STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 23, 2008
v	No. 281947 Macomb Circuit Court
JOSEPH THOMAS REINER, Defendant-Appellant.	LC No. 2006-004090-FH

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his plea-based convictions of second-degree home invasion, MCL 750.110a(3), and assault and battery, MCL 750.81.[1] We affirm defendant's plea-based convictions, but remand for resentencing consistent with this opinion. This appeal has been decided without oral argument. MCR 7.214(E).

Defendant first argues that his plea must be set aside because the trial court failed to advise him of the 15-year maximum sentence for the offense of second-degree home invasion at the time he entered his plea. When accepting defendant's guilty plea, the trial judge asked whether second-degree home invasion carried a maximum penalty of five years or ten years. Defense counsel replied that it had a maximum penalty of ten years. The prosecution did not correct counsel's error. However, both the sentencing information report and the presentence information report contained the correct maximum sentence information for the charge.

Because defendant did not move to withdraw his plea before the trial court, raising this issue as a basis for withdrawal, he cannot now raise it on appeal. Pursuant to MCR 6.310(D):

> A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one,

[1] In return for his plea, a charge of first-degree home invasion, MCL 750.110a(2), was dismissed. The prosecution also agreed not to seek enhanced sentencing under the habitual offender statute, MCL 769.10.

> unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

Thus, apart from any consideration of trial counsel's exacerbation of the error below,[2] defendant is entitled to no appellate relief on his claim that the trial court failed to comply with MCR 6.302(B)(2). MCR 6.310(D).

Defendant also argues that his plea agreement was illusory because he could not have been successfully prosecuted for first-degree home invasion. MCL 750.110a(2) provides in pertinent part:

> A person who breaks and enters a dwelling with intent to commit a felony, larceny, or assault in the dwelling, a person who enters a dwelling without permission with intent to commit a felony, larceny, or assault in the dwelling, or a person who breaks and enters a dwelling or enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:
>
> (a) The person is armed with a dangerous weapon.
>
> (b) Another person is lawfully present in the dwelling.

A "'[d]welling' means a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter." MCL 750.110a(1)(a). At the plea hearing, defendant stated that he was leaving the victims' home with the victims' belongings when the one of the victims, who had pulled into the driveway, grabbed him. Defendant then pushed the victim and drove away. Defendant now maintains that these facts were insufficient to satisfy the elements of first-degree home invasion, and thus that he received an illusory benefit by pleading to a lesser charge.

A defendant may be entitled to withdraw a guilty plea if the bargain on which the plea was based was illusory—i.e., if the defendant received no benefit from the agreement. *People v Harris*, 224 Mich App 130, 132; 568 NW2d 149 (1997). "'One instance where this Court has found a plea to be illusory is where a defendant is improperly charged with a greater offense and the defendant pleads guilty of a lesser offense to avoid conviction of the greater.'" *People v Graves*, 207 Mich App 217, 218-219; 523 NW2d 876 (1994), quoting *People v Gonzalez*, 197

[2] In any event, defendant is precluded from relief on the additional grounds that the court relied on defense counsel's assertion during the plea proceedings that the maximum possible penalty for second-degree home invasion was ten years and that defense counsel affirmatively indicated that he was satisfied with the plea proceedings. Counsel cannot harbor error as an appellate parachute. *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991); see also *People v Herron*, 464 Mich 593, 606 n 8; 628 NW2d 528 (2001). We note that defendant does not raise any claim that defense counsel was ineffective.

Mich App 385, 391; 496 NW2d 312 (1992). Under such a circumstance a plea is not made understandingly and voluntarily. *Graves, supra* at 220. "However, where the facts in a case indicate that a plea is voluntary, the plea will be upheld regardless of whether the defendant received consideration in return." *Harris, supra* at 132-133.

In the instant case, defendant has not shown that he is entitled to relief on the ground that his plea was illusory and thus involuntary. First, pursuant to MCR 6.310(D), defendant cannot now claim his plea was involuntary. In addition, we note that defendant waived his preliminary examination, and concurrent probable cause hearing. This essentially precluded the prosecution from introducing evidence to support the first-degree home invasion charge at that time. Defendant's plea, and failure to raise this issue below, made it unnecessary for the trial court to make any further inquiry into the circumstances of the home invasion with an eye toward establishing the elements of the greater offense. And defendant's claim that his admissions during the plea proceeding were insufficient to establish a factual basis for first-degree home invasion is immaterial because defendant was not pleading guilty to this greater charge.

Nor was defendant's plea rendered illusory or involuntary by the trial court's consideration of defendant's prior assignments under the Holmes Youthful Trainee Act (HYTA). This is because defendant received other, independent benefits for his plea—i.e., dismissal of a charge of first-degree home invasion, MCL 750.110a(2), and an agreement by the prosecution not to seek enhanced sentencing under the habitual offender statute, MCL 769.10. See *People v Taylor*, 418 Mich 954 (1984), adopting *People v Taylor*, 124 Mich App 426, 431; 335 NW2d 208 (1983) (KAUFMAN J., dissenting).

But this is not to say that the trial court did not otherwise err by considering defendant's prior assignments under the HYTA at the time of sentencing. It is true, as the prosecution points out, that defendant has not properly appealed the scoring of the sentencing guidelines in this case. He has alleged no error with respect to the scoring of the prior record variables (PRVs) in his statement of the questions presented, MCR 7.212(C)(5); *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008), and has only cursorily suggested, without adequate briefing or proper citation to authority, MCR 7.212(C)(7); *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), that PRV 1 was misscored. Nonetheless, we may overlook a defendant's improper presentation of his claims of error in order to address a significant issue or to correct an error of law. See *People v Kennan*, 275 Mich 452, 454; 266 NW 468 (1936); see also *Health Care Ass'n Workers Comp Fund v Dep't of Consumer & Industry Services*, 265 Mich App 236, 243; 694 NW2d 761 (2005).

"An assignment to youthful trainee status under the HYTA is not to be construed as a conviction." *People v Garner*, 215 Mich App 218, 220; 544 NW2d 478 (1996); see also MCL 762.14(2). Accordingly, an assignment to youthful trainee status under the HYTA may not be "considered as a 'conviction' in scoring the guidelines for PRV 1." *Garner*, *supra* at 220. It appears as though the trial court considered defendant's previous HYTA assignments when scoring 75 points for PRV 1 in this case. This constituted an error of law. Because a sentence is invalid if based on "a tangible legal or procedural error," *People v Wybrecht*, 222 Mich App 160, 167; 564 NW2d 903 (1997), and because a lower score for PRV 1 would have placed defendant within a lower recommended minimum sentencing range under the legislative guidelines, MCL 777.64, we must remand for resentencing. On remand, the trial court shall recalculate

defendant's score for PRV 1 without considering any prior assignments to youthful trainee status under the HYTA. *Garner*, *supra* at 220.

Defendant's plea was not involuntary or illusory. However, the trial court improperly considered defendant's prior HYTA assignments when scoring the sentencing guidelines in this case.

We affirm defendant's plea-based convictions, but remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Patrick M. Meter