THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2008-0087, State of New Hampshire v. Christos Dimopoulos, the court on May 7, 2009, issued the following order:

The defendant, Christos Dimopoulos, appeals an order of the trial court denying his motion to withdraw his guilty plea. He argues that: (1) his plea was not knowing, intelligent and voluntary, see Boykin v. Alabama, 395 U.S. 238 (1969); and (2) he was denied effective assistance of counsel prior to entering the plea. We affirm.

We turn first to the standard applied by the trial court in reviewing the defendant's motion to withdraw his plea. The party who bears the burden of proof when a defendant challenges the knowledge or volition of his plea depends upon the procedural posture of the appeal. State v. Arsenault, 153 N.H. 413, 416 (2006). In a collateral attack, as in this case, see id. at 417, "the defendant must describe the specific manner in which the waiver was in fact involuntary or without understanding, and must at least go forward with evidence sufficient to indicate that his specific claim presents a genuine issue for adjudication." Id. at 416 (quotations and brackets omitted). The trial court found and the State does not contest that the defendant satisfied his initial burden.

We turn then to the record's compliance with Boykin. If the face of the record indicates that the original sentencing court affirmatively inquired into the knowledge and volition of the defendant's plea, then the defendant bears the burden of demonstrating by clear and convincing evidence that the sentencing court was wrong and that his plea was either involuntary or unknowing for the reason he claims. Richard v. MacAskill, 129 N.H. 405, 408 (1987). The record of the 2004 sentencing hearing indicates that the court inquired into the defendant's ability to understand English and his proffered plea, as well as the charged offenses and the rights he would waive if his plea were accepted.

The defendant must therefore demonstrate by clear and convincing evidence that the sentencing court erred. To satisfy this burden, the defendant contends that he had difficulty understanding English. Citing several portions of the record before us and noting that the defendant was not giving "pat answers" at the plea hearing, the trial court found that "the defendant's English language skills and the lack of an interpreter at the plea and sentencing hearing did not prevent the defendant from knowingly, voluntarily and intelligently entering guilty pleas." See Roy v. Perrin, 122 N.H. 88, 94 (1982) (weight to be given testimony depends upon credibility of witnesses; credibility of witnesses is for trial court to determine). This finding is supported by the evidence.

The defendant also argues that he did not admit to the culpable mental state required for the charged offenses. The record reflects that at the hearing, the State made an offer of proof as to the conduct with which the defendant was charged; the offer included that "each incident of touching was for the purpose of sexual arousal or gratification." The defendant responded in the affirmative when asked if he had heard the offer and whether the facts were accurate. When the defendant later said that he had no sexual purpose in mind, the State asked for a trial date and defense counsel requested a short recess. At the end of the recess, defense counsel stated that the defendant would agree that there was an element of sexual curiosity. At another point in the colloquy, the defendant responded in the affirmative when asked if he "were engaging in a sexualized behavior with this young girl?" Given the record before us, we conclude that the defendant failed to meet his burden that his plea was invalid. See State v. Thornton, 140 N.H. 532, 539 (1995) (defendant's denial of certain aspects of crime insufficient to reverse trial court's finding that he understood the elements of the crime to which he pled guilty).

The defendant also argues that the trial court erred in denying his motion to withdraw his plea based upon ineffective assistance of counsel. To prevail on this claim, the defendant has the burden to prove that his earlier plea was not made voluntarily and that withdrawal of the plea must be allowed to correct a manifest injustice. State v. Sharkey, 155 N.H. 638, 640 (2007). Absent an unsustainable exercise of discretion, we will not set aside the trial court's findings. Id.

To successfully assert a claim for ineffective assistance of counsel, a defendant must show first, that counsel's representation was deficient and, second, that counsel's deficient performance actually prejudiced the outcome of the case. Id. at 640-41 (in context of guilty plea, prejudice prong requires defendant to demonstrate reasonable probability that, but for counsel's errors, defendant would not have pled guilty and would have insisted upon going to trial). Even if we assume in this case where there is no evidence that the defendant ever requested an interpreter and where the trial court explained the possible sentences, that the defendant could somehow satisfy the first prong required to establish deficient representation, he cannot meet the second prong because he repeatedly asserted throughout the several pre-trial hearings that he did not wish to go to trial in order to spare the victim.

To the extent that the defendant bases his claim of ineffective assistance of counsel upon the premise that he was entitled to the plea bargain reached in January 2004, we find his argument unpersuasive. As we have previously noted, a plea bargain standing alone is of no constitutional significance, State v. Jeleniewski, 147 N.H. 462, 469 (2002). The defendant argues that his counsel's failure to advise him that he would be incarcerated that day if the plea were accepted by the court resulted in his rejection of the plea. Because we conclude

that immediate incarceration was not a direct consequence of the defendant's plea, see State v. Elliot, 133 N.H. 190, 193 (1990) (direct consequences are limited to those areas about which trial court must inquire prior to accepting plea); Diamontopoulas v. State, 140 N.H. 182, 186 (1995) (Boykin satisfied if defendant informed of direct consequences of guilty plea), and the defendant does not assert that his counsel affirmatively misinformed him of the plea's consequences, see State v. Sharkey, 155 N.H. at 641-43, we find no error in the trial court's ruling on this issue.

The defendant's motion for leave to file additional authority is granted.

Affirmed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk