STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EVERETT CLARE ALEXANDER,

Defendant-Appellant.

UNPUBLISHED
November 25, 1997

Nos. 196158; 199761
Muskegon Circuit
LC No. 92-035077-FH

Before: Smolenski, P.J., and MacKenzie and Neff, JJ.

PER CURIAM.

In Docket No. 196158 defendant appeals as of right his no contest plea and subsequent sentence. In Docket No. 199761 defendant appeals as of right his resentencing. We affirm.

I

On October 5, 1992, defendant was driving an automobile which collided with a motorcycle driven by Randy Wannamaker who died as a result of the collision. Defendant was charged with operating a vehicle under the influence of intoxicating liquor (OUIL) causing death, MCL 257.625(4); MSA 9.2325(4), and alternatively, manslaughter, MCL 750.321; MSA 28.553, and of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084. Pursuant to a plea bargain, defendant entered a plea of no contest to the charges of negligent homicide, MCL 750.324; MSA 28.556, and habitual offender, third offense, MCL 769.11; MSA 28.1083.

At defendant's sentencing hearing, defendant withdrew his plea and the original charges were reinstated. Following a three-day jury trial before Muskegon Circuit Judge R. Max Daniels, defendant was convicted of OUIL causing death. Defendant pleaded guilty to habitual offender, fourth offense, and was sentenced by Judge Daniels to fifteen to thirty years' imprisonment.

Defendant filed a claim of appeal and this Court reversed defendant's conviction and remanded for a new trial before a different judge. *People v Alexander*, unpublished opinion per curiam of the Court of Appeals issued October 31, 1994 (Docket No. 164748). On May 31, 1995, defendant entered a plea of no contest to the charge of OUIL causing death before Muskegon Circuit Judge

Michael E. Kobza. As part of the plea agreement the prosecutor promised to dismiss a supplemental information that alleged that defendant had three prior felony convictions, and also to "leave sentencing in this matter to the discretion of the Court." Judge Kobza sentenced defendant to ten to fifteen years' imprisonment with credit for 988 days served.

A hearing was then held before Judge Kobza regarding defendant's motion to withdraw his May 31, 1995, plea and reinstate his former no contest plea to negligent homicide as an habitual offender, third offense. The parties agreed that the prosecutor had breached his plea agreement by asking the court to give defendant the maximum sentence. Judge Kobza denied defendant's motion to withdraw his plea but ordered resentencing because of the breach of the plea agreement. On November 25, 1996, defendant was resentenced by Muskegon Circuit Judge Timothy G. Hicks to ten to fifteen years' imprisonment with credit for 1,512 days served. Defendant appeals both his May 31, 1995, no contest plea and the November 25, 1996, resentencing.

II

Defendant first argues that the trial court abused its discretion in failing to grant defendant's request to withdraw his May 31, 1995, plea based on the prosecutor's breach of the plea agreement. We disagree.

A prosecutor is bound by a plea agreement in which the prosecutor agreed to take no position on the defendant's request for a sentence below the statutory mandatory minimum sentence. *People v Arriaga*, 199 Mich App 166, 168-169; 501 NW2d 200 (1993). Once a trial court accepts a plea induced by an agreement with a prosecutor, the terms of that agreement must be fulfilled. *People v Siebert*, 201 Mich App 402, 427; 507 NW2d 211 (1993), aff'd in part 450 Mich 500. Depending on the circumstances of the case, the remedy for failure to fulfill the agreement may be either plea withdrawal or specific performance. *Id*. Normally, the choice of remedy is within the court's discretion, though a defendant's preference is to be accorded considerable weight. *Id*.

In *People v Nixten*, 183 Mich App 95, 99; 454 NW2d 160 (1990), we ordered that the defendant be resentenced where the sentencing agreement was breached by the prosecutor. "[B]ecause defendant is not asserting his innocence and is merely complaining that the prosecution did not keep its part of the bargain, we find that specific performance is the appropriate remedy." *Id*. In this case, defendant also complains that the prosecutor did not abide by the plea agreement and defendant does not assert his innocence. Therefore, the trial court did not abuse its discretion in denying defendant's motion to withdraw his 1995 plea and ordering resentencing.

Further, by entering a valid, knowing, and voluntary plea, a defendant waives any alleged defect with respect to a prior plea agreement. *People v Ruff*, 108 Mich App 716, 718; 310 NW2d 852 (1981). By entering into the 1995 plea agreement, defendant abandoned the claim that the 1993 plea should be reinstated because his withdrawal of the 1993 plea agreement was defective. The trial court properly ruled that defendant waived any rights he may have had under the 1993 plea agreement.

III

Next, defendant contends that Judge Daniels' act of sua sponte vacating defendant's 1993 no contest plea at sentencing is contrary to law and defendant should be allowed to reinstate the 1993 plea agreement. Defendant further contends that the failure of defendant's counsel to request reinstatement of the 1993 plea agreement amounts to ineffective assistance of counsel.

MCR 6.311(C) provides as follows:

> A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. MCR 6.302; *People v Thew*, 201 Mich App 78, 82; 506 NW2d 547 (1993). Although defendant now argues that no one "in their right mind" would accept the 1995 plea agreement accepted by defendant, the transcript of the plea reveals no indication that defendant's 1995 no contest plea was anything other than voluntary. Because defendant has presented no evidence other than his postconviction statement that the plea was not voluntary, defendant's acceptance of the 1995 plea agreement resulted in a waiver of any alleged defects with respect to defendant's 1993 plea agreement. *Ruff, supra* at 718.

Defendant has also waived his claim of ineffective assistance of counsel. "Where the alleged deficient actions of defense counsel relate to issues that are waived by a valid unconditional guilty plea, the claim of ineffective assistance of counsel relating to those actions is also waived." *People v Vonins (After Remand)*, 203 Mich App 173, 176; 511 NW2d 706 (1993). Defendant's unconditional guilty plea waived his claim of ineffective assistance of counsel relating to the 1993 plea agreement.

IV

Defendant contends that his sentence of ten to fifteen years for the charge of OUIL causing death is disproportionate.[1] We disagree.

The trial court stated at sentencing, and defendant concedes on appeal, that the sentencing guidelines do not apply in this case. The offense to which defendant pleaded guilty, OUIL causing death, provides for a maximum prison term of fifteen years. MCL 257.625(4); MSA 9.2325(4). Before sentencing defendant, Judge Hicks made the following remarks:

> But at this point you have been convicted of this crime, and as I look at this matter, I look at a fairly lengthy criminal history here. I look at 5 felonies and 13 misdemeanors, and with someone your age, Mr. Alexander, what I try to do is I try look [sic] at the criminal history and see are we seeing any signs of improvement here, you know, are we seeing any breaks in this criminal chain that would tell me that people are learning

not to do these things anymore. And frankly, in your case I don't see any. I see crimes committed in the 40s, the 50s, the 60s, the 70s, the 80s and the 90s. And as it relates to alcohol use, there's an operating while impaired in 1987. There's an operating while under the influence of intoxicating liquor. These are both convictions in 1990, two years before this happened. And so under these circumstances the maximum here is 15 years.

The sentencing court properly considered defendant's extensive criminal history, *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985), as well as the reformation of defendant, *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). Although defendant argues that his advanced age provides a basis for a reduced sentence, our Supreme Court has held that "[a] reasonable sentence may include a limited consideration of a defendant's age in terms of other permissible and relevant individual factors such as the absence or presence of a prior record." *People v Fleming*, 428 Mich 408, 423 n 17; 410 NW2d 266 (1987). The sentencing transcript reveals that Judge Hicks properly considered defendant's age in a limited manner in terms of defendant's criminal record.

Our review of the sentencing transcript reveals that the sentencing court properly tailored defendant's sentence to the circumstances of the case and the offender. Defendant has an extensive criminal history that was properly considered by the court, and defendant's crime resulted in the death of another. Therefore, the ten- to fifteen-year sentence is in compliance with the statute under which defendant was convicted and is proportionate to the seriousness of the crime and defendant's prior record.

Affirmed.

/s/ Michael R. Smolenski
/s/ Barbara B. MacKenzie
/s/ Janet T. Neff

[1] Defendant also claims that because his 1993 plea was improperly vacated sua sponte by the sentencing judge, he should be sentenced in accordance with that 1993 plea agreement to negligent homicide. However, as noted above, defendant has waived any claim regarding the 1993 plea agreement by voluntarily accepting the 1995 plea agreement and pleading guilty to OUIL causing death.