STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 1999
v	No. 207002 Jackson Circuit Court
MARSHA LEE DENMAN, Defendant-Appellant.	LC No. 95-071323 FH

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

In 1995, defendant pleaded nolo contendere to larceny by false pretenses over $100, MCL 750.218; MSA 28.415, and was sentenced to four to ten years' imprisonment. In a prior appeal, this Court ruled that the trial court erred in refusing to consider defendant's motion to withdraw her plea as one brought before sentencing under MCR 6.310(B) and, therefore, remanded the case for further proceedings or resentencing[1] before a different judge. *People v Denman*, unpublished memorandum opinion of the Court of Appeals, issued April 4, 1997 (Docket No. 190811). On remand before a different judge, the trial court denied defendant's motion to withdraw her plea and resentenced her to five to ten years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first claims that the trial court, in denying her motion to withdraw her plea, erroneously relied on MCR 6.302(B)(4), because the charged crime occurred before the effective date of the amendment to that court rule.

MCR 6.302(B)(4), which was adopted on January 19, 1995, effective March 1, 1995, provides:

> (B) An Understanding Plea. Speaking directly to the defendant, the court must advise the defendant and determine that the defendant understands:
>
> * * *

> (4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea.

The court rule precludes criminal appellants from claiming unfulfilled promises or threats as a basis for plea withdrawal if those promises or threats were not disclosed at the time of the plea.

Contrary to defendant's contention, we believe that MCR 6.302(B)(4), being a procedural rule, may be given retroactive effect. *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992); *People v Link*, 225 Mich App 211, 214; 570 NW2d 297 (1997). Although defendant acknowledged at the plea hearing that there were no promises or threats made to her to induce her to enter her plea, she did not receive the advice prescribed by MCR 6.302(B)(4) before tendering her plea. Nonetheless, we conclude that defendant has not demonstrated entitlement to relief.

This Court reviews a trial court's denial of a motion to withdraw a guilty plea before sentencing for an abuse of discretion. *People v Spencer*, 192 Mich App 146, 150; 480 NW2d 308 (1991). Apart from MCR 6.302(B)(4), there is no absolute right to withdraw a guilty plea once it has been accepted. *People v Kennebrew*, 220 Mich App 601, 605; 560 NW2d 354 (1996); *People v Gomer*, 206 Mich App 55, 56; 520 NW2d 360 (1994); *People v Sanders*, 112 Mich App 585, 586; 316 NW2d 266 (1982). MCR 6.310(B) provides:

> Withdrawal Before Sentence. On the defendant's motion or with the defendant's consent, the court in the interest of justice may permit an accepted plea to be withdrawn before sentence is imposed unless withdrawal of the plea would substantially prejudice the prosecution because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by MCR 6.311(B).

In *Spencer, supra* at 151, this Court observed:

> [I]n order to withdraw a guilty plea before sentencing, the defendant must first establish that withdrawal of the plea is supported by reasons based on the interests of justice. If sufficient reasons are provided, the burden then shifts to the prosecution to demonstrate substantial prejudice. To constitute substantial prejudice, the prosecution must show that its ability to prosecute is somehow hampered by the delay. This would appear to require more than mere inconvenience in preparing for trial. Ultimately, the trial judge should bear in mind what is in the interests of justice in deciding if a plea may be withdrawn. Accordingly, what constitutes substantial prejudice may vary from case to case.

See also *Gomer, supra* at 57-58, citing *People v Jackson*, 203 Mich App 607, 611-613; 513 NW2d 206 (1994), and *People v Thew*, 201 Mich App 78; 506 NW2d 547 (1993).

In the present case, the record reveals that the trial court, although referring to MCR 6.302(B), did not deny defendant's motion solely because she had waived her right to withdraw her plea. Rather, the trial court also reasoned that, under the circumstances, to permit defendant to withdraw her plea would be "propagating perjury," that the plea had been properly accepted by the original trial court, and that the record factually supported the plea. The trial court effectively concluded, and we agree, that defendant failed to carry her burden of showing that withdrawal of her plea was warranted "in the interest of justice," as required by MCR 6.310(B). In essence, defendant failed to establish "a fair and just reason for withdrawal of the plea." *Jackson*, *supra* at 611.

Although defendant now asks this Court to remand the case for an evidentiary hearing regarding her claim that her plea was improperly induced by her attorney's promise of a lenient sentence, we note that she did not request an evidentiary hearing in the trial court and, in fact, expressly informed the trial court that an evidentiary hearing was not required. "[A] party cannot seek reversal on the basis of an error that the party caused by either plan or negligence." *Detroit v Larned Associates*, 199 Mich App 36, 38; 501 NW2d 189 (1993). Because defendant failed to avail herself of the opportunity in the trial court to factually support her claim that withdrawal of her plea was required in the interest of justice, we conclude that the trial court did not abuse its discretion in denying defendant's motion to withdraw her plea.

II

Next, defendant argues that she is entitled to resentencing because her increased sentence, after a successful appeal to this Court, was the result of vindictiveness. We disagree. Because defendant was resentenced by a different judge, a presumption of vindictiveness does not arise. *People v Mazzie*, 429 Mich 29, 33-34; 413 NW2d 1 (1987). The record indicates that the second trial court imposed a higher sentence, not because of vindictiveness, but because it viewed the evidence regarding the effect of defendant's fraud on the numerous individuals differently than the original sentencing court. *Id.*

III

The record does not support defendant's claim that her right to allocution was violated at resentencing. MCR 6.425(D)(2)(c); *People v Berry*, 409 Mich 774, 781; 298 NW2d 434 (1980). Moreover, as in *People v Grady*, 204 Mich App 314, 316; 514 NW2d 541 (1994), there is no indication that the sentencing court had decided upon a particular sentence before defendant's allocution.[2]

IV

Further, defendant's sentence does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). It is permissible for a sentencing court to depart upward from the sentencing guidelines' recommended minimum sentence on the basis of facts already considered in the guidelines' offense variables where those facts are not adequately reflected in the guidelines score. See, e.g., *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998). Also, the fact that a defendant does not have a prior criminal record does not preclude a sentencing

court from imposing the maximum possible sentence. *People v Granderson*, 212 Mich App 673, 681; 538 NW2d 471 (1995). Here, the record establishes that defendant defrauded hundreds of people of in excess of one-half million dollars, yet she received the same score under offense variables 8, 17, and 25 of the guidelines that she could have received had she only defrauded three or more persons for any substantial portion of her income exceeding $5,000. Under these circumstances, the sentencing court's upward departure from the sentencing guidelines was appropriate, and defendant's five-year minimum sentence, which is substantially less than the maximum permissible penalty, is not disproportionate.

V

Next, contrary to defendant's argument, the judgment of sentence provides that payment of restitution is a condition "of" parole, not a condition "for" parole. Cf. *People v Greenberg*, 176 Mich App 296, 310-311; 439 NW2d 336 (1989). Although the trial court's remarks at resentencing suggested that defendant had to pay restitution before being considered for parole, it is the terms of the judgment of sentence, not the trial court's remarks at resentencing, that are controlling. *People v Collier*, 105 Mich App 46, 52; 306 NW2d 387 (1981).

VI

Finally, defendant failed to preserve for appellate review the issue whether the sentencing court improperly considered the remarks of Mr. Ganton at resentencing. See generally, *People v Jonas*, 201 Mich App 449, 452; 506 NW2d 542 (1993) (a defendant ordinarily must object to alleged errors in the proceedings of a sentencing hearing to preserve the error for review). Even so, we note that Mr. Ganton's receipt of a refund does not affect his status as a "victim" as defined under the Crime Victim Rights Act. MCL 780.752(1)(j)(i); MSA 28.1287(752)(1)(j)(i). Moreover, even if Mr. Ganton were not considered to be a victim, the trial court was afforded broad discretion to consider his remarks at resentencing. *People v Albert*, 207 Mich App 73, 74; 523 NW2d 825 (1994).

Affirmed.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck

[1] This Court also ruled that the trial court erred by denying defendant her right to allocution at sentencing.

[2] This Court has already granted plaintiff's motion to strike the non-record exhibit that defendant cites in support of this claim.