

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 2, 2013

v

CHRISTOPHER BLAYNE KIYOSHK,

Defendant-Appellant.

No. 295552
Kalamazoo Circuit Court
LC No. 2006-001463-FJ

ON REMAND

Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

This case comes before us on remand from the Supreme Court. Defendant appeals by leave granted¹ from Kalamazoo Circuit Court Judge Alexander C. Lipsey's December 4, 2009 order denying his motion for relief from judgment. Defendant challenges his 2006 plea-based conviction of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) (victim under 13 years of age), for which he was sentenced to 5 to 25 years' imprisonment.

Our previous opinion set forth the facts:

Defendant was born on December 24, 1985 and reached 14 years of age on December 24, 1999. In 2006, defendant was charged as an adult with four counts of CSC-1 (victim under 13), involving his young cousin. Count I alleged fellatio occurring in 1999; Count II alleged sexual intercourse occurring in 1999; Count III alleged sexual intercourse occurring in 2000; and Count IV alleged cunnilingus occurring in 2000. Defendant elected to plead guilty to count II, in exchange for which the prosecutor agreed to: 1) dismiss the three additional counts of CSC-I; 2) recommend a sentence of 5 to 25 years' imprisonment; and 3) permit defendant to argue for a sentence below the recommended sentence if the judge scored the guidelines in a manner that produced a guidelines

¹ *People v Kiyoshk*, unpublished order of the Court of Appeals, entered February 5, 2010 (Docket No. 295552).

recommendation lower than the one calculated by the prosecutor. At the September 14, 2006 plea proceeding, the factual basis to support defendant's plea was established through the following exchange:

The Court: During the period of time not otherwise described except as being in 1999 in the city and county of Kalamazoo, did you have sexual intercourse with [the victim], who at the time was under the age of 13?

Defendant: Yes.

The Court accepted defendant's plea and sentenced defendant to five to 25 years' imprisonment, consistent with the prosecutor's recommendation.

Defendant did not seek a direct appeal, but in August 2009, he moved for relief from judgment under MCR 6.500 *et seq*, arguing that the circuit court lacked jurisdiction to hear and decide his case on the ground that he was 13 years old when he committed the crime to which he pleaded guilty, such that jurisdiction over the matter vested solely within the juvenile division of the circuit court. Defendant also asserted ineffective assistance of counsel for failure to challenge the circuit court's lack of jurisdiction to entertain defendant's criminal prosecution.

The trial court denied the motion, finding that defendant "waived any claim this Court lacked jurisdiction when he entered into an unconditional guilty plea." It further determined that the circuit court did, in fact, have jurisdiction to entertain defendant's criminal prosecution because, although defendant was a minor at the time of the crime, he was an adult at the time of his arrest and guilty plea. Finally, the trial court found that defendant had waived any claim of ineffective assistance of counsel by entering into the unconditional plea. Defendant then filed an application for leave to appeal with this Court, which was granted. [*People v Kiyoshk*, unpublished opinion per curiam of the Court of Appeals, issued June 2, 2011 (Docket No. 295552), pp 1-2, rev'd 493 Mich 923 (2013)(footnotes omitted).]

We concluded that the circuit court lacked jurisdiction over defendant for count II, first-degree CSC based on sexual intercourse in 1999, the count to which he pleaded guilty. The acts alleged in counts III and IV occurred in 2000, when at all times defendant was age 14. The acts alleged in counts I and II occurred in 1999. The only allegation of intercourse in 1999 occurred in July when defendant was 13 years old. Because defendant was age 13 when he committed first-degree CSC as alleged in count II, we concluded that the family division had exclusive jurisdiction over that count. *Kiyoshk*, unpublished opinion, pp 3-4.

Our Supreme Court reversed. The Court explained that the issue is one of personal jurisdiction, not subject matter jurisdiction. The circuit court has subject matter jurisdiction over felony cases. "Whether defendant was of an age that made circuit court jurisdiction appropriate is thus a question of personal jurisdiction." *People v Kiyoshk*, 493 Mich 923. The Court determined that "by entering a guilty plea in the circuit court, and failing to contest the circuit

court's jurisdiction, defendant implicitly consented to that court's exercise of personal jurisdiction." *Id.*

The Supreme Court has remanded the case for consideration of defendant's ineffective assistance of counsel argument. When a claim of ineffective assistance of counsel arises in the context of a plea, the relevant inquiry is whether the defendant tendered the plea voluntarily and understandingly. *People v Armisted*, 295 Mich App 32, 48; 811 NW2d 47 (2011). The pertinent question is not whether counsel's advice was right or wrong; rather, it is whether counsel's advice was within the range of competence for attorneys in criminal case." *People v Lucey*, 287 Mich App 267, 275; 787 NW2d 133 (2010). Defense counsel is given wide discretion in matters of trial strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant was charged as an adult with four counts of first-degree CSC. The circuit court has jurisdiction over juveniles at least 14 years of age who commit any of the "specified juvenile violations," of which first-degree CSC is one. MCL 600.606; *People v Conant*, 238 Mich App 134, 140-141; 605 NW2d 49 (1999). The automatic waiver provision in MCL 764.1f authorizes a prosecutor to bring felony proceedings in the circuit court against a juvenile defendant charged with one of the specified violations.

Even if trial counsel had successfully challenged the circuit court's jurisdiction over counts I and II, defendant would still have had to face two counts of first-degree CSC in the circuit court for acts he committed when he was age 14. As we observed in our prior opinion, "counts III and IV clearly arose after defendant turned 14, giving the circuit court jurisdiction over those counts." *Kiyoshk*, unpublished opinion, slip op, p 4. We also noted with respect to defendant's ineffective assistance of counsel claim "that by seeking to vacate his plea, defendant has opened himself up to reinstatement of the multiple other charges that were dismissed." *Id.* at 4 n 3. Although counts I and II could have been transferred to the juvenile division of the family court because defendant was 13 years old when he committed the act, the decision whether to challenge the circuit court's jurisdiction on that count was one of trial strategy, for which this Court will not substitute its judgment. *Ackerman*, 257 Mich App at 455.

In exchange for defendant's guilty plea to count II in circuit court, the prosecution dismissed the other three counts of first-degree CSC, including the two counts that would necessarily have been tried in circuit court. The prosecution also agreed to recommend a 5- to 25-year sentence, which the trial court ultimately imposed. Defendant fails to show any defect in the proceedings that would render his plea involuntary such that his conviction should not be allowed to stand. MCR 6.508(D)(3)(b)(ii).

Affirmed.

/s/ Douglas B. Shapiro
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello