STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID WESLEY TAYLOR,

Defendant-Appellant.

UNPUBLISHED
February 12, 1999

No. 196318
Saginaw Circuit Court
LC No. 96-011944 FH

Before: Smolenski, P. J., and Saad and Gage, JJ.

PER CURIAM.

Defendant pleaded guilty to two counts of embezzlement, MCL 750.174; MSA 28.371, two counts of forgery, MCL 750.248; MSA 28.445, and to being a third-offense habitual offender, MCL 769.11; MSA 28.1083. The trial judge sentenced defendant to four concurrent terms of eighty months' to twenty years' imprisonment. The trial court denied defendant's motion to withdraw his guilty plea or for resentencing. Defendant appeals of right, and we affirm defendant's convictions, and affirm his sentences in part, but remand for further proceedings on the issue of restitution.

I

Defendant first claims that his guilty plea was not knowing, voluntary, and accurate because it was his understanding that his minimum sentence would be no greater than thirty-six months and his maximum sentence no greater than eighty months.

After a plea has been accepted by the trial court, there is no absolute right to withdraw the plea. *People v Eloby (After Remand)*, 215 Mich App 472, 474; 547 NW2d 48 (1996). When a motion to withdraw a plea is made after sentencing, the decision whether to grant the motion rests within the discretion of trial court, whose decision will not be disturbed on appeal unless there is a clear abuse of discretion resulting in a miscarriage of justice. *Id*. at 475; see also *People v Haynes* (After Remand), 221 Mich App 551; 562 NW2d 241 (1997). An abuse of discretion will be found only if an unprejudiced person, considering the facts on which a trial court relied in making its decision, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

A guilty plea "not only must be voluntary but must be [a] knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances and likely consequences." *People v Thew*, 201 Mich App 78, 95; 506 NW2d 547 (1993), quoting *Brady v United States*, 397 US 742, 747-748; 90 S Ct 1463; 25 L Ed 2d 747 (1970). A defendant's guilty plea will not be set aside when an appellate court is convinced that it was knowingly, intelligently, and voluntarily given. *People v Gonzalez*, 197 Mich App 385, 391; 496 NW2d 312 (1992).

Here, the following exchange occurred at defendant's guilty plea proceeding:

> *Court*: Okay. Now, the notice in the file indicates he'll be pleading guilty to Count I, embezzlement, agent or trustee over $100; Count II, forgery; Count III, embezzlement, agent or trustee; Count IV, forgery, and habitual offender third offense. Is there anything else that's part of this agreement?
>
> *Defense Counsel*: Yes, briefly, your Honor. Based on negotiations from the prosecutor, in addition to what the Court has already mentioned in respect to the plea, *the prosecutor will recommend guidelines on the embezzlement charge which we have calculated to be 36 to 80 months*.
>
> *Court*: Is that correct, Mr. [prosecutor]?
>
> *Prosecutor*: Your Honor, the People have agreed that the Defendant will receive the benefit of that recommendation. Even though one of the charges he's pleading to has a higher statutory maximum, we have agreed - - that would be for forgery.
>
> *Defense Counsel*: Correct.
>
> *Prosecutor*: And we have agreed that the 36 to 80 month range applicable to the lower charge will be the recommended cap guideline range. You'd be permitted to use anything in that range if you saw fit to follow the recommendation and the Defendant would still be bound by the plea.
>
> * * *
>
> *Court*: Your attorney has indicated that you're pleading guilty to Counts I, II, III, and IV, and HOA third. How do you plead to these charges?
>
> *Defendant*: Guilty, your Honor.
>
> *Court*: Have you discussed this with [defense counsel]?
>
> *Defendant*: Yes, I have.
>
> * * *

Court: *Do you understand in the case of Count I, you're pleading to a felony and the maximum penalty is 10 years, and Count II, forgery, maximum 14 years, Count III, embezzlement, maximum 10 years of five thousand dollars, Count IV, forgery, maximum 14 years, Count V . . . there is no Count V, but there - - third conviction would double those maximums*?

Defendant: *Yes, I do, your Honor.* [Emphasis added.]

It is clear from the record that the purpose and intent behind the reference to the "36 to 80 months range" was the agreement that the prosecutor would recommend that the trial court use the sentencing guidelines' recommendation for embezzlement, rather than forgery, which would have been higher. There is nothing in the record to indicate that the thirty-six to eighty months range was intended to encompass defendant's minimum and maximum sentences. Further, the trial court explained what the *maximum* sentences were for each of the four counts, and that defendant's habitual offender plea *would double those maximums*. It is implausible that a discussion regarding the maximum possible sentences, and the possibility of those maximums being doubled, would have reasonably led defendant to believe that "eighty months" referred to his maximum possible sentence.

We also note that, at sentencing, defendant obtained clarification on the record that the sentence agreement was based on the guidelines for embezzlement and not for forgery. In addition, defendant has ten prior convictions, five of which are for felonies of a fraudulent nature. Two of the four felonies were prosecuted after the sentencing guidelines went into effect in 1984. As such, defendant presumably has some experience with the criminal justice system. In addition, defendant appears intelligent, considering that he has a paralegal certificate and, at the time of the offenses, was working as a bookkeeper and a business engineer. Finally, contrary to what defendant argues, it is apparent from the record that defendant and defense counsel had reviewed the sentencing guidelines.

Accordingly, we find that the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea on the ground that he allegedly misunderstood the sentencing agreement. Indeed, requests to withdraw pleas are generally regarded as frivolous where the circumstances indicate that the defendant's true motivation for moving to withdraw is a concern regarding sentencing. *Haynes*, *supra* at 559. Here, we are satisfied that defendant's plea was voluntary, knowing and intelligent.

II

Defendant's contention that he should be allowed to withdraw his guilty plea because the trial court did not comply with MCR 6.302(C)(2) is not preserved for review because defendant did not move in the trial court to withdraw his plea on this ground. MCR 6.610(E)(7)(a); MCR 6.311(C); *People v Corteway*, 212 Mich App 442, 447; 538 NW2d 60 (1995).

III

Defendant also contends that the trial court did not have proper jurisdiction and venue to accept his guilty plea or impose sentence in this case. Because defendant failed to object to Saginaw County as the proper venue, the venue issue is waived. *People v Ginther*, 390 Mich 436, 440; 212 NW2d 922 (1973). Whether a court has subject-matter jurisdiction is a question of law, which this Court reviews de novo. *People v Laws*, 218 Mich App 447, 451; 554 NW2d 586 (1996). We find that the circuit court clearly had subject-matter jurisdiction over this criminal case. See *People v* Smith, 438 Mich 715; 475 NW2d 333 (1991). Moreover, defendant has failed to present any argument in support of his proposition that the trial court did not have subject-matter jurisdiction. A defendant may not merely announce a position and leave it to this Court to discover and rationalize the basis for his claims. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

IV

Defendant's arguments that he is entitled to resentencing because the trial court misscored or misinterpreted Offense Variable 8, Offense Variable 17, and Prior Record Variable 7 are not properly preserved for review. Defendant failed to object to the scoring of these variables before or at sentencing, or as soon thereafter as the alleged inaccuracies could reasonably have been discovered. MCR 6.429(C). In any event, appellate relief is not available for defendant's claimed errors because they are based only on an alleged misinterpretation or misapplication of the guidelines. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997). Appellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied. *Id*. at 178. Defendant's claims do not state a cognizable claim on appeal. *Id*. at 177.

V

We reject defendant's contention that that he is entitled to resentencing because the trial court made an improper assumption of guilt on a pending charge at sentencing. A trial court may not make an independent finding of a defendant's guilt on another charge and use it as basis for justifying sentence. *People v Tyler*, 188 Mich App 83, 86; 468 NW2d 537 (1991). A sentence is invalid when it is based on improper assumptions of guilt. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). However, a sentencing court may consider a pending charge when sentencing a defendant. *People v Durfee*, 215 Mich App 677, 683; 547 NW2d 344 (1996); *People v Coulter* (After Remand), 205 Mich App 453, 456; 517 NW2d 827 (1994).

Before imposing sentence, the trial court mentioned defendant's pending charge along with his five prior felony convictions for theft:

> Now, if I'm correct, I have reviewed your criminal history as set forth on the report. And I count five prior crimes of theft. The one in '83, one in '85, one in '87, and one in '89, and one in '89 – another in '89. *And of course, we have a pending matter possibly as reflected in the report*. So it appears that as much as I would like to enable you to repay [the victim] at an early date, that it is not appropriate, that the greater need is to protect society from your conduct. [Emphasis added.]

After imposing sentence, the trial court explained the reason for the sentence:

> Again, *the reason for this [sentence] is the extensive prior criminal history* that leads me to the conclusion that society needs to be protected from your conduct even more urgently than [the victim] needs prompt repayment. And so the punishment is there and certainly the protection of society is there. [Emphasis added.]

There is no indication that the trial court made an independent finding of guilt as to the pending charge. Moreover, it is apparent that the trial court did not use the pending charge as justification for defendant's sentences, but relied on defendant's extensive criminal history. Therefore, this issue is without merit.

VI

We also reject defendant's allegation that the trial court violated MCL 750.503; MSA 28.771 when it sentenced defendant to eighty months' to twenty years' imprisonment. Statutory interpretation is a question of law, which this Court reviews de novo. *People v Thomas*, 438 Mich 448, 452; 475 NW2d 288 (1991).

MCL 750.503; MSA 28.771 provides:

> A person convicted of a crime declared in this or any other act of the state of Michigan, to be a felony, for which no other punishment is specially prescribed by any statute in force at the time of the conviction and sentence, shall be punished by imprisonment in the state prison for not more than 4 years or by a fine of not more than 2,000 dollars, or by both such fine and imprisonment.

The term "felony" is defined in MCL 750.7; MSA 28.197 as "an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison." Defendant's argument that the habitual offender statute defines a substantive offense is misplaced. The plain language of MCL 769.11; MSA 28.1083 provides for sentencing enhancement:

> (1) If a person has been convicted of 2 or more felonies, attempts to commit felonies, or both, whether the convictions occurred in this state or would have been for felonies in this state if the convictions obtained outside this state had been obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction as follows:
>
> (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, then the court, except as otherwise provided in this section or section 1 of chapter 11, *may sentence the person to imprisonment for a maximum term which is not more than twice the longest term prescribed by law for a first conviction of that offense or for a lesser term*. [Emphasis added.]

Moreover, prior to the codification of 769.11; MSA 28.1083, the Supreme Court observed that:

> [t]he legislature *did not intend to make a separate substantive crime out of being an habitual criminal* but rather, for deterrent purposes, intended to augment the punishment for second or subsequent felonies. [*People v Hendrick*, 398 Mich 410, 416-417; 247 NW2d 840 (1976), quoting *People v Shotwell*, 352 Mich 42, 46; 88 NW2d 313 (1958). Emphasis added.]

In addition, this Court has held that Michigan's habitual offender statutes are merely sentence enhancement mechanisms rather than substantive crimes. *In re Jerry*, 294 Mich 689; 293 NW 909 (1940); *People v Zinn*, 217 Mich App 340, 345; 551 NW2d 704 (1996); *People v Anderson*, 210 Mich App 295; 532 NW2d 918 (1995). As such, MCL 750.503; MSA 28.771 is not applicable and defendant's claim is without merit.

VII

We reject defendant's argument that his sentence is invalid because the trial court mistakenly believed that it was required by law to double the maximum sentence for each conviction. A sentence is invalid when it is based on a misconception of the law. *Miles, supra* at 96; *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994). In this case, however, there is no affirmative indication in the record that the trial court was operating under a misconception of the law when it imposed defendant's sentences. There is no indication that the trial court believed that it was required to double the maximum sentences for defendant's convictions. Indeed, defendant's forgery convictions carry a statutory maximum penalty of fourteen years, MCL 750.248; MSA 28.445, yet defendant received an enhanced maximum sentence of only twenty years. If the trial court had believed it was required to double the maximum terms, it would have imposed a maximum sentence of twenty-eight years for the forgery convictions, not twenty. Therefore, this issue is without merit.

VIII

Defendant contends that the trial court failed to resolve a factual dispute regarding the accurate amount of restitution that was due. We agree.

The following colloquy occurred at sentencing:

> *Defense Counsel*: [W]ith respect to restitution. And I note the report indicates that he is to pay $20,598.72 in restitution. And the [sic] back in April, they have faxed off to me a beginning of a letter where he has indicated each and every check where he is responsible for writing out of Advocate Engineering and has totaled it up to be $15,835.16. And he is certainly willing if there's a dispute with that amount to have a hearing on it and prove exactly the amount that is due and owing, but that's the amount he's based his budget upon, and I--
>
> *Court*: Could I see counsel in chambers for just a moment?
>
> *Defense counsel*: Certainly.

(Short recess taken.)

> *Court*: Okay. We'll resume the case of People verse Taylor. I think we were down to the point where, [defense counsel], do you have any further comments that you'd like to make on behalf of [defendant]?
>
> *Defense counsel*: Really, I have nothing further. Mr. Taylor may have something in his own behalf, but I don't.

Shortly thereafter, the trial court imposed defendant's sentence and ordered that he pay restitution in the amount of $20,589.72.

The foregoing record indicates that defendant objected to the amount of restitution listed in the PSIR and requested a hearing if there was a dispute. Although the court ordered a brief recess as defense counsel was arguing, nothing was placed on the record regarding any ruling or finding that was made in chambers during the recess. Further, although defendant's plea agreement included payment of restitution, the agreement did not provide for a specific amount. At the plea hearing, the parties agreed that the court would order restitution and "if there's any dispute it would be resolved through some sort of sentence or probation hearing." Therefore, we remand for an evidentiary hearing to determine the appropriate amount of restitution. MCL 780.767; MSA 28.1287(767); *People v Grant*, 455 Mich 221, 224-225 n 4, 242-243; 565 NW2d 389 (1997). Defendant's sentences are affirmed in all other respects.

IX

Finally, defendant claims erroneously that he was denied his right to effective assistance of counsel and is therefore entitled to withdraw his plea or resentencing. Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). When the claim stems from a plea of guilty, courts must determine whether the defendant tendered the plea voluntarily and understandingly. *People v Mayes (After Remand.)*, 202 Mich App 181, 183; 508 NW2d 161 (1993). We have considered defendant's claims, and conclude that they are meritless.

Affirmed in part and remanded for further proceedings on the issue of restitution. We do not retain jurisdiction.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Hilda R. Gage