

Court of Appeals, State of Michigan

ORDER

People of MI v Theodore Muttscheler

Docket No. 275411

LC No. 05-00913-FH

Donald S. Owens
Presiding Judge

Richard A. Bandstra

Alton T. Davis
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued January 29, 2008 is hereby VACATED. A new opinion is attached to this order.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

MAR 25 2008

Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE MUTTSCHALER,

Defendant-Appellant.

UNPUBLISHED

January 29, 2008

No. 275411

Baraga Circuit Court

LC No. 05-000913-FH

Before: Owens, P.J., and Bandstra and Davis, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from a circuit court order denying his motion to withdraw his guilty plea. We reverse and remand. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

A postjudgment motion to withdraw a guilty plea is reviewed for an abuse of discretion resulting in a miscarriage of justice. *People v Davidovich*, 238 Mich App 422, 425; 606 NW2d 387 (1999), *aff'd* 463 Mich 446 (2000). A defendant is entitled to withdraw a guilty plea “when it is established by evidence that a plea of guilty was induced by an unfulfilled promise of leniency made by a judge or a prosecutor.” *People v Walls*, 3 Mich App 279, 282; 142 NW2d 38 (1966). Where a defendant’s plea of guilty is induced by the prosecutor’s promise relating to sentencing and the court accepts such a plea, the terms of that agreement must be fulfilled. *People v Swirles*, 206 Mich App 416, 418-419; 522 NW2d 665 (1994); *People v Schluter*, 204 Mich App 60, 63; 514 NW2d 489 (1994). If the court determines that it cannot follow the recommendation, the court must then give the defendant the opportunity to withdraw his guilty plea. *People v Killebrew*, 416 Mich 189, 209-210; 330 NW2d 834 (1982).

Here, defendant pleaded guilty pursuant to a plea agreement whereby he would be sentenced within the guidelines. The guidelines set a minimum sentence range of 5 to 17 months. The trial court imposed a prison sentence of 12 to 30 months. Although the minimum sentence was within the guidelines range, because the upper limit of the minimum sentence range was 18 months or less, the trial court was required to impose an intermediate sanction “unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections.” MCL 769.34(4)(a). An intermediate sanction is “probation or any sanction, other than imprisonment in a state prison or state reformatory, that may lawfully be imposed.” MCL 769.31(b). It may include a variety of sanctions, including probation, jail time, a combination of the two, community service, or a fine.

MCL 769.31(b)(i)-(xv). An intermediate sanction does not include a prison sentence. *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002).

The trial court admittedly did not state any substantial and compelling reason for imposing an indeterminate prison sentence rather than an intermediate sanction. Because defendant's guidelines range was 5 to 17 months, and because the guidelines require an intermediate sanction, which does not include a prison term, when the upper end of the guidelines range is 18 months or less, the sentence imposed by the trial court was not within the guidelines and the trial court therefore abused its discretion when it denied defendant's motion to withdraw his guilty plea.

The trial court's reliance on *People v Weatherford*, 193 Mich App 115; 483 NW2d 924 (1992), was misplaced. That case addressed the issue of the location where a consecutive sentence of one year or less may be served, not whether a sentence of one year (or any other term) is within the guidelines. It appears that the trial court assumed that, had it imposed an intermediate sanction that included a jail term, then pursuant to *Weatherford*, defendant would have to serve that sentence in prison. Regardless of the merits of that assumption, the fact remains that the sentence actually imposed, an indeterminate prison sentence, was imposed in violation of the parties' agreement that defendant be sentenced within the guidelines. That is, an indeterminate sentence of 12 to 30 months is not within the guidelines when the minimum sentence range is 5 to 17 months because, in that instance, an intermediate sanction is required. Although an intermediate sanction could include a determinate jail sentence of no more than one year, it does not include an indeterminate prison sentence.

The general rule is "that where a trial court substantially fails to fulfill a plea agreement, a reviewing court has discretion to choose between vacating the plea or ordering specific performance, with the defendant's choice accorded considerable weight." *Schluter, supra* at 67. Because defendant has not expressed any preference on appeal and does not assert his innocence but complains only that the bargain was not fulfilled, specific performance is the proper remedy. *People v Nixten*, 183 Mich App 95, 99; 454 NW2d 160 (1990).

Accordingly, we remand for resentencing in accordance with the parties' plea agreement. If the trial court determines that it cannot follow the sentence agreement, it shall allow defendant to withdraw his guilty plea. *Killebrew, supra* at 209-210.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Richard A. Bandstra