

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL M. MARTIN,

Defendant-Appellant.

UNPUBLISHED

January 13, 1998

No. 189839

Recorder's Court

LC No. 92-005562

Before: MacKenzie, P.J., and Hood and Hoekstra, JJ.

MEMORANDUM.

Defendant was convicted following a bench trial of felonious assault, MCL 750.82; MSA 28.277, and was sentenced to three years' probation, despite his status as a fourth offender, MCL 769.12; MSA 28.1084. Defendant subsequently pleaded guilty to violating the terms of his probation and received a sentence of two to four years' imprisonment. Defendant appeals by leave granted. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's failure to move to withdraw his plea in the trial court waives appellate review of his claims that his plea was not knowingly and voluntarily entered and that the trial court failed to comply with the requirements of MCR 6.445(F) before accepting defendant's plea. MCR 6.311(C); *People v Baugh*, 127 Mich App 245, 247; 338 NW2d 199 (1983).

Defendant's ineffective assistance of counsel claim lacks record support. Upon revocation of defendant's probation, defendant was subject to the same penalty as he might have received if his probation order had never entered. MCL 771.4; MSA 28.1134; *People v Burks*, 220 Mich App 253, 256; 559 NW2d 357 (1996). Accordingly, when defense counsel informed defendant that defendant could be sentenced as a fourth offender, counsel imparted accurate information and, therefore, counsel's advice was within the range of competence demanded of attorneys in criminal cases. *People v Haynes (After Remand)*, 221 Mich App 551, 558; 562 NW2d 241 (1997). Counsel's representation cannot be deemed deficient because he failed to anticipate the trial court's error. Moreover, once the court expressed its erroneous belief that it could not sentence defendant as an habitual offender and, therefore, its intention to impose a maximum sentence significantly below that

which defendant could have lawfully received, had defense counsel advised defendant to withdraw his plea in light of an error favorable to defendant, as defendant now argues counsel should have done, such advice likely would have left defendant in a worse position because it would have allowed the prosecution time to produce legal authority to demonstrate to the court that it could sentence defendant as an habitual offender, thereby exposing defendant to the potential for the imposition of a greater maximum sentence than he received.

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Harold Hood

/s/ Joel P. Hoekstra