STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 7, 2010
v	No. 291637 Ingham Circuit Court
GARY SANDER GUTMAN, Defendant-Appellant.	LC No. 08-000492-FC

Before: BORRELLO, P.J., and JANSEN and BANDSTRA, JJ.

PER CURIAM.

Defendant appeals by leave granted his guilty-plea convictions of three counts of first-degree criminal sexual conduct (sexual penetration with person under age thirteen), MCL 750.520b(1)(a), for which he was sentenced to serve three concurrent terms of 120 to 540 months' imprisonment with 370 days' credit. We remand to give defendant an opportunity to withdraw his pleas.

Defendant claims he pleaded guilty based on his counsel's statement that the court would impose "flat" sentences of 72 to 120 months' imprisonment, i.e., that his minimum sentence would be 72 months, and his maximum sentence would be 120 months.[1] Defendant preserved this issue because his attorney moved to allow defendant to withdraw his guilty pleas immediately after sentence was imposed, citing *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982), and claiming that defendant and counsel understood that the sentences were to be specific terms of 72 to 120 months' imprisonment. MCR 6.310(D).

[1] Defendant has submitted a personal affidavit in support of this claim with his application and with his brief on appeal. He has not submitted an affidavit from his trial counsel. The affidavit was not first submitted to the trial court and made part of the record. Therefore, it is not properly considered on appeal, *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992). However, it is consistent with defense counsel's statements at sentencing, and it does at least represent the expected testimony defendant would provide at an evidentiary hearing. Defendant acknowledges on appeal that the term "flat sentence" is not found in the record of the plea proceedings, and defendant further concedes "that nothing stated on the record at the time of the plea by the court or the prosecution would establish their intent to agree to be bound by a flat sentence."

"There is no absolute right to withdraw a guilty plea once it has been accepted." *People v Gomer*, 206 Mich App 55, 56; 520 NW2d 360 (1994), citing *People v Sanders*, 112 Mich App 585, 586; 316 NW2d 266 (1982). This Court reviews a trial court's decision regarding a post-sentencing motion to withdraw a guilty plea for an abuse of discretion resulting in a miscarriage of justice. *People v Ovalle*, 222 Mich App 463, 465; 564 NW2d 147 (1997). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [a] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); see also, *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007), citing *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006), quoting *Babcock*, 469 Mich at 269.

Defendant moved to withdraw his guilty pleas immediately after the court pronounced sentence.[2] A motion to withdraw a guilty plea after sentencing is governed by MCR 6.310(C), which provides:

> The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea to stand, the additional advice given and inquires made become part of the plea proceeding for the purposes of further proceedings, including appeals.

The trial court did not follow the procedure outlined in MCR 6.310(C); rather, the court simply indicated that its understanding of the plea agreement was different than defense counsel's, and it ascertained that the prosecutor did not agree with defense counsel's perception of the agreement.

MCR 6.302(C) details the requirements for ensuring that a guilty plea is voluntarily made. The court rule provides in relevant part:

> (1) The court must ask the prosecutor and the defendant's lawyer whether they have made a plea agreement.
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> (2) If there is a plea agreement, the court must ask the prosecutor or the defendant's lawyer what the terms of the agreement are and confirm the terms of the agreement with the other lawyer and the defendant.

[2] Defendant's counsel did not specifically ask to withdraw the pleas, but instead stated, "we would like to bring up pursuant to People versus Killibrew [sic], because the guidelines were greater than what was agreed to, I believe he would like to go to trial." This Court considers this to be a request by defendant to withdraw his guilty pleas.

> (3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a specific sentence disposition or a prosecutorial sentence recommendation, the court may
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> (a) reject the agreement; or
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> (b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to or recommended by the prosecutor; or
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> (c) accept the agreement without having considered the presentence report; or
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> (d) take the plea agreement under advisement.
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> If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow the sentence disposition or recommendation agreed to by the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement.

The trial court asked the parties if there was a plea agreement, so the court complied with MCR 6.302(C)(1). The prosecutor responded that there was and explained that the parties had "stipulated pursuant to People versus Killibrew [sic] to a guidelines range of 72 months through 120 months" based on the sentencing guidelines that "went into effect on March 1st of 1984." The prosecutor did not specifically indicate that use of this guidelines range required any particular sentence, or even that the parties were agreeing that the court should confine its minimum sentence within the stipulated range. The prosecutor's reference to *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982), gives the only hint that there was a particular sentence or sentencing range contemplated.

Pursuant to MCR 6.302(C)(2), the court asked defendant's counsel if the prosecutor's statements were correct. Defendant's counsel agreed that the parties were stipulating to the use of the 1984 guidelines, but then he added: "we want to make sure . . . that the minimum is 72 and the maximum 120." Defendant contends that the prosecutor and the court should have been put on notice by this statement that defendant and defense counsel believed the agreement called for specific sentences of 72 to 120 months' imprisonment. The court's response to defense counsel's statement was, "Right. It's within the guidelines," and defense counsel responded to the court by agreeing, "That's correct, Your Honor." Neither of these statements resolved the ambiguity, and, viewed from their own perspectives, each statement was consistent with their respective misunderstandings. The court then asked defendant if he understood the plea agreement, and defendant replied that he did. Defendant further agreed with the court that "the statement by the prosecutor and [his counsel was] complete and correct." Notably, however, the court's cursory compliance with the requirements of MCR 6.302(C)(2) did not resolve the underlying ambiguities.

Defense counsel's statement that he wanted to make sure "that the minimum is 72 and the maximum 120" could be interpreted two different ways: it could indicate, as the prosecutor and

the court apparently believed, that the minimum sentences were to be somewhere within this "minimum" and "maximum," or it could indicate, as defendant and his counsel evidently believed, that the guidelines range itself was to constitute the sentences, with the minimums being 72 months and the maximums being 120 months. Because this ambiguity was not resolved, it was natural for defendant to agree with the court's general questions whether he understood the plea agreement and whether the statement of the agreement by the prosecutor and his counsel was "complete and correct."

The plea-taking procedure was therefore defective because the court failed to "confirm the (sentencing) terms of the agreement with . . . the defendant." MCR 6.302(C)(2). Notwithstanding the understanding that the court, the prosecutor or defense counsel may have had, the record contains no attempt by the court, or anyone else, to explain to defendant that the "72 to 120" language set the parameters of the minimum sentence to be imposed, rather than establishing the minimum sentence and the maximum sentence to be imposed. By failing to even consider this issue, the trial court also failed to comply with the plea-withdrawal procedure. MCR 6.310(C).

As we have indicated, the standard governing a trial court's decision concerning a motion to withdraw a guilty plea provides that to overturn the decision there must be an abuse of discretion resulting in a miscarriage of justice. *Ovalle*, 222 Mich App at 465. Although the phrase "miscarriage of justice" is invariably combined with the abuse of discretion standard, it has not been defined with any precision.[3] In fact, a miscarriage of justice is generally determined in the negative, that is, by the court's conclusory determination that no miscarriage of justice has been shown, see e.g. *People v Ward*, 459 Mich 602, 614; 594 NW2d 47, amended 460 Mich 1204 (1999) ("No miscarriage of justice would result here by rejecting defendant's motion to withdraw the guilty plea. Defendant has never claimed factual innocence, and the principal motivation behind the motion is plainly extrication from the sentencing implications of OUIL

[3] The prosecutor correctly observes that our Supreme Court, in *People v Mauch*, 397 Mich 646, 658-659 n 5; 247 NW2d 5 (1976), presented a list of circumstances that might constitute a miscarriage of justice in the context of a plea-based conviction: (1) "where there was no attempt to ascertain that a crime was committed and that the defendant committed it," (2) "where subsequent evidence strongly suggested defendant's innocence," (3) "where the trial court threatened defendant with a stiffer sentence if he refused to plead guilty and thereby waive error committed at his prior trial which resulted in a verdict of guilty," (4) "where defendant had been adjudicated insane at the time of his guilty plea," (5) "where the plea record indicated that defendant asserted his innocence but was misled by the court and thus was induced to enter a guilty plea," or (6) "where the defendant was young, had no prior experience with the courts, did not personally plead guilty but allowed his attorney to speak for him, under circumstances that established an 'obvious inducement' for the guilty plea." The prosecutor contends that "[t]he common theme that permeates these scenarios is that the surrounding circumstances undermined the reliability of the plea as an adjudication of guilt." However, given the age of the *Mauch* decision—before sentence bargaining was recognized and permitted by our Supreme Court—and given that the list is clearly not meant to be exclusive or exhaustive, this Court concludes that, while instructive, the *Mauch* decision does not control the determination in this sentence-bargain case of whether a miscarriage of justice occurred.

3d"), or no specific determination is made at all, the reviewing court being satisfied to find that there was no abuse of discretion, see e.g. *People v Rettelle*, 173 Mich App 196, 201; 433 NW2d 401 (1988) ("Therefore, the trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty pleas"); *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996) ("Under the circumstances of this case, the trial court did not abuse its discretion in denying defendant's motion to withdraw his plea")[4].

Given our holding that defendant is entitled to withdraw his pleas because of his misperception of the sentences to be imposed, we need not address his alternative claim that he should be allowed to withdraw the pleas because he was denied the effective assistance of trial counsel.

In summary, we conclude that the trial court abused its discretion and that this abuse resulted in a miscarriage of justice. Defendant pleaded guilty in reliance on a specific sentence bargain that was the apparent result of a mutual mistake of the prosecutor, defense counsel, and the trial court, and which defendant therefore could never have received. We therefore remand this case to give defendant the opportunity to withdraw (or to confirm) his guilty pleas. MCR 6.310(C).

We remand to give defendant an opportunity to withdraw his pleas. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Richard A. Bandstra

[4] Notably, the *Eloby* Court found there was no abuse of discretion by the trial court, but largely because, although there was a mutual mistake by the prosecutor and defense counsel regarding the sentencing guidelines (and therefore the potential sentence the defendant could be subject to), the court offered the defendant the option of withdrawing his plea, and the defendant declined. 215 Mich App at 475-476. Obviously, in this case there appears to have been a mutual mistake, but defendant was never offered the option to withdraw his pleas; indeed, he requested that option and it was denied.