert*, had begun winning federal habeas relief from plea-based convictions in cases where the trial court misinformed them of their opportunity to request counsel. Defendant cites no authority for this proposition, and the case he does cite for the remedy to that problem, *Ward v Wolfenbarger*, 340 F Supp 2d 773 (ED Mich, 2004), is based on a court's failure to inform the defendant of his right to appeal and corresponding right to counsel after a jury conviction, not a plea-based conviction, and is, accordingly, distinguishable from this case. See *Ward v Wolfenbarger*, 323 F Supp 2d 818, 821 (ED Mich, 2004), mod 340 F Supp 2d at 775.

Defendant also cites *US v Tucker*, 404 US 443, 448-449; 92 S Ct 589; 30 L Ed 2d 592 (1972), and *Burgett v Texas*, 389 US 109, 114; 88 S Ct 258; 19 L Ed 2d 319 (1967), for the proposition that using a conviction obtained in violation of the right to counsel to enhance a sentence is impermissible. But *Tucker* and *Burgett* involved deprivation of trial counsel, not appellate counsel and, therefore, defendant's reliance on those cases is misplaced. Consequently, the trial court's reliance on *Tucker*, and Michigan's retroactive adoption of its holding in *People v Moore*, 391 Mich 426, 437; 216 NW2d 770 (1974), was erroneous. In light of the trial court's legal errors, its decision to grant defendant relief from judgment was an abuse of discretion.

Reversed and remanded for reinstatement of defendant's original sentence. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly

/s/ Kurtis T. Wilder

/s/ Mark T. Boonstra