

October 14, 2004

**STATE OF MICHIGAN**

**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELMORE GREENE,

Defendant-Appellant.

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UNPUBLISHED

October 14, 2004

No. 248175

Oakland Circuit Court

LC No. 02-182477-FH

Before: Griffin, P.J., and Saad and O'Connell, JJ.

PER CURIAM.

Defendant pled guilty to third-degree fleeing and eluding a police officer,<sup>1</sup> carrying a concealed weapon in a vehicle,<sup>2</sup> felon in possession of a firearm,<sup>3</sup> felonious assault,<sup>4</sup> possession of a loaded shotgun in a vehicle,<sup>5</sup> two counts of possession of a firearm during the commission of a felony (“felony-firearm”),<sup>6</sup> and operating a motor vehicle while license suspended or revoked.<sup>7</sup> Defendant appeals by delayed leave granted from the trial court’s order that denied defendant’s motions to withdraw his guilty plea, for a *Ginther*<sup>8</sup> hearing, and/or for resentencing, and we affirm.<sup>9</sup>

Defendant appeared before the trial court for the purpose of pleading guilty pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). The prosecutor erroneously informed

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<sup>1</sup> MCL 750.479a(3).

<sup>2</sup> MCL 750.227(2).

<sup>3</sup> MCL 750.224f.

<sup>4</sup> MCL 750.82.

<sup>5</sup> MCL 750.227c.

<sup>6</sup> MCL 750.227b.

<sup>7</sup> MCL 257.904(1)(a).

<sup>8</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

<sup>9</sup> This appeal is being decided without oral argument pursuant to MCR 7.214(E).

the trial court that the applicable statutory sentencing guidelines recommended a minimum term range of seven to twenty-eight months for third-degree fleeing and eluding a police officer, the most serious offense with which defendant was charged. The trial court said that it would follow the guidelines, and accepted defendant's plea of guilty of all charges.

The guidelines as calculated by the trial court recommended a minimum term range of twelve to thirty months for third-degree fleeing and eluding. The trial court sentenced defendant as a second habitual offender to terms of thirty months to seven and one-half years for third-degree fleeing and eluding a police officer, carrying a concealed weapon in a vehicle, felon in possession of a firearm, and felonious assault, twenty-four months to thirty-six months for possession of a shotgun in a vehicle, seventy-eight days for driving while license suspended or revoked, and two years for felony-firearm.

Defendant moved to withdraw his pleas or for resentencing, and for an evidentiary *Ginther* hearing. The trial court denied defendant's motions, and ruled that the sentences imposed were in accordance with the guidelines and did not violate the *Cobbs* agreement.

A guilty plea must be understanding, voluntary, and accurate. MCR 6.302(A)-(D). If a defendant pleads guilty in reliance upon the trial court's preliminary evaluation as to the appropriate sentence, he must be allowed to withdraw the plea if the trial court later determines that the actual sentence must exceed the preliminary evaluation. *Cobbs, supra* at 283. The question whether an actual sentence exceeded the trial court's preliminary evaluation is one of fact. We review a trial court's findings of fact for clear error. *People v Everard*, 225 Mich App 455, 458; 571 NW2d 536 (1997).

The decision to grant or deny a motion to withdraw a guilty plea after sentencing is within the discretion of the trial court. The trial court's decision will not be disturbed unless it constituted a clear abuse of discretion resulting in a miscarriage of justice. *People v Ovalle*, 222 Mich App 463, 465; 564 NW2d 147 (1997).

Defendant says that his trial counsel was ineffective for failing to notice that the prosecutor had improperly calculated the sentencing guideline score. To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *Id.* at 600. When ineffective assistance is claimed in the context of a plea, the pertinent issue is whether the defendant tendered the plea voluntarily and understandingly. *People v Swirles (After Remand)*, 218 Mich App 133, 138; 553 NW2d 357 (1996). Here, defendant pled guilty with the understanding that the trial court would sentence defendant in accordance with the sentencing guidelines. Moreover, defendant stated on the record that his plea was not in accordance with a plea bargain, and that no one had promised him anything in exchange for his plea. Accordingly, we hold that trial counsel's performance was not ineffective, and that the trial court properly denied defendant's motion for a *Ginther* hearing. See *Carbin, supra*; *Swirles, supra*.

Defendant argues that he was entitled to withdraw his pleas because the trial court did not comply with the *Cobbs* agreement. The trial court indicated that it would sentence defendant in accordance with the guidelines, and did so. The trial court calculated the recommended guidelines range at twelve to thirty months, and imposed sentence within range. Defendant did not object to the trial court's calculation of the guidelines, and did not assert that the minimum terms of thirty months violated the *Cobbs* agreement. He pleaded guilty with the understanding that he would be sentenced within the guidelines, and the sentences imposed by the trial court conformed to the *Cobbs* agreement. Accordingly, we hold that the trial court did not abuse its discretion when it denied defendant's motion to withdraw his pleas. *Ovalle, supra*. Defendant was not prejudiced because the trial court complied with its agreement to sentence him within the guidelines.

Affirmed.

/s/ Richard Allen Griffin

/s/ Henry William Saad

/s/ Peter D. O'Connell