# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 16, 2008 |
| v | No. 279731<br>Chippewa Circuit Court |
| FELIX JUNCO,<br><br>Defendant-Appellant. | LC No. 06-008313-FH |

Before: Servitto, P.J. and Donofrio and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right the sentence of two to ten years in prison imposed after his conviction of prisoner in possession of a weapon, MCL 800.283(4). Because the sentencing court provided defendant an opportunity to allocute and waiver of allocution was purposeful, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant cut his cellmate's face with a homemade weapon after the cellmate demanded sex and threatened defendant with a homemade weapon. Defendant claimed he was prevented from informing officers about the threat because of his cellmate's constant presence.

At sentencing, defendant stated that he had read the presentence report. A conversation followed between defendant and his counsel, some of which was recorded. The recorded portion contained defense counsel's question to the probation officer regarding whether a hold on defendant had been found from the United States Customs and Immigration Service. Thereafter, defense counsel waived defendant's right to make a statement to the trial court. Defendant made no documented statements following the conversation with his counsel. The trial court then sentenced defendant as a third habitual offender, MCL 769.11, to two to ten years in prison. The parties agreed that the trial court complied with MCR 6.425 for sentencing purposes.

We review de novo the interpretation of a court rule. *People v Petit*, 466 Mich 624, 627; 648 NW2d 193 (2002). A forfeited right may be reviewed for plain error, but the intentional relinquishment of a right constitutes a waiver that extinguishes the error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Defendant argues that he was not afforded a "reasonable opportunity" to advise the court of circumstances to consider prior to sentencing. Defendant did not preserve this issue below; however, relief is not warranted under any standard of review.

MCR 6.425(E)(1) provides in part:

> At sentencing, the court must, on the record:
>
> (a) determine that the defendant . . . ha[s] had an opportunity to read and discuss the presentence report,
>
> (b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule (E)(2),
>
> (c) give the defendant, the defendant's lawyer . . . an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence.

MCR 6.425 does not require a court to specifically ask a defendant if he has anything to say on his own behalf before sentencing. *Petit*, *supra* at 628, 633 (affirming the defendant's sentence where defense counsel stated there was nothing further when asked, although the defendant was not specifically asked). The trial court in *Petit* complied with the rule simply by asking if there was "anything further." *Id*. at 629. *Petit* overruled the previous interpretation of a former rule that required the court to specifically ask a defendant whether he wished to address the court prior to imposing sentence. *Id*. at 632-633 (overruling *People v Berry*, 409 Mich 774; 298 NW2d 434 (1980)). The *Petit* Court stated that the former rule required that a defendant must be provided a "reasonable opportunity" to allocute, whereas the current rule required only an "opportunity." *Id*. at 632.

It is uncontested that defendant stated on the record that he reviewed the presentence report prior to sentencing. MCR 6.425(E)(1)(a). Defendant had the opportunity to explain or challenge any information in the presentence report. MCR 6.425(E)(1)(b). At issue is whether defendant had the opportunity to advise the trial court of any circumstances he believed the trial court should have considered in imposing its sentence. MCR 6.425(E)(1)(c). Defendant argues that he must have been given a "reasonable chance." Defendant's argument is without merit, because it is directly contradictory to the decision in *Petit*.

Moreover, nothing on the record in this case suggests that defendant had something to say. Defendant had been involved in a discussion with his counsel about a hold from the United States Customs and Immigration Service. Defendant did not appear to make an attempt to say anything during that conversation or thereafter.

Defendant's claim of ineffective counsel is not properly before us because it was not set forth in his statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). In any event, this claim is without merit. Defense counsel waived defendant's right to allocute after conferring with defendant regarding an immigration matter. It is possible that counsel made a strategic decision to forego further comment to avoid having defendant make incriminating or prejudicial remarks. We do not second-guess counsel on matters of strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). The trial court did not deny defendant the right to allocute prior to sentencing. The trial court was required to do no more than provide an opportunity to address the court. Defendant's

claim that he was required to be presented with a reasonable opportunity fails under *Petit*, and MCR 6.425(E)(1)(c).

Affirmed.

/s/ Deborah A. Servitto
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood