

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN EUGENE STEWART,

Defendant-Appellant.

UNPUBLISHED

October 5, 2010

No. 292609

Lapeer Circuit Court

LC Nos. 08-009518-FH

07-009517-FH

Before: GLEICHER, P.J., and ZAHRA and K. F. KELLY, JJ.

PER CURIAM.

On his plea, defendant was convicted of one count of assault with intent to do great bodily harm less than murder, MCL 750.84 (LC No. 08-009518-FH), and one count of domestic violence, third offense, MCL 750.81(4) (LC No. 08-009517-FH). A plea bargain in the case resulted in the dismissal of charges for first-degree home invasion, aggravated assault and dismissal of two fourth-offender charges. Defendant was sentenced to concurrent terms of five to ten years' and one to two years' imprisonment, respectively. Defendant appeals by delayed leave granted.¹ We affirm.²

Defendant's argument on appeal is that the trial court erred by denying his motion to withdraw his guilty plea before sentencing. He contends that his plea was not voluntarily made because counsel rendered ineffective assistance in advising defendant regarding the minimum sentence he would receive. He asserts that had he known of the erroneous scoring, he would not have entered his plea.³ We disagree. We review a trial court's denial of a defendant's motion to

¹ *People v Stewart*, unpublished order of the Court of Appeals, issued September 1, 2009 (Docket No. 292609).

² This appeal has been decided without oral argument pursuant to MCR 7.214(E).

³ Defendant did not raise this argument as a basis for withdrawing his plea before the trial court despite the fact that defendant knew defense counsel had erred in preliminarily scoring the guidelines. Rather, the basis for withdrawing his plea was a claim of innocence. Thus, defendant's argument is unpreserved. However, this Court may consider this unpreserved argument since all the facts necessary to its resolution have been presented. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006).

withdraw a guilty plea for an abuse of discretion. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997). Further, “[t]o establish ineffective assistance of counsel, a defendant must show that counsel’s performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). However, whether a defendant should be permitted to withdraw a guilty plea on the basis that he was denied effective assistance of counsel depends, not on whether counsel’s advice was right or wrong, but on whether the defendant tendered the plea voluntarily. *Id.* at 70.

Once a trial court accepts a defendant’s guilty plea or a plea of nolo contendere, the defendant has no absolute right to withdraw it. *People v Eloby (After Remand)*, 215 Mich App 472, 474-475; 547 NW2d 48 (1996). However, if a defendant moves to withdraw his plea, he must establish a fair and just reason that would justify the plea’s withdrawal. *Harris*, 224 Mich App at 131. Examples of fair and just reasons for withdrawal include: (1) when the plea resulted from fraud, duress, or coercion, *People v Gomer*, 206 Mich App 55, 58; 520 NW2d 360 (1994); (2) when the plea involved erroneous legal advice coupled with actual prejudice to legal rights, see *People v Jackson*, 417 Mich 243, 246; 334 NW2d 371 (1983); or (3) when the bargain on which the plea was based was illusory, i.e., the defendant received no benefit from the bargain, *Harris*, 224 Mich App at 132. If the facts of the case indicate that the plea was voluntary, it will be upheld regardless whether the defendant received consideration in return. *Id.* at 132-133.

Here, defendant has failed to establish a fair or just reason that would justify withdrawal of his plea. A review of the record reveals that his plea was voluntarily given. During the plea proceeding, the trial court informed defendant of the maximum penalties for both offenses and defendant affirmed that he understood this information. Defendant signed an advice of rights form, acknowledging that he was waiving his rights by entering the plea. Defendant also indicated during the plea proceedings that no promises of leniency, or other promises, were made to induce his plea and also that he had not been threatened into entering into the plea. Significantly, defendant did not expressly condition his plea on a sentence within the guidelines, much less an assertion that the preliminary guideline scoring was correct. Moreover, defendant received a substantial benefit from entering into the plea bargain: His other charges were dismissed, including the habitual offender notices. Given the foregoing, defendant has not shown that he entered into the plea involuntarily or unknowingly, or that the basis for the plea was illusory.

Further, the fact that defense counsel incorrectly informed defendant of the minimum sentence on the charge of assault with intent to do great bodily harm less than murder does not provide a basis to withdraw the plea. Counsel’s preliminary calculation of the sentencing guidelines was correct as to the maximum sentence, but approximately ten months lower than the maximum minimum sentence ultimately calculated by the department of corrections (DOC).⁴

⁴ Defense counsel calculated defendant’s minimum guideline range to be 29 to 57 months, whereas the DOC computed defendant’s minimum guideline range to be 34 to 67 months. Ultimately, the trial court sentenced defendant to a minimum sentence of five years or 60 months. Thus, defendant was sentenced to three more months than he could have been had
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However, no evidence of record indicates that defendant relied on this incorrect information when he voluntarily decided to enter into the plea agreement.⁵ As noted, defendant did not expressly condition his plea on a sentence within the guidelines or an assertion that counsel's preliminary guideline scoring be applied. Defendant's mere dissatisfaction with his sentence is not grounds for withdrawal of his plea. *People v Haynes (After Remand)*, 221 Mich App 551, 559; 562 NW2d 241 (1997) ("[C]ounsel's incorrect prediction concerning a defendant's sentence . . . is not enough to support a claim of ineffective assistance of counsel."). Thus, the trial court did not abuse its discretion by denying defendant's motion to withdraw his plea.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly

(...continued)

defense counsel's calculation been correct. Nonetheless, the trial court had the discretion to sentence defendant to a lesser term within the guideline range, which would have comported with defense counsel's erroneous calculation, but it chose not to.

⁵ In fact, both defendant and the court knew of the error before sentencing, but, as noted, defendant did not decide to raise the matter as a basis to withdraw the plea.