STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID WAYNE RIIPPA,

Defendant-Appellant.

UNPUBLISHED
July 10, 1998

No. 182553
Berrien Circuit Court
LC No. 79-003325 FY

Before: White, P.J., and Cavanagh and Reilly, JJ.

PER CURIAM.

Defendant pleaded no contest to a charge of assault with intent to murder, MCL 750.83; MSA 28.278. The trial court sentenced defendant to thirty to ninety years' imprisonment. Defendant appeals as of right. We affirm.

I

First, defendant argues that the trial court erred in denying his motion to withdraw his plea. Defendant asserts that he is entitled to have his plea withdrawn both because the trial court failed to inquire whether anyone had promised defendant anything to induce his plea and because defendant had in fact been promised leniency in exchange for his plea.

There is no absolute right to withdraw a guilty plea once it has been accepted. When a defendant moves to withdraw his guilty plea before sentencing, the burden is on the defendant to establish a fair and just reason for withdrawal of the plea. A trial court's denial of a defendant's motion to withdraw a guilty plea is reviewed for an abuse of discretion. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997).

The transcript of the plea proceeding contains the following passage:

> THE COURT: Have I fully complied with the applicable court rules, Miss Bogren [the prosecutor]?

MISS BOGREN: Your Honor, I believe that the Court has touched on all these issues, but if the Court would just specifically ask Mr. Riipa [sic] if anyone has promised him or threatened him in any fashion to get him to enter the plea. I think it's clear from the statement they haven't, but to cover the court rule.

THE COURT: Yes, thank you.

Has anyone at all tried to trick you or threaten you or force you to plead no contest?

THE DEFENDANT: No.

At the time defendant entered his plea, MCR 6.302(C)(4)(a) required the trial court to inquire of the defendant whether anyone had promised him anything in exchange for his plea. Defendant asserts that because the trial court asked only if anyone "tried to trick you or threaten you or force you to plead no contest," he is entitled to withdraw his plea.

We disagree. The Supreme Court has stated that technical noncompliance with the court rules in accepting a plea of guilty or nolo contendere does not necessarily require reversal. *People v Blue*, 428 Mich 684, 689; 411 NW2d 451 (1987). Whether a particular departure requires reversal depends on the nature of the noncompliance. *Id*.

In the present case, we conclude that the error in the plea proceeding does not justify setting aside defendant's guilty plea. The trial court stated, "[T]he Court does not find that at any time during this private meeting between the Defendant and the Undersheriff that the Undersheriff promised, suggested, or even intimated that he was going to recommend to the Prosecutor or to this Court that the sentence would be a straight 20 years or a straight 20 years plus one or two years." The trial court further found that defendant's plea was intelligently and voluntarily made. See *People v Thew*, 201 Mich App 78, 95; 506 NW2d 547 (1993).

On appeal, this Court will not disturb trial court findings of fact unless they are clearly erroneous. *People v Reeves*, 222 Mich App 32, 35; 564 NW2d 476 (1997), lv gtd 456 Mich 899; 573 NW2d 615 (1997). Gary Ruhl testified that, contrary to defendant's assertions, during their meeting he did not ask defendant "if he could do a couple more years," and he never promised defendant that he would recommend a sentence of twenty years.[1] Although this testimony conflicts with defendant's, questions of credibility are left to the trier of fact and will not be resolved anew by this Court. *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997). On the basis of Ruhl's testimony, the trial court's finding that defendant was not promised leniency in exchange for his plea is not clearly erroneous. Accordingly, the error in the plea-taking procedure was not prejudicial.[2] After reviewing the record, we conclude that the trial court's finding that defendant's plea was knowing and voluntary is not clearly erroneous. The trial court therefore did not abuse its discretion in refusing to allow defendant to withdraw his plea.

II

Defendant next claims that he was denied the effective assistance of counsel. A defendant that claims that he has been denied the effective assistance of counsel must establish that (1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, 513 US 1121 (1995).

A

First, defendant contends that he received ineffective assistance of counsel because his attorney failed to investigate witnesses for an involuntary intoxication defense. To establish ineffective assistance in the context of a guilty plea, courts must determine whether the defendant tendered a plea voluntarily and understandingly. *Thew*, *supra* at 89. Guilty pleas may be found to be involuntary or unknowing on the basis of ineffective assistance of counsel where defense counsel has failed to discuss possible defenses to the charges to which defendant is pleading guilty. *Id*. at 91.

The trial court found that defendant had established neither substandard performance by his counsel nor any prejudice. These findings are not clearly erroneous. See *Reeves*, *supra*. A review of the record indicates that defendant understood that by pleading no contest he waived his right to raise any and all defenses, including involuntary intoxication.

In addition, the record establishes that counsel and defendant did discuss involuntary intoxication as a defense. In fact, defendant first told counsel that Helen and John Testini had heard Leatha Tober say that she had drugged him the night of the stabbing. However, defense counsel testified that he believed that an involuntary intoxication defense was unlikely to succeed.[3] This Court will not substitute its judgment for that of trial counsel in matters of trial strategy. *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997).

Moreover, the trial court found that both defendant and defense counsel had already decided to pursue a plea. This finding is not clearly erroneous. See *Reeves*, *supra*. Defendant testified that he did not want to go through another trial. Defense counsel also stated that defendant never wanted to go to trial. Based on defendant's excellent record in prison, both defendant and defense counsel were hopeful that he would obtain a reduction in sentence.[4]

Furthermore, even if defense counsel should have investigated the involuntary intoxication defense more thoroughly, defendant has not shown that he was thereby prejudiced. Defense counsel testified that he had spoken with Helen Testini. Defendant maintains that counsel should also have interviewed John Testini and Tober. However, at the evidentiary hearing on remand, Tober testified that she had not drugged defendant, and she had never stated that she had. The trial court found that her testimony was credible, and the testimony of Helen and John Testini was not. Defendant therefore has not shown that if defense counsel had undertaken additional investigation, the outcome of the proceedings would have been different. See *Pickens*, *supra*.

B

Defendant maintains that counsel either refused or failed to permit defendant to tell him what was said during the pretrial conversation between defendant and Ruhl. Although the trial court did not directly address this question, the court specifically found that defense counsel did "what was expected of an attorney in the normal representation of a client to perform to the best of his ability and to a standard of performance that would ensure the Defendant of an adequate representation." Defense counsel testified at the evidentiary hearing that he had not refused to discuss the conversation with defendant. In fact, he and defendant had several brief conversations about it, but he had emphasized to defendant that he could not use anything that had been said at the meeting in court. The trial court apparently found defense counsel's testimony credible. Accordingly, defendant has not established that counsel was ineffective on this basis.[5]

C

Defendant also claims that counsel erred by failing to inform him of the trial court's comments at an in-chambers meeting. However, because defendant did not raise this argument at the evidentiary hearing on remand, it is not preserved for appellate review, and we decline to address it. See *People v Ghosh*, 188 Mich App 545, 546; 470 NW2d 497 (1991).

D

Defendant asserts that he was denied effective assistance of counsel when his attorney failed to object at sentencing to the introduction of the uniform worn by the victim when defendant stabbed him and to the inflammatory remarks made by the prosecutor regarding the exhibit. We find no error requiring reversal. During the hearing at which defendant tendered his plea, the trial court made the following factual findings: Defendant attacked the victim with a knife, stabbing him nine times. The knife punctured the victim's bulletproof vest. The victim lost approximately ten pints of blood. These facts were sufficient to support the trial court's characterization of the incident as a "brutal, vicious, unprovoked attack . . . perpetrated on an unsuspecting police officer during a routine traffic stop." Defendant has not sustained his burden of showing that, had defense counsel objected to the introduction of the victim's uniform, the result of the proceedings would have been different. See *Stanaway*, *supra* at 687-688.

III

Defendant next claims that his sentence, which exceeds the sentencing guidelines, is disproportionate. Defendant asserts that the trial court abused its discretion by taking into account variables already provided for in the guidelines and considering the victim's occupation as a police officer. Defendant further maintains that the trial court gave inadequate weight to defendant's progress in prison.

A sentence constitutes an abuse of discretion if it violates the principle of proportionality, which requires sentences to be proportionate to the seriousness of the circumstances surrounding the offense

and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). In the instant case, during a routine traffic stop, without any warning, defendant perpetrated a brutal and vicious attack on a police officer. Defendant stabbed the victim with a knife at least nine times. Some of the wounds were inflicted while the officer was kneeling. The victim sustained permanent physical and emotional damage. Defendant's prior criminal record was extensive, and he was on federal probation for a felony at the time of the attack. We conclude that defendant's sentence is proportionate to the seriousness of the circumstances surrounding the offense and the offender.

IV

Finally, defendant contends that he is entitled to resentencing because he was not given an opportunity prior to sentencing to review the Parole Guidelines Data Entry form, which was attached to the presentence investigation report. However, this document is not attached to the presentence report contained in the record. According to defendant, this form is prepared by the Department of Corrections pursuant to Policy Directive 06.05.100. Because this form was not prepared by the trial court, and defendant has presented no evidence that the trial court actually saw it, much less considered it at sentencing, we conclude that defendant must address any claims of inaccuracies in the information contained in the form to the Department of Corrections.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ Maureen Pulte Reilly

[1] This testimony is consistent with the fact that Ruhl requested in both presentence reports and at the sentencing hearing that the trial court impose a minimum sentence of forty years.

[2] The trial court mentioned an additional rationale for concluding that the deficiency in the plea proceeding was not prejudicial. In his affidavit, defendant stated,

> When Judge Grathwohl asked me during the no-contest plea hearing on September 14, 1994 if any promises were made to induce my plea, I replied that there were not, thinking that nothing from my meeting with Gary Ruhl was suppose[d] to be disclosed . . . .

Defendant essentially repeated this statement during the evidentiary hearing. The trial court therefore concluded that defendant would not have told the court about the alleged promise even if the plea-taking had been flawless. Defendant has not shown that this finding was clearly erroneous.

[3] Defense counsel explained that he did not think a jury would find a claim of involuntary intoxication persuasive "because there was also a lot of voluntary intoxication going on."

[4] At the hearing on remand, the trial court noted that it had considered defendant's outstanding record in prison and that it had been a factor in sentencing defendant to a minimum of thirty years, rather than the forty-year minimum imposed after the initial trial.

[5] Furthermore, before the meeting between defendant and the victim, the parties signed a form entitled "Consent to Conduct a Meeting" which stated that "nothing said in the meeting is usable at any future proceeding for any purpose by either party." At the time of sentencing, defendant had almost completed the requirements for a bachelor's degree in computer science. The probation officer, defense counsel, and the trial court all agreed that defendant is very intelligent. Defendant has not claimed that he did not understand the meaning of the document that he was signing. Defendant was therefore on notice that anything said by the victim carried no legal weight.