

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF EATON

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

DISTRICT CT. NO. 09-257-SD

v

CIRCUIT COURT NO. 10-57-AR

STEPHEN MICHAEL SHIPMAN,
Defendant.

OPINION

This case involves an interlocutory appeal from the District Court's ruling on January 12, 2010, denying Defendant's motion to withdraw his plea. This Court granted leave to appeal to determine if the District Court made an appropriate ruling.

On February 9, 2009, Defendant was pulled over for having a defective exhaust system. When the officer approached the car, he smelled alcohol and the Defendant's eyes were watery and glassy. After observing the Defendant and smelling the alcohol, the officer asked the Defendant to step out of the car and asked if he had been drinking. The Defendant responded that he believed that was an inappropriate question. The officer then conducted field sobriety tests: a Horizontal Gaze Nystagmus (HGN) test, the one leg stand test, and the walk and turn test. Based on Defendant's performance in these tests, and the officer's preliminary observations, the officer asked Defendant if he would submit to a Preliminary Breath Test (PBT). Defendant refused. Defendant was arrested

for operating while under the influence of alcohol and driving on a suspended license.

Upon arrest, Defendant was taken to the Eaton County Jail, where he agreed to a breath test on the DataMaster. Two DataMaster tests were administered after a fifteen minute observation period. One test registered a .09 BAC and the other registered as a 'refusal' on the DataMaster printout.

Defendant was charged with OWI –second offense, DWLS-second offense, and PBT refusal. Defendant retained Barry Furgason to represent him. After discussions with his attorney, Defendant tendered a plea of guilty to OWI-first offense and DWLS-first offense with entry into the Fast Track program as a term of probation and no up front jail on May 5, 2009.

At some point after, Defendant sought to withdraw the plea. In December, 2009, a three day evidentiary hearing was held in front of Judge Reincke, who denied the motion to withdraw the plea. After the December, 2009 hearing, Defendant appealed the decision to this Court, which granted leave to appeal.

Defendant argues that his plea was not knowingly, voluntarily or accurately entered because he received ineffective assistance of counsel when he entered his plea. Specifically, Defendant argues that his attorney, Barry Furguson, provided ineffective assistance by not investigating the adequacy of the charges, by failing to investigate any affirmative defenses, by failing to obtain the DataMaster logs, and by failing to obtain an expert on the DataMaster.

Defendant argues that Mr. Furguson's representation did not comport to

professional norms, thus, did not meet the *Strickland* test. See *Strickland v Washington*, 466 US 668, 104 SCt 2052, 80 LEd2d 674 (1984).

Defendant argues that trial counsel had a duty to thoroughly investigate before making a strategic decision, which he did not do. Defendant asserts that Mr. Ferguson had a complete lack of knowledge and information regarding the case when the Defendant took the plea. Defendant's expert, attorney Mike Nichols, testified that had Mr. Ferguson did a proper investigation, he would have known the defenses available to Defendant before offering legal advice.

Further, Defendant argues that Mr. Ferguson failed to obtain expert witnesses, as necessary, to gain a better understanding of the DataMaster machine and process. Mr. Ferguson testified that he knew nothing about the circumstances under which the DataMaster was administered and he failed to request the log sheets. Defendant argues that Mr. Ferguson blindly accepted the accuracy of the instrument that ultimately led to the charge. By not educating himself on this instrument, Mr. Ferguson's actions were no objectively reasonable.

Defendant further argues that but for counsel's error, there was a reasonable probability that the result of the proceeding would have been different. Defendant asserts that had Mr. Ferguson consulted with experts, which he had not consulted in years, he would have determined that the prosecution would have had problems establishing guilt.

Defendant points out in his brief all of the inaccuracies that Mr. Ferguson relied upon, including his lack of understanding of the law in this area and lack of

knowledge regarding the material facts, to argue that the interest of justice requires the Defendant to be able to withdraw his plea.

Defendant also points out that there was the "very real possibility" of presenting a number of defenses including attacking the officer's probable cause to arrest the Defendant. Defendant goes through several of the field sobriety tests that were utilized and argues that none of them supplied the officer with probable cause to arrest. Defendant argues that even if the Court determines that there was probable cause to arrest, there was a "very real possibility" of challenging the reliability of the DataMaster results. None of these defenses were brought to the Defendant's attention.

The people argue that withdrawal of the plea is not in the interest of justice because Defendant was represented by counsel and his plea was knowing, intelligent and voluntary. The People argue, citing *People v Serr*, 73 Mich App 19; 250 NW2d 535 (1976), that the Defendant should not be able to now assert that the statements he made on the record and under oath are now false. The People assert that Defendant stated on the record that he was legally drunk, he blew a .09 BAC, he was driving a vehicle. Allowing the Defendant to withdraw his plea would set a precedent for all defendants to withdraw their plea if they do not like the outcome.

Regarding the ineffective assistance of counsel claim, the People first argue that the Defendant wants this Court to review Mr. Ferguson's actions with hind-sight and a fine-tooth comb. The People point out that the Court of Appeals has indicated that they will not second guess counsel's trial strategy and will not

assess counsel's competency through hind sight. See *People v Barnett*, 163 Mich App 331; 414 NW2d 897 (1987).

The People further argue that the Defendant has failed to present a meritorious defense that would allow for the plea withdrawal. First, Defendant asserts that there was an issue regarding probable cause to arrest. But, the lower court made a ruling there was probable cause to arrest after Mr. Ferguson brought a motion to dismiss on this issue. Second, Defendant claims the DataMaster could be challenged. But there was testimony at the hearing setting forth the reliability of the machine through the weekly and 120 day tests. Third, Defendant attacks the administration of the sobriety tests. But, this is meritless because the Defendant provided a factual basis for the plea.

The People also argue that this Court should not consider Defendant's expert testimony from attorney Mike Nichols. The People rely on an unpublished opinion *People v Burbridge*, 2005 Mich App LEXIS 1588 (June 30, 2005), citing federal caselaw, to argue that Mr. Nichols' testimony is inconsistent with the recognition that determining if one provided ineffective assistance is a mixed question of law and fact for a court to decide.

The People argue that even though Defendant continues to focus on the fifteen minute observation period before taking a PBT, this is a moot point because the Defendant refused to take the PBT. Further, while Defendant has indicated that the DataMaster was administered wrong because the fifteen minute observation period was not complied with; the prosecutor points to

testimony that indicates that the time on the video is not the actual time. Rather, it is the duration of time the video had been running.

Finally, the people argue that the Administrative Rules only require a reading from one breath test to be sufficient for evidentiary standards. Thus, the Defendant's argument that Mr. Ferguson should have challenged the DataMaster is moot.

Standard of Review:

This Court reviews the lower court's denial of a motion to withdraw a guilty plea for an abuse of discretion. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997). An abuse of discretion occurs when the trial court's decision falls outside a range of principled outcomes. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). An abuse of discretion occurs "when the result is 'so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but [the] defiance [of it] . . .'" *Dep't of Transportation v Randolph*, 461 Mich. 757, 768; 610 N.W.2d 893 (2000). An abuse of discretion involves far more than a difference of opinion. *Id.*

Analysis:

MCR 6.310(B) controls how the courts determine whether a plea should be withdrawn before sentencing. MCR 6.310(B) states:

(B) Withdrawal After Acceptance but Before Sentence. After acceptance but before sentence,

- (1) a plea may be withdrawn on the defendant's motion or with the

defendant's consent only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by subrule (C).

This Court finds that there was an abuse of discretion by the District Court in not permitting the withdrawal of the plea. The Court finds that allowing the withdrawal is in the interest of justice for a variety of reasons:

1. Errors in the plea proceeding

Rule 6.302 (A) plea requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out subrules (B)-(E).

There is no record that the Court placed the Defendant under oath and personally carried out the requirements of subrule (B)-(E). This Court notes that the Court rule makes it mandatory that all of those rights be given before a plea can be accepted. There is no advisement of rights form in the court file and the Judge never advised the Defendant of all of his rights on the record. Also the Defendant was never placed under oath during the entry of the plea.

Rule 6.310 (C) Motion to Withdraw Plea After Sentence. The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea

proceeding for the purposes of further proceedings, including the appeals.

Here there was clearly an error in the plea proceeding and the Defendant wishes to withdraw his plea. The District Court's failure to follow the court rule requires that the Defendant be permitted to withdraw his plea.

2. The interest of justice requires that the defendant be permitted to withdraw his plea.

A review of the plea transcript shows that the Defendant was never placed under oath, nor was he given his plea rights, and there is little support on the record for a finding that the Defendant is guilty of the offense.

Rule 6.302 (D). An Accurate Plea.

(1) If the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading.

The plea transcript reveals the following exchange between the court and the Defendant:

THE COURT: I now see a plea sheet that says no upfront jail. So, with that added as part of the conditions?

THE DEFENDANT: Yes, your Honor.

THE COURT: There aren't any others. That's it, right?

THE DEFENDANT: Yes.

THE COURT: So, were you driving a car on a public road in Eaton County, Michigan, on February 9th of '09?

THE DEFENDANT: Yes, your Honor.

THE COURT: Were you intoxicated due to the consumption of alcohol?