

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD WISSERT,

Defendant-Appellant.

UNPUBLISHED

November 16, 2001

No. 220372

Wayne Circuit Court

LC No. 94-009846

Before: Doctoroff, P.J., and Saad and Wilder, JJ.

PER CURIAM.

This case is before us as on leave granted pursuant to a remand from the Supreme Court.¹ Defendant appeals from his conviction for second-degree murder, MCL 750.317, following a guilty plea. Defendant was sentenced to eight to twenty years in prison. We reverse and remand.

I. Facts and Proceedings

On February 28, 1996, defendant pleaded guilty to manslaughter, MCL 750.321, and agreed to testify truthfully in the trial of his codefendant, Andre Watts,² in exchange for the prosecution's promise to dismiss the charges of first-degree murder, MCL 750.316, two counts of assault with intent to commit murder, MCL 750.83, and one count of possession of a firearm during the commission of a felony, MCL 750.227b. The prosecution also agreed to recommend a sentence of three to fifteen years. In pleading guilty, defendant admitted that he gave Watts a gun with the knowledge that Watts was going to use the weapon.

Despite this admission, at Watts' trial, which took place before defendant's sentencing, defendant testified that he did not know Watts was going to use the gun when he gave it to him.

¹ *People v Wissert*, 460 Mich 855; 597 NW2d 1 (1999).

² Watts was convicted of second-degree murder, MCL 750.317, assault with intent commit murder, MCL 750.83, and felony-firearm, MCL 750.227b. This Court affirmed. *People v Watts*, unpublished opinion per curiam of the Court of Appeals, issued December 12, 1997 (Docket No. 195569). The Supreme Court denied Watts' application for leave to appeal. *People v Watts*, 459 Mich 869; 586 NW2d 89 (1998).

Based on this testimony, the trial court determined that defendant's trial testimony contradicted his previous testimony that he had knowledge Watts was going to use the weapon and also found that defendant's trial testimony indicated he was denying any culpability in the death of the victim. Thus, the trial court vacated defendant's guilty plea and set a date for trial.³

Nonetheless, in lieu of trial, defendant again entered into a plea agreement with the prosecution. However, instead of manslaughter, that agreement permitted defendant to plead guilty to one count of second-degree murder. In pleading guilty, defendant again informed the court that he gave the gun to Watts knowing that he was going to use it to shoot someone. The Court accepted defendant's plea and sentenced him to eight to twenty years in prison.

II. Analysis

On appeal, defendant argues that the trial court erred in vacating defendant's first guilty plea. Specifically, defendant contends that pursuant to MCR 6.310(B) and *People v Strong*, 213 Mich App 107, 107; 539 NW2d 736 (1995), a defendant must consent to a trial court's decision to sua sponte vacate a guilty plea. We agree. A trial court's decision to vacate a guilty plea is reviewed for an abuse of discretion. *Strong, supra* at 111-112.

In *Strong, supra*, the trial court sua sponte vacated the defendant's guilty plea before he was sentenced because the defendant testified that he never committed the crime to which he was pleading guilty. *Id.* at 109-110. This Court held that the trial court abused its discretion by sua sponte vacating the defendant's guilty plea without his consent. *Id.* at 112-113. In so holding, this Court stated:

On its face, MCR 6.310 allows a trial court to set aside an accepted plea only where (1) a motion to withdraw the plea is brought by the defendant; (2) *the court on its own motion and with the consent of the defendant sets aside the plea*; or (3) a motion to vacate the plea is brought by the prosecution on the ground that the defendant has violated the terms of the plea agreement. The plain language of the court rule clearly limits the discretion of the trial court to vacate an accepted plea. The trial court may exercise its discretion to vacate an accepted plea only under the parameters of the court rule. [*Id.* (Emphasis added.)]

The Court then went on to state that "[n]otwithstanding a defendant's protestations of innocence, a trial court may not vacate sua sponte an accepted plea absent the defendant's consent." *Id.* at 112. Likewise, MCR 6.310(B) provides, in part:

(B) 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

³ While the record indicates that the trial court entered an order granting defendant's motion to withdraw his plea, the record does not indicate that defendant ever moved to withdraw his plea or that the prosecutor moved to vacate defendant's plea. As such, it appears to this court that the trial court sua sponte vacated defendant's plea.

would substantially prejudice the prosecutor because of reliance on the plea.
[Emphasis added.]

In response to defendant's argument, the prosecution argues that, because defendant violated the terms of the agreement, it had the right, pursuant to MCR 6.310(C),⁴ to withdraw from the plea agreement and move to vacate defendant's plea. While we agree the prosecutor had such rights under MCR 6.310(C), the record does not establish that the prosecution ever moved to vacate defendant's plea; as such, MCR 6.310(C) does not apply. Because the trial court sua sponte vacated defendant's plea after defendant testified at his codefendant's trial, the prosecutor never moved to vacate defendant's plea in accordance with MCR 6.310(C), and defendant never consented to the withdrawal of his plea as required by both *Strong* and MCR 6.310(B), the trial court abused its discretion in vacating defendant's accepted guilty plea. Therefore, we reverse defendant's conviction for second-degree murder and remand for reinstatement of the original plea and for sentencing.⁵ *Strong, supra* at 113.

In view of our disposition of this issue, we need not address defendant's remaining issues on appeal.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Henry William Saad
/s/ Kurtis T. Wilder

⁴ MCR 6.310(C) provides:

Vacation of Plea Before Sentence. On the prosecutor's motion, the court may vacate a plea before sentence is imposed if the defendant has failed to comply with the terms of a plea agreement.

⁵ We express no opinion whether the record would support an MCR 6.310(C) motion filed by the prosecutor to vacate defendant's plea.