

APPENDIX A

**MICHIGAN STATE CIRCUIT COURT DENIAL
OF MOTION FOR RELIEF FROM JUDGMENT,**

DATED SEPTEMBER 25, 2020.

Page 1.

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

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiffs,

v.

File No. 14-040429-FC

DEVUNAIRE DAMOREA SIMS,

Defendant.

OPINION AND ORDER OF THE COURT

At a session of said Court, held at the Court House in the City of Saginaw, County of Saginaw, and State of Michigan, this 25th day of September 2020;

PRESENT: HONORABLE MANVEL TRICE III, Circuit Judge

This matter comes before the Court on Defendant's Motion for Relief from Judgment pursuant to MCR 6.500 *et seq.*

OPINION

I. Background

On January 21, 2015, the date set for trial in this matter before the Hon. Robert L. Kaczmarek, and with jury selection about to commence, Defendant Devunaire Sims instead chose to accept a plea offer from the prosecution. He faced trial on an open charge of murder and associated felony firearm charge arising out of the July 5, 2014 shooting death of Damon "Country" Ratcliff. Evidence presented at the earlier preliminary examination included testimony from witness Mary Barnes-Johnson who testified that on that date Defendant Sims, Co-Defendant Aaron "Red" Turner, and

others, had been over at her home located at 1114 Hayes in the City of Saginaw. (PET.II, 4-6; 10).¹ Sims and Turner were her cousins. (PET.II, 5). After a brief trip to the hospital, she returned to see them walking down Hayes when they encountered Country and his companions. (PET.II, 29). She “thought they were finna start fighting” when she heard several gunshots, totaling more than 5 in number but less than 10. (PET.II, 32-33). In later conversation at her house, she heard Turner state he had shot Ratcliff because he grabbed him. (PET.II, 36). Defendant Sims also said, “[t]hat um, he had shot, un, the man too.” (PET.II, 36). Sims further elaborated “that he unloaded his gun,” but that no casings would be found because he had used a revolver. (PET.II, 36). She also recalled “Sims telling Mr. Turner he shoulda shot the other two people that was there too.” (PET.II, 38).

In addition to Defendant’s own admission to the crimes, evidence was also presented, through Det. Ryan Oberle, as to Co-Defendant Turner’s later statement to the police admitting that he “shot one time and shot the victim one time.” (PET.II, 82). However, he also told the police that he knew Sims had a revolver that day, and although he didn’t actually see Sims fire, he knew “that Mr. Sims was standing right next to him and... that’s where the shots came from...” (PET.II, 83). Forensic pathologist Dr. Kanu Virani’s confirmed that the victim has been shot more than once, testifying that there were four gunshot wounds on Ratcliff’s body. (PET.II, 16). On January 21, 2015, the same trial date on which Defendant Sims ultimately decided to plead, Co-Defendant Turner entered into a plea agreement where he agreed to testify at Sims’s trial.²

¹ “PET.II” refers to the Preliminary Examination Transcript, Vol. II.

² See the register of actions for *People v. Aaron Robert Turner*, Tenth Cir. File No. 14-040430-FC, publicly available online at <https://secure.saginawcounty.com/CourtInformation>Select.aspx>

Under the plea agreement which he accepted, Defendant Sims was allowed to plead to the lesser offense of second-degree murder and felony firearm. The People further agreed to recommend that Defendant's minimum sentence for his second-degree murder not exceed 25 years. Consistent with that agreement, Defendant was sentenced on March 2, 2015 to serve the mandatory consecutive 2-year sentence for his felony firearm conviction to be followed by a minimum sentence of 25 years to a maximum of 40 years for the second-degree murder conviction.

Defendant thereafter requested appointment of appellate counsel who filed a delayed application for leave to appeal on his behalf. That application was denied on Order of our Court of Appeals "for lack of merit in the grounds presented." *People v. Sims*, COA Docket No. 327642 (Mich.Ct.App., July 8, 2015). A late application to our Supreme Court was subsequently rejected on February 26, 2016. Defendant now returns to circuit court with the filing of the instant motion for relief from judgment.

II. Discussion

A. Standard of Review

In a motion for relief from judgment, the defendant bears the burden of establishing entitlement to the relief requested. MCR 6.508(D). A court may not grant relief if the motion alleges grounds for relief which were decided against the defendant in a prior appeal unless the defendant establishes that a retroactive change in the law has undermined the prior decision. MCR 6.508(D)(2). Additionally, relief may not be granted where the motion:

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

- (a) good cause for failure to raise such grounds on appeal or in the prior motion, and
- (b) actual prejudice from the alleged irregularities that support the claim for relief...

MCR 6.508(D)(3).

In a conviction entered on a plea of nolo contendere, "actual prejudice" means that there was a "defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand." MCR 6.508(D)(3)(b)(ii). Actual prejudice also occurs in any case where there is an 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)(iii).

B. Grounds for Relief

Defendant argues that his conviction by plea in this matter should be set aside on the theory that trial counsel was ineffective in allegedly forcing him to take the plea offer.

1. Good Cause

To establish good cause for his failure to raise the grounds now presented in his earlier application for leave to appeal, Defendant generally claims that appellate counsel was ineffective in failing to raise an ineffective assistance of trial counsel argument in his application for leave to appeal. However, it is well-settled that appellate counsel is not ineffective for winnowing out weak arguments or failing to advocate a meritless position.

Pratt, 254 Mich.App. at 430; *People v. Mack*, 265 Mich.App. 122, 130 (2005). As discussed below, Defendant's claims of having been forced into taking the plea by trial

counsel is not supported by the record of the plea hearing and his criticisms of the actions of his trial counsel are entirely frivolous. Therefore, as there is no reason a competent appellate attorney would have advocated the issue, good cause has not been shown.

2. No Actual Prejudice

Contrary to the present belated claim that his now deceased trial attorney somehow threatened or coerced him into accepting the plea offer, Defendant has already sworn under oath in these proceedings that he was neither threatened nor coerced into accepting that plea offer. At the plea hearing, the trial court diligently inquired into this very subject, and Defendant assured that Court that was not the case – and that he knew he was waiving any ability to ever claim otherwise.

THE COURT: Now, do you understand if I accept your plea, you're giving up any claim this plea is the result of any promise or consideration which was not placed on the records here in court?

THE DEFENDANT: Yes.

THE COURT: And you're giving up any claim this plea is not of your own free will?

THE DEFENDANT: Yes.

* * *

THE COURT: Sir, has anyone promised you anything beyond what I've stated here today to induce you to make this plea?

THE DEFENDANT: No.

THE COURT: Has anyone threatened you in any manner to induce you to make this plea?

THE DEFENDANT: No.

THE COURT: It's your choice to plead no contest to second degree murder and felony firearm?

THE DEFENDANT: Yes.

(PT, 8; 9-10).³

Given Defendant has already sworn that he was not threatened "in any manner" to make the plea, his present claims to the contrary are without merit. Further, he also knowingly and voluntary waived his right to ever make the claim that he was threatened. Therefore, no relief from judgment is warranted.

Moreover, and notwithstanding the motion's language which seeks to cast the actions of deceased defense counsel in a sinister or threatening light, the actual conduct complained fails to demonstrate any ineffective assistance on his part. Rather, Defendant essentially complains that trial counsel met with him several times on the day of trial, and offered his counsel on the plea offer, the evidence against him, and the upcoming trial. Indeed, the plea transcript reflects that trial counsel advised his client as to a number of pivotal witnesses who would be called at trial, specifically mentioning that they had discussed Mary Barnes-Johnson, Co-Defendant Aaron Turner, and Det. Ryan Oberle. (PT, 3). As Defendant requested legal counsel be appointed in this matter, he cannot now complain that he received such counsel. In the end, it was his decision, having been so advised, as to either accept or reject that counsel.

Nor does Defendant cite any legal authority that meeting with one's client, and discussing plea offers, the evidence to be presented at trial, and otherwise communicating with him in any way constitutes ineffective assistance of counsel. To the contrary, such client communication and discussion of such matters would seem to be the very hallmark of effective representation.

³ "PT" refers to the January 21, 2015 Plea Transcript.

Defendant further makes the specious argument that trial counsel was ineffective in supposedly "threatening" him with life in prison. However, Defendant does not deny that he was facing trial on an open charge of murder – which subjected him to the possibility of being convicted of first-degree murder at trial. In order to make an informed decision as to whether to accept the plea offer, or to reject it and proceed to trial, it was trial counsel's duty to inform Defendant of the extent of his criminal exposure, and that the penalty for a first-degree murder conviction at trial would be life in prison without the possibility of parole. Accurate and necessary legal advice cannot ever support a claim of ineffective assistance, and the penalties for criminal offenses set by our Legislature do not in any way constitute "threats" originating from trial counsel.

Defendant next complains that the trial counsel arranged for him to speak with his mother that morning regarding the plea offer. Again, Defendant cites no legal authority for the proposition that facilitating communication with trusted family members constitutes ineffective assistance of counsel. Rather, to the extent Defendant received legal counsel on the merits of his case from a trained professional, and then also had the opportunity to discuss the personal ramifications with his mother, only further demonstrates the degree to which Defendant was able to make a fully informed decision in this case. Again, the ultimate choice whether or not to plead or go to trial remaining his and his alone.

Next, Defendant claims that while these conversations on the day of trial were ongoing he was held in the courthouse holding cell "without food or water" for the four hours preceding his afternoon plea at 1:40 p.m.⁴ As an initial matter, such complaint

⁴ Motion for Relief from Judgment and Brief in Support, 2.

does not bear upon any aspect of his trial attorney's representation. In any event, that Defendant, about to be tried for murder, was not free on bond but being held in custody and subject to residing in a cell is unremarkable. Assuming *arguendo* that he may have missed a noon-hour lunch while busy meeting with his attorney concerning the trial about to begin that afternoon, or engaged in conversations with his mother, he makes no claim that he ever asked to be taken back to the jail for lunch rather than continue his conversations. Nor does he make any claim that he ever requested food or water and was denied. Finally, his motion is devoid of any legal authority that supports the position that a plea is involuntary if a criminal defendant has not had a meal in the preceding four hours or misses lunch. Therefore, actual prejudice warranting relief from judgment has not been shown.

Finally, Defendant's motion makes reference to the fact it was known Co-Defendant Aaron Turner had sent a letter to the Court, while the matter was pending, purporting to recant his statements to the police regarding Sims's involvement in the shooting.⁵ He now seems to suggest that defense counsel was somehow ineffective in allowing him to take the plea given this dubious act of his co-defendant. However, at the time Defendant pled, Turner had already earlier that day accepted a plea deal and agreed to testify at Sims's trial. Even assuming Turner's testimony would still have been favorable to the Defendant, and Turner would attempt to minimize or deny Sims's involvement when called as a witness, he would have been immediately impeached with his prior inconsistent statements to Det. Ryan Oberle establishing that Sims had, indeed, shot the victim. Nor was Turner's statement the only evidence that he had shot the

⁵ See copy of correspondence from Aaron Turner, filed 09/23/2014 in this case, and furnished by the Court to the defense attorneys representing Turner and Sims, as well as the prosecuting attorney.

deceased. As discussed above, witness Mary Barnes-Johnson had testified at the preliminary examination about Sims having himself admitted that he shot Ratcliff. At the time of the plea, trial counsel specifically made a record that the discussions with his client had involved Mary Barnes-Johnson, Co-Defendant Aaron Turner, and Det. Ryan Oberle. (PT, 3). Therefore, the record is clear that Defendant made an informed decision to plead with full knowledge of the evidence that would be presented against him at trial.

ORDER

Accordingly, as Defendant has shown neither good cause to avoid procedural default, nor actual prejudice, the Court **DENIES** Defendant's Motion for Relief from Judgment.

IT IS SO ORDERED.



MANVEL TRICE III

Circuit Judge

10th Judicial Circuit

Dated: September 25, 2020.

APPENDIX B

PEOPLE v. SIMS, 2021 MICH. APP. LEXIS

3689 (MICH. CT. APP. JUNE 15, 2021)

Court of Appeals, State of Michigan

ORDER

People of MI v DeVunaire Damorea Sims

Michael F. Gadola
Presiding Judge

Docket No. 356916

Stephen L. Borrello

LC No. 14-040429-FC

Brock A. Swartzle
Judges

The motion to waive fees is GRANTED for this case only.

The motion to remand for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436 (1973) is DENIED.

The delayed application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred in denying the motion for relief from judgment.



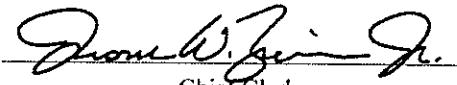
Presiding Judge

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



June 15, 2021

Date



Chief Clerk

APPENDIX C

PEOPLE v. SIMS, ___ MICH. ___; 967

N.W.2d 621 (MICH. SUP. CT. JAN. 4, 2022)

Order

Michigan Supreme Court
Lansing, Michigan

January 4, 2022

Bridget M. McCormack,
Chief Justice

163419

Brian K. Zahra
David F. Viviano
Richard H. Bernstein
Elizabeth T. Clement
Megan K. Cavanagh
Elizabeth M. Welch,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 163419
COA: 356916
Saginaw CC: 14-040429-FC

DEVUNAIRE DAMOREA SIMS,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the June 15, 2021 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).



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.

January 4, 2022

A handwritten signature of Larry S. Royster.

Clerk