

In the Supreme Court

Appeal from the Court of Appeals

Judge Robert. P. Young Jr.

152562

People of the State of Michigan,

Plaintiff - [Appellant].

v.

DAVID ROARK,

Defendant - [Appellee]



Amicus Brief - [Amici]

ORAL ARGUMENT NOT REQUESTED

TABLE OF CONTENTS:

TABLE OF AUTHORITIES

STATEMENT OF JURISDICTION

STATEMENT OF QUESTIONS PRESENTED

STATEMENT OF FACTS

I. THE DEFENDANT WAS NOT ACCURATELY ADVISED OF THE DIRECT CONSEQUENCES OF HIS PLEA, AS THE COURT FAILED TO MENTION THE LIFETIME ELECTRONIC MONITORING REQUIREMENT.

II. THE DEFENDANT HAS DEMONSTRATED ACTUAL PREJUDICE AS HIS PLEA IS UNKNOWING AND INVOLUNTARY.

III. THE DEFENDANT MUST NOT DEMONSTRATE THAT HE WOULD NOT HAVE PLEADED GUILTY IF HE HAD KNOWN ABOUT THE LIFETIME ELECTRONIC MONITORING REQUIREMENT.

TABLE OF AUTHORITIES:

CASES:

- Blakinship v State 858 SW 2d 897, 905 (Tenn, 1993)
- Brady v United States, 397 US 742; 90 S Ct 1463; 25 L Ed 2d 747
(1970)
- Hoptowit v Ray, 682 F2d 1237 (9th Cir., 1982)
- Lane v Williams, 455 US 624; 102 S Ct 1322; 71 L Ed 2d 508 (1982)
- Machibroda v United States, 368 US 487, 493 (1962)
- Miller-Wohl Co. v Commissioner of Labor, 694 F2d 203, (19th Cir. 1982)
- People v Brown, 442 Mich 684; 822 NW 2d 208 (2012)
- People v Cole, 491 Mich 325; 817 NW 2d 497 (2012)
- People v Haywood, 209 Mich App 217 (1995)
- People v Jackson, 203 Mich App 607 (1994)
- People v Jaworski, 387 Mich 21; 194 NW 2d 868 (1972)
- People v McPherson, 263 Mich App 124 (2004)
- People v O'Valle, 222 Mich App 463 (1997)
- People v Williams, 47 A.D. 2d 989, 360 N.Y.S. 2d 713 (1975)
- United States ex rel Baker v Finkbeiner, 551 F2d 180 (7th Cir. 1977)
- United States v Timmreck, 441 US 780; 99 S Ct 2085; 60 L Ed 2d 634
(1979)
- United States v Walsh, 733 F2d 31 (6th Cir. 1984)
- Williams v Morris, 633 F2d 71 (7th Cir. 1980)
- Williams v Smith, 591 F2d 169 (CA 2, 1979)

CONSTITUTION, STATUTES, COURT RULES:

US Const Amend XIV

MCR 6.302

MCR 6.508(D)(3)(b)

MCR 6.508(D)(3)(b)(ii)

MCR 7.306

MCR 7.309

MCL 750.520 b

MCL 750.520 n (1)

MCL 791.285 (1)-(2)

28 USCS sec 841 (b)(1)(A)

28 USCS sec 846

28 USCS sec 2255

STATEMENT OF JURISDICTION:

It has been held that the Court has broad discretion in determining whether to appoint amicus curiae, *Hoptowitz v Ray*, 682 F 2d 1237 (9th Cir., 1982)

Mr. McKay seeks to take a legal position, presents legal arguments in support of it, investigate fully the facts in the complaint, and advise the Court on the public interests at issue, *Miller - Wohl Co. v Commissioner of Labor*, 694 F 2d 203, 204 (19th Cir. 1982) (amici fulfill the classic role of amicus curiae by assisting in a case of general public interest, supplementing the assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the Court's attention to law that might otherwise escape consideration.

Amicus Curiae brief may be filed only on motion granted by the Court and must conform to subrules (A) and (B), MCR 7.306, and MCR 7.309. The brief of an amicus curiae is to be filed within 21 days after the brief of the appellee. Mr. McKay prays the Court accept his amicus curiae brief for filing.

STATEMENT OF QUESTIONS
PRESENTED:

I. WHETHER THE DEFENDANT WAS ACCURATELY ADVISED OF THE DIRECT CONSEQUENCES OF HIS GUILTY PLEA, INCLUDING LIFETIME ELECTRONIC MONITORING?

The Court answered, "No."

Mr. McKay answers, "No."

II. WHETHER THE DEFENDANT HAS DEMONSTRATED ACTUAL PREJUDICE PURSUANT TO MCR 6.508 (D)(3)(b)?

The Court answered, "Yes."

Mr. McKay answers, "Yes."

III. WHETHER THE DEFENDANT MUST DEMONSTRATE THAT HE WOULD NOT HAVE PLEADED GUILTY IF HE HAD KNOWN ABOUT THE LIFETIME ELECTRONIC MONITORING REQUIREMENT?

The Court answered, "No."

Mr. McKay answers, "No."

STATEMENT OF FACTS:

Defendant David Roark was convicted pursuant to a guilty plea of MCL 750.520b(i)(b), and MCL 750.145c. The trial court sentenced defendant to 14 to 25 years for the CSC-I conviction and 10 to 20 years imprisonment for the child sexually abusive activity conviction. The defendant argued that he was entitled to withdraw his plea because the trial court failed to advise him of mandatory lifetime electronic monitoring, which rendered his plea involuntary. On October 20, 2015, the Court of Appeals agreed, and granted the defendant relief.

The prosecution appealed, and on April 1, 2016 the application for leave to appeal was considered. The Supreme Court ordered the parties to file briefs addressing, 1) whether the defendant was accurately advised of the direct consequences of his plea, including lifetime electronic monitoring, 2) whether the defendant has demonstrated actual prejudice, pursuant to MCR 6.508(D)(3)(b), and 3) whether the defendant must demonstrate that he would not have pled guilty had he known about the lifetime electronic monitoring requirement. Mr. McKay seeks to file an Amicus Curiae brief.

ARGUMENT I

THE DEFENDANT WAS NOT ACCURATELY ADVISED OF THE DIRECT CONSEQUENCES OF HIS PLEA, AS THE COURT FAILED TO MENTION THE LIFETIME ELECTRONIC MONITORING REQUIREMENT.

Standard of Review: A claim of constitutional error is reviewed de novo, *People v McPherson*, 263 Mich App 124 (2004). Voluntariness of a plea is reviewed de novo, *People v Haywood*, 209 Mich App 217 (1993). A court's decision to permit plea withdrawal after sentencing is reviewed for a clear abuse of discretion resulting in a miscarriage of justice, *People v Orville*, 222 Mich App 463, 465 (1997).

Specifically the understanding, voluntary, and accurate components of MCR 6.302 are rooted in the requirements of constitutional due process, US Const. Amend. XIV; *People v Cole*, 491 Mich 325; 817 NW 2d 497 (2012); *Brady v United States*, 397 US 742, 748; 90 S Ct 1463; 25 L Ed 2d 747 (1970).

It is therefore established that the defendant must be advised of the sentence that he will be forced to serve as the result of his guilty or no contest plea, *Blakenhip v State*, 858 SW 2d 897, 905 (Tenn, 1993).

Furthermore the defendant must be apprised of all direct consequences of the guilty or no contest plea, *Brady, supra*, at 755. In the case at hand the trial court failed to advise the defendant of the mandatory lifetime electronic monitoring requirement, which constitutes a mandatory minimum, and is a part of the sentence itself, MCR 6.302; MCL 760.520 b; MCL 750.520 n (1); MCL 791.295 (1)-(2).

In its failure to do so the trial court failed to advise the defendant of the direct consequence of his plea, *Smith v Doe*, 538 US 84; 92; 123 S Ct 1140 (2003). There is no need to re-examine legislative intent since it was decided in *Cole*, that mandatory lifetime electronic is a direct consequence of a plea, *Cole, supra*, at 337.

Thus, when governing criminal statutes mandate that a defendant be sentenced to lifetime electronic monitoring, due process requires the trial court to inform the defendant entering plea that he or she will be subject to mandatory lifetime electronic monitoring in order to fulfill the 'understanding' and 'voluntary' requirements of the Fourteenth Amendment and of the court rule, see MCR 6.302.

Preservation of Error: Mr. McKay directs the attention of the court to the preservation of error in defendant Roark's case.

ARGUMENT I I

THE DEFENDANT HAS DEMONSTRATED ACTUAL PREJUDICE, AS HIS PLEA IS UNKNOWING AND INVOLUNTARY.

Standard of Review: A claim of constitutional error is reviewed de novo, *People v McPherson*, 263 Mich app 124 (2004). Voluntariness of a plea is reviewed de novo, *People v Haywood*, 209 Mich app 217 (1995). A court's decision to permit plea withdrawal after sentencing is reviewed for a clear abuse of discretion resulting in a miscarriage of justice, *People v Ovale*, 222 Mich app 463, 465 (1997).

The prosecution would contend that the defendant has failed to establish actual prejudice and cites to *United States v Timmreck*, 441 US 780, 783-784; 99 Sct 2085; 60 L Ed 2d 634 (1979) as a basis for denying collateral relief. However under the correct standard, the defendant has established actual prejudice, MCR 6.508 (D)(3)(b).

In *Timmreck*, the defendant was convicted pursuant to a guilty plea, of conspiracy to distribute a controlled substance, 21 USC sec 846. The defendant subsequently filed a motion under 28 USC sec 2255 to vacate his sentence, contending that his guilty plea was taken in violation of Fed. R. Crim. P. 11, as the court failed to inform him about the three year minimum mandatory special parole term that 21 USC sec 841(b)(1)(A) required to be added to any other sentence meted out for the charge.

The court held that while a violation of Rule 11 had occurred, it did not justify collateral relief under 28 USC sec 2255 because defendant had not suffered any prejudice inasmuch as he had received a sentence within the maximum described to him at the time the guilty plea was accepted. The court limited its holding to 'formal' violations of Rule 11 and emphasized that the formal violation had not prejudiced the petitioner's due process rights. The court further established that the error was neither constitutional nor jurisdictional, nor resulted in a "complete miscarriage of justice" or in a proceeding "inconsistent with the rudimentary demands of fair procedure." Id at 784.

More importantly, the court noted that Timmreck did not argue that he was unaware of the special parole term. Id at 784. And unlike the defendant in Roark, Timmreck did not involve a defendant who pled guilty in exchange for a specific sentence or who received a sentence longer or substantially different than bargained for.

In the instance, where a defendant pleads guilty pursuant to a plea bargain, which is accepted by the trial court, and the sentence imposed exceeds the sentence promised, the defendant's due process rights are violated. *United States ex rel Baker v Finkbeiner*, 551 F 2d 180 (7th Cir., 1977).

Although the Baker case was decided prior to Timmreck, the

Seventh Circuit later reconciled the two cases in *United States ex rel Williams v Morris*, 633 F2d 71 (7th Cir., 1980) vacated sub nom as moot, *Lane v Williams*, 455 US 624; 102 S Ct 1322; 71 L Ed 2d 508 (1982). The Williams court stated:

We think it plain . . . that the holding in *Baker* is in no way inconsistent with that of *Timmreck*, unlike *Timmreck*, *Baker* involved not merely a technical violation of proper procedure but a complete failure to inform the defendant at any time that he would in fact be in the custody of the state for a period of three to four years (including parole) rather than the one to two years he had been promised. Moreover, unlike *Timmreck* whose combined prison and parole terms were within the maximum penalty he had been warned he could receive and who had never been promised less than the maximum, *Baker* was prejudiced in that he received a sentence calling for two years of custody (on parole) more than he had bargained for. In short, the two cases are not only not on all fours as the state acknowledges, but wholly different. We therefore find no cause to re-examine the decision in *Baker v Williams*, 633 F2d at 75. Thus *Timmreck* does not overrule *Baker* and its progeny. Accord *United States v Walsh*, 733 F 2d 31 (6th Cir., 1984).

It is important for the court to weigh the distinguishing factors in the case at hand against cases like *Timmreck*, which include, 1) the defendant was unaware of the mandatory lifetime monitoring requirement, 2) the defendant pled in exchange for a specific sentence, 3) the defendant received a sentence longer than bargained for, lifetime electronic monitoring, 4) the error alleged is in fact constitutional as it offends Fourteenth amendment due process, 5) the issue is inconsistent with the rudimentary demands of fair procedure, and 6) predominant to any factor prejudice is present, *People v Jackson*, 203 Mich app 607, 614 (1994); MCL 6.508 (1)(3)(b)(ii)

In cases such as Baker, and Roark, where the defendant seeks to challenge his guilty or no contest plea on collateral attack, and the court failed to advise the defendant of the direct consequence of the plea, which is a mandatory lifetime electronic monitoring sentence, thus violating the defendant's due process rights to an "understanding" and "voluntary" plea, actual prejudice is present, People v Jackson, 203 Mich App 607, 614 (1994); Brady, supra. This is so because it cannot be said that a defendant was aware of the critical information necessary to assess the bargain being considered, and the defendant is entitled to plea withdrawal, People v Cole, 491 Mich 325, 338; 817 NW 2d 497 (2012); People v Brown, 492 Mich 684; 822 NW 2d 208 (2012).

Preservation of Error: Mr. McKay directs the attention of the court to the preservation of error in defendant Roark's case.

ARGUMENT III

THE DEFENDANT MUST NOT DEMONSTRATE THAT HE WOULD NOT HAVE PLEADED GUILTY IF HE HAD KNOWN ABOUT THE LIFETIME ELECTRONIC MONITORING REQUIREMENT.

Standard of Review: A claim of constitutional error is reviewed de novo, People v McPherson, 263 Mich App 124 (2004). Voluntariness of a plea is reviewed de novo, People v Haywood, 209 Mich App 217 (1995). A court's decision to permit plea withdrawal after sentencing is review-

ed for a clear abuse of discretion resulting in a miscarriage of justice, *People v Ovalle*, 222 Mich App 463, 465 (1997).

Some would argue that *Williams v Smith*, 591 F.2d 169 (CA 2, 1974) is a basis for denying relief to defendants such as RcarK. I would argue that their position is misplaced.

In his appeal to the state courts, Williams contended that his conviction was invalid since Justice Marshall had failed to advise him of the consequences of his plea. He also argued that the court's representation as to the maximum sentence constituted a promise that should be enforced by a remand for resentencing without application of the persistent offender statute. The court rejected both arguments noting that Williams's attorney relayed the information concerning the possible application of the persistent offender statute to Williams in a letter dated August 10, 1973, and that Williams had made no effort to withdraw his plea even when informed of the possible application of the persistent offender statute. It concluded:

It was "clear that when the defendant appeared for sentencing" he was not relying on the representation made by the court when his plea was taken as to the maximum sentence that could be imposed by the court." *People v Williams*, 47 A.D. 2d 989, 366 N.Y.S. 2d 713, 714 (1975).

The court further held,

The test for the validity of a state court guilty plea is whether the defendant was aware of actual sentencing possibilities, and if not, whether accurate information would have made any difference in his decision to enter a plea. *Williams* Id.

However, this is not the exclusive test for the validity of a state court guilty plea. The state of Michigan has previously applied the test in *Machibroda v United States*, 368 US 487, 493 (1962), which held;

"The test is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant".

Id. And if it does not then the defendant must be allowed plea withdrawal, see *People v Jaworski*, 387 Mich 21; 194 NW 2d 868 (1972) (holding "A defendant who enters a guilty plea simultaneously waives several constitutional rights, including his privilege against compulsory self incrimination, his right to trial by jury, and his right to confront his accusers. For this waiver to be valid under the Due Process Clause, it must be an intelligent relinquishment or abandonment of a known right or privilege. Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of Due Process and it is therefore void.")

Furthermore, the argument that the defendant cannot attack the validity of his plea unless he demonstrates that he would not have entered the plea unless he demonstrates that he would not have entered the plea had he been aware of the direct consequence of his plea, is without merit. In *United States ex rel Baker v Finkbeiner*, 551 F2d 188 (7th Cir. 1977), in circumstances identical to Roark the court rejected this very argument. The court found that the correct test is whether the sentence actually imposed is different from the sentence which the prosecutor and the trial court promised, Id at 183. If so, the plea must not stand.

The defendant in the case at hand was not aware of the lifetime monitoring requirement, hence his plea is unknowing and involuntary, unlike the defendant

in Williams who was informed by his attorney of the possible consequences of his plea, and the correct test to be applied is that of Machibroda. This represents the most consistent analysis with Due Process.

To do otherwise, would not only be a violation of Due Process, but also of the relevant court rules and would require the court to re-examine all of the relevant laws. See MCR 6.302; US Const. Amend XIV; Const. 1963, art. 1 sec. 17; *People v Pluma*, 284 Mich App 645, 648; 773 NW 2d 763 (2009); *North Carolina v Alford*, 400 US 25, 31; 91 S Ct 160; 27 L Ed 2d 162 (1970).

Preservation of Error: Mr. McKay directs the court's attention to the preservation of error in defendant Roark's case.

IV. RELIEF REQUESTED.

For the foregoing reasons Mr. McKay prays the court will affirm the decision of the Court of Appeals dated October, 20, 2015, as there is no abuse of discretion in granting relief.