Order

Michigan Supreme Court
Lansing, Michigan

June 17, 2020

Bridget M. McCormack,
Chief Justice

159841

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 159841
COA: 346627
Saginaw CC: 15-041631-FC

TIMOTHY RONALD HARE,
Defendant-Appellant.

_____/

By order of November 26, 2019, the prosecuting attorney was directed to answer the application for leave to appeal the May 22, 2019 order of the Court of Appeals. On order of the Court, the answer having been received, the application for leave to appeal is again considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).

Appendix A

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

June 17, 2020

Clerk

a0610

Appendix A

Order

Michigan Supreme Court
Lansing, Michigan

November 26, 2019

159841

Bridget M. McCormack,
Chief Justice

David F. Viviano,
Chief Justice Pro Tem

Stephen J. Markman
Brian K. Zahra
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PEOPLE OF THE STATE OF MICHIGAN,
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v

SC: 159841
COA: 346627
Saginaw CC: 15-041631-FC

TIMOTHY RONALD HARE,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the May 22, 2019 order of the Court of Appeals is considered. We DIRECT the Saginaw County Prosecuting Attorney to answer the application for leave to appeal within 28 days after the date of this order.

The application for leave to appeal remains pending.

Appendix E

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 26, 2019

Clerk

a1118

Court of Appeals, State of Michigan

ORDER

People of MI v Timothy Ronald Hare

Docket No. 346627

LC No. 15-041631-FC

Brock A. Swartzle
Presiding Judge

Patrick M. Meter

Michael J. Kelly
Judges

The Court orders that the motion to waive fees is GRANTED for this case only.

The Court orders that the delayed application for leave to appeal is DENIED for lack of merit in the grounds presented.

Brock A. Swartzle
Presiding Judge

M. J. Kelly, J., would remand to the trial court for an evidentiary hearing and decision on whether defendant was denied the effective assistance of counsel. *People v Ginther*, 390 Mich 436 (1993).

Appendix B

A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

MAY 22 2019
Date

Jerome W. Zimmer Jr.
Chief Clerk

Appendix B

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF SAGINAW

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

File No. 15-041631-FC-5
Hon. Darnell Jackson

V
TIMOTHY RONALD HARE,
Defendant.
_____/

John A. McColgan, Jr. (P37168)
Saginaw County Prosecuting Attorney
111 S. Michigan Avenue
Saginaw, MI 48602

A TRUE COPY
Michael J. Hanley, Clerk

Timothy Ronald Hare #981251
Defendant in Pro Per
Saginaw Correctional Facility
9625 Pierce Road
Freeland, MI 48623
_____/

OPINION AND ORDER DENYING DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

At a session of said Court held in the Courthouse located in the City and County of Saginaw, State of Michigan, on this 27th day of September, 2018.

PRESENT: THE HONORABLE DARNELL JACKSON, CIRCUIT JUDGE.

This action is presently before the Court on Defendant's Motion for Relief from Judgment pursuant to MCR 6.500 *et seq*. After having thoroughly reviewed Defendant's brief and all documents filed therein together with the Court file, transcripts, and the applicable law, the Court will deny the Motion.

On May 13, 2016, Defendant was convicted by a jury of two counts of second-degree criminal sexual conduct (relationship) (CSC 2nd), contrary to MCL 750.520c(1)(b), and one count of first-degree criminal sexual conduct (person under thirteen, Defendant seventeen years of age or older) (CSC 1st), contrary to MCL 750.520b(2)(b). Defendant was acquitted of an additional charge of CSC 1st, contrary to MCL 750.520b(2)(b). On June 27, 2016, Defendant was

sentenced to concurrent prison terms of 8 years to 15 years for the CSC 2nd convictions and 25 years to 50 years for the CSC 1st conviction.[1]

Following sentencing, Defendant requested, and was appointed, appellate counsel to assist him in pursuing his appellate remedies. Thereafter, Defendant's court-appointed appellate counsel filed an appeal of right which was denied by the Court of Appeals in an unpublished per curiam opinion dated October 12, 2017. See *People v Hare*, unpublished per curiam opinion of the Court of Appeals, issued October 12, 2017 (Docket No. 33876). Defendant's pro se application for leave to appeal was also denied by the Supreme Court on April 3, 2018.

On September 5, 2018, Defendant filed the instant Motion for Relief from Judgment pursuant to MCR 6.500 *et seq.* Subchapter 6.500 of the Michigan Court Rules establishes the exclusive procedure for pursuing postappeal relief from a criminal conviction. *People v McSwain*, 259 Mich App 654, 678; 676 NW2d 236 (2003). These rules are designed to balance the finality of criminal judgments with the individual interests that may arise in an extraordinary case. See *People v Reed*, 449 Mich 375, 389; 535 NW2d 496 (1995). To this end, MCR 6.508(D) precludes relief from judgment unless the defendant demonstrate (a) good cause for failure to raise the grounds for relief on appeal and (b) actual prejudice from the alleged irregularities that support the claim for relief. *McSwain*, 259 Mich App at 678; MCR 6.508(D)(3)(a) and (b). "Actual prejudice" means that "(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonable likely chance of acquittal; . . . (iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case." MCR 6.508(D)(3)(b)(i) and (iii).

In the instant Motion, Defendant argues that he is entitled to relief from judgment because his trial counsel was ineffective for allegedly failing to inform Defendant of a plea offer extended by the prosecution in a letter dated December 9, 2015. In that letter, assistant prosecuting attorney Angelina Scarpelli stated in relevant part as follows:

> The above matter is scheduled for jury trial on January 5, 2016. I would make the following offer to settle the matter: Defendant shall plead to 2 counts of CSC—1st (relationship) with agreed upon guidelines of 81-135 and all remaining counts would be dismissed. People would agree that the sentences would run concurrent and the Court should stay within the guidelines. **This would avoid the mandatory minimum of 25 years on Counts 3 & 4.**
>
> * * *

[1] As part of his sentences, Defendant was also ordered to register as a sex offender pursuant to the Sex Offenders Registration Act and to be subject to lifetime electronic monitoring.

> Please review the above offer with your client as soon as possible. This offer will expire on December 23, 2015 at 5:00 p.m. if I have not heard from you.

(Defendant's Exhibit A) (emphasis in original).

Because the above ineffective assistance of trial counsel claim could have been raised in Defendant's appeal of right, MCR 6.508(D)(3)(a) requires Defendant to establish good cause for his failure to raise it at that time as a prerequisite for obtaining relief from judgment.[2] Here, Defendant attempts to establish good cause by arguing that his appellate counsel was ineffective for failing to raise this issue on appeal.

A claim of ineffective assistance of appellate counsel, if supported, is sufficient to satisfy the good cause requirement of MCR 6.508(D)(3)(a). See *People Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). However, a claim of ineffective assistance of appellate counsel cannot be premised on the failure of counsel to pursue frivolous or meritless issues. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991); *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003). As outlined below, Defendant's instant ineffective assistance of trial counsel claim is non-meritorious. Therefore, Defendant cannot demonstrate "good cause" within the meaning of MCR 6.508(D)(3)(a) by showing that his appellate counsel was ineffective for failing to raise this issue on appeal.

The two-prong test for ineffective assistance of counsel claims is set forth in *Strickland v Washington*, 466 US 668 (1984). Under the *Strickland* performance prong, a defendant must show "that counsel's performance fell below an objective standard of reasonableness." *Id.* at 688. The *Strickland* prejudice prong requires a defendant to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

In order to succeed on an ineffective assistance of trial counsel claim, the defendant must establish *both* deficient performance by counsel and that counsel's deficient performance caused prejudice to the defendant. In *Strickland*, the Court explained that a court need not decide whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of counsel's allegedly deficient performance. Thus, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.* at 697. As outlined below, in this

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[2] A court may waive MCR 6.508(D)(3)(a)'s "good cause" requirement only if it concludes that there is a significant possibility that the defendant is innocent. In this case, the record contains strong evidence of Defendant's guilt, and Defendant's Motion does not argue that he is actually innocent of the crimes that he was convicted of. Therefore, the Court declines to waive the "good cause" requirement of MCR 6.508(D)(3)(a).

case, Defendant cannot satisfy the prejudice prong of his ineffective assistance of trial counsel claim. Thus, the Court need not address the performance prong.

Here, Defendant asserts that trial counsel's deficient performance deprived him of the opportunity to accept the plea offer presented by the prosecution on December 9, 2015, and caused him to suffer a more severe penalty when he was convicted after a trial. In *Lafler v Cooper*, 566 US 156, 163 (2012), the Court held that in order to establish the prejudice prong of the *Strickland* inquiry in this context, the defendant must show that: (1) he would have accepted the plea offer; (2) the prosecutor would not have withdrawn the plea offer in light of intervening circumstances; (3) the trial court would have accepted the defendant's plea under the terms of the bargain; and (4) the defendant's conviction or sentence under the terms of the plea would have been less severe than the conviction or sentence that was ultimately imposed. *Lafler*, 566 US at 164.

As to the first element of the *Lafler* inquiry, Defendant has executed an affidavit asserting that he was never "shown, advised or informed" of the plea offer and that "I would have ABSOLUTELY accepted that offer if I had been informed of it." (Defendant's Exhibit C—Affidavit of Timothy Hare at ¶¶ 7 & 8). The Court questions whether Defendant would actually have accepted the plea offer in light of his steadfast claim of innocence throughout the duration of this action. Indeed, Defendant testified in his own defense at trial and denied committing *any* acts of sexual abuse towards the victim, his biological daughter. (See Trial Transcript Vol II of IV at 215-233).

Moreover, even if Defendant would have accepted the plea offer extended by the prosecution, he cannot satisfy the remaining elements of the *Lafler* inquiry. Under the plea agreement offered by the prosecution, Defendant would have plead guilty to two counts of CSC 1st in exchange for a dismissal of the CSC 2nd charges and the prosecutor's recommendation that the Court impose concurrent sentences within a stipulated sentencing guidelines range of 81 months (6 years, 9 months) to 135 months (11 years, 3 months). The prosecutor further represented that the plea offer would avoid the mandatory 25-year minimum sentence on Counts 3 & 4 (the CSC 1st charges). This statement by the prosecution was incorrect.

Pursuant to MCL 750.520b(2)(b), CSC 1st is punishable by not less than 25 years "[f]or a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age[.]" Here, it is undisputed that Defendant was over 17 years of age and the victim was less than 13 years of age at the time of the two penetrations that formed the basis of the CSC 1st charges.[3] Accordingly, under MCL 750.520b(2)(b), this Court lacked the authority to

[3] During the preliminary examination and at trial, the victim testified that Defendant penetrated her vagina with a sex toy when she was approximately 11 years old. The victim further testified that a few months later, Defendant

impose a minimum sentence of less than 25 years under the terms of the plea offered by the prosecution. As such, the Court finds that Defendant cannot establish the final three prongs of *Lafler*; specifically, that the prosecutor would not have withdrawn the plea offer in light of intervening circumstances; that the Court would have accepted Defendant's plea under the terms proposed by the prosecutor; and that Defendant's sentence under the plea offer would have been less severe than the 25-year minimum sentence that was ultimately imposed by the Court following his trial.

To be clear, even if Defendant would have accepted the prosecution's plea offer to plead guilty to two counts of CSC 1st, and the prosecutor had not withdrawn the offer, the Court would not have followed the prosecutor's recommendation to impose sentences within a stipulated guidelines range of 81 months to 135 months. Instead, this Court would have followed the Legislature's directive under MCL 750.520b(2)(b), and would have imposed mandatory minimum sentences of 25 years. Because Defendant's sentences, if he had accepted the plea agreement, would not have been less severe than the sentences he actually received, Defendant was not prejudiced by his trial counsel's purported failure to advise him of the plea offer extended by the prosecution on December 9, 2015.

In closing, the Court finds that Defendant has not established entitlement to relief from judgment under MCR 6.508(D). As outlined above, Defendant's instant ineffective assistance of counsel claim fails under the *Strickland* prejudice prong. Therefore, appellate counsel was not obligated to raise this issue on appeal, and good cause has not been shown. MCR 6.508(D)(3)(a). Additionally, Defendant has failed to show actual prejudice within the meaning of MCR 6.508(D)(3)(b)(i) or (iii). Accordingly, Defendant's Motion for Relief from Judgment is DENIED.

NOW, THEREFORE, IT IS HEREBY ORDERED that Defendant's Motion for Relief from Judgment is DENIED.

DARNELL JACKSON
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served upon all parties of record pursuant to MCR 8.105(C) and MCR 2.107(D).

09/27/18
Date

Deputy Clerk

raped her by putting his penis inside of her vagina. (See Preliminary Examination Transcript at 12-16; see also Trial Transcript, Vol II at 22-25).

JOHN A. MCCOLGAN, JR.
Saginaw County Prosecuting Attorney

COURT HOUSE
111 SOUTH MICHIGAN AVENUE
SAGINAW, MICHIGAN 48602

CHRISTOPHER S. BOYD
Chief Assistant Prosecuting Attorney

December 9, 2015

Mr. William D. White
804 S. Hamilton St.
Saginaw, MI 48602

Here COPY

RE: People V. Timothy Ronald [redacted]
15-041631-FC

Dear Mr. White:

The above matter is scheduled for jury trial on January 5, 2016. I would make the following offer to settle the matter: Defendant shall plead to 2 counts of CSC – 1st (relationship) with agreed upon guidelines of 81 – 135 and all remaining counts would be dismissed. People would agree that the sentences would run concurrent and the Court should stay within the guidelines. **This would avoid the mandatory minimum of 25 years on Counts 3 & 4.**

It is my understanding the Victim testified in front of the Honorable Barbara Meter and the Court found that the criminal sexual conduct had occurred. I expect that the Victim will do just as well at the criminal jury trial. Additionally, the People had hired an expert to explain to the jury the delayed and different reports of the child victim.

Please review the above offer with your client as soon as possible. This offer will expire on December 23, 2015 at 5:00 pm if I have not heard from you. Please do not hesitate to contact me if you have any questions concerns, or counter-offers. Thank you for your attention to this matter and I await your response.

Very truly yours,

Angelina R. Scarpelli
Assistant Prosecuting Attorney

Appendix D