STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 7, 2009
v	No. 285402 Oakland Circuit Court
BERNARD WILLIAM KADE, Defendant-Appellant.	LC No. 2007-215779-FH

Before: O'Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals by leave granted his guilty-plea convictions of third-degree fleeing and alluding, MCL 257.602a(3)(a), and driving while license suspended, second offense, MCL 257.904(3)(b). Defendant was sentenced as a third habitual offender, MCL 769.11, to 30 to 120 months' imprisonment for the fleeing and alluding conviction and 144 days in jail for the driving while license suspended conviction. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that, because he was unaware that he was going to be sentenced as an habitual offender when he entered his pleas, the plea was not valid and should be vacated. Defendant entered his plea on July 31, 2007, at his arraignment, and the prosecution filed the habitual offender enhancement on August 2, 2007, as permitted by MCL 769.13(1) and (3).

When a motion to withdraw a plea is made following sentencing, the decision to grant the motion rests within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion that resulted in a miscarriage of justice. *People v Boatman*, 273 Mich App 405, 406-407; 730 NW2d 251 (2007). The procedures governing the acceptance of a guilty plea are set forth in MCR 6.302. MCR 6.302(A) states that the trial court cannot accept a guilty plea unless the plea was made with understanding, voluntarily, and accurately. MCR 6.302(B)(2) provides:

> **(B) An Understanding Plea.** Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:
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> * * *

(2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law[.]

This court rule has been interpreted to mean that a defendant must be advised of the consequences of a plea, but that requirement has not been extended beyond informing the defendant of the maximum possible sentence and any mandatory minimum sentence applicable to the charged offense. *People v Johnson*, 413 Mich 487, 490; 320 NW2d 876 (1982); *Boatman*, *supra* at 408. The habitual offender statue does not create a substantive offense separate from and independent of the underlying principal offense. *People v Oswald (After Remand)*, 188 Mich App 1, 12; 469 NW2d 306 (1991). Accordingly, the specific argument defendant raises here has been rejected in *Boatman*; MCR 6.302(B)(2) "does not encompass a specific requirement to inform an habitual offender regarding the effect this status has on sentencing." *Boatman*, *supra* at 409.

Defendant points out that, notwithstanding this ruling, the *Boatman* panel vacated the defendant's plea to support his claim that the trial court's failure to inform him that he would be sentenced as a habitual offender deprived him of the opportunity to make an intelligent plea. However, the *Boatman* panel did not vacate the defendant's plea because of the trial court's failure to comply with MCR 6.302(B)(2), the argument defendant raises here. Instead, the *Boatman* panel noted that the defendant's guilty plea arose out of an agreement between him, his attorney and the prosecutor's office whereby the prosecutor would recommend that the court impose a sentence within the guidelines. *Id*. at 410. Because the lower court record also indicated that there was confusion as to "which guidelines [were] being agreed to," the *Boatman* panel reasoned that the defendant was not properly "informed of the nature and consequences of his . . . bargain." *Id*. at 412. Defendant cannot rely on this logic in seeking relief here as the record amply demonstrates that his plea was not the result of any sentencing agreement whatsoever, much less one that was misunderstood or confusing.

In sum, defendant pleaded guilty to third-degree fleeing and alluding and operating a motor vehicle on a suspended license, second offense. The trial court informed defendant of the minimum and maximum sentences for both charges as required by MCR 6.302(B)(2). *Johnson*, *supra* at 490; *Boatman*, *supra* at 408. The trial court thus complied with MCR 6.302(B)(2), and, accordingly, the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea.

Defendant next argues that the trial court should not have scored prior record variable (PRV) 5 at ten points for three prior misdemeanor convictions because he did not have the benefit of counsel at the time of those convictions. Defendant argues that he had the right to counsel for these misdemeanor convictions because he received a suspended or a probated sentence. This Court reviews a trial court's factual findings at sentencing for clear error. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). This Court reviews a trial court's decision to impose an increased sentence pursuant to the habitual offender act for an abuse of discretion. *Id*.; *People v Reynolds*, 240 Mich App 250, 252; 611 NW2d 316 (2000).

The federal and state constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. Convictions obtained in violation of the constitutional right to counsel may not be used to enhance a criminal sentence. *United States v Tucker*, 404 US 443, 449; 92 S Ct 589; 30 L Ed 2d 592 (1972),

quoting *Burgett v Texas*, 389 US 109, 115; 88 S Ct 258; 19 L Ed 319 (1967). However, in *People v Reichenbach*, 459 Mich 109, 120; 587 NW2d 1 (1998), our Supreme Court held that, "under both the federal and state constitutions, a defendant accused of a misdemeanor is entitled to appointed trial counsel only if 'actually imprisoned.'" The Court further held that lawful uncounseled prior misdemeanor convictions can be used for sentence enhancement purposes. *Id*. at 124.

Because there is no evidence that defendant was actually imprisoned, and defendant does not claim that he was actually imprisoned for the three misdemeanor convictions on which the trial court based the PRV 5 scoring of ten points, defendant's sentence enhancement was valid, and he is not entitled to resentencing on this basis.

Defendant also argues that his trial counsel provided ineffective assistance. He first contends that counsel was ineffective because counsel failed to object to defendant's misdemeanor convictions, which he accrued without the benefit of counsel, being used to score PRV 5 at ten points. 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 and that there was a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). As discussed above, PRV 5 was properly scored based on the misdemeanor convictions because defendant was not actually imprisoned and thus, was not entitled to counsel. Counsel is not required to advocate a meritless position. *Mack*, *supra* at 130. Accordingly, this argument is without merit.

Finally, defendant argues that his trial counsel was ineffective because he failed to object to the enhancement of defendant's sentence as a habitual offender when his prior operating while intoxicated (OUIL), third offense conviction was already an enhanced charge. Defendant offers no support for this argument other than stating that his 1999 conviction had "no business being a felony." A defendant cannot simply announce a position or assert an error and leave it up to this Court to do his research and develop his arguments and then accept or reject his position. *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984). Moreover, defendant's argument is without merit. The Supreme Court has ruled that OUIL convictions that have become felonies because of previous OUIL convictions pursuant to MCL 256.625(7)(a)(ii) can be further enhanced under the habitual offender statute. *People v Bewersdorf*, 438 Mich 55, 70; 475 NW2d 231 (1991). As such, defendant's sentence was properly enhanced.

We affirm.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio