

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 16, 2010

v

KARL NICO GILBERT,

No. 293930
Wayne Circuit Court
LC No. 08-016194-FJ

Defendant-Appellant.

Before: M. J. KELLY, P.J., and K. F. KELLY and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his plea-based convictions of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Because we conclude that there were no errors warranting relief, we affirm. We have decided this appeal without oral argument under MCR 7.214(E).

In January 2009, defendant pleaded guilty to armed robbery and felony-firearm in exchange for dismissal of a second charge of armed robbery. The plea agreement also included a sentence agreement of seven to 20 years for armed robbery, plus two years for felony-firearm. As a factual predicate for the plea, defendant testified that he and another individual, who was armed with a firearm, approached a woman, the other person pointed a gun at the woman, and the pair obtained property from the woman.

The trial court sentenced defendant under the plea agreement. Defendant then moved to withdraw his guilty plea on the ground that it was not intelligent, voluntary, and understanding, because it was entered without knowledge of the appropriate sentencing guidelines. Defendant also maintained that his trial counsel was ineffective. Specifically, he argued that his trial counsel's decision to waive the preliminary examination and his failure to allocute during sentencing fell below an objective standard of reasonableness under prevailing professional norms. After a hearing, the trial court denied defendant's motion. This Court subsequently granted defendant's delayed application for leave to appeal.

Defendant first argues that his plea was not knowing, voluntary, and intelligent where neither the trial court nor defense counsel informed him about the sentencing guidelines for his offense. We review a trial court's denial of a defendant's motion to withdraw a guilty plea for an abuse of discretion. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997). A trial court abuses its discretion when it selects an outcome that falls outside the range of principled outcomes. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

There is no absolute right to withdraw an accepted guilty plea. *People v Gomer*, 206 Mich App 55, 56; 520 NW2d 360 (1994). And the burden is on the defendant to establish a basis for withdrawing the plea. *Harris*, 224 Mich App at 131; see also MCR 6.310(C). "Further, requests to withdraw pleas are generally regarded as frivolous where the circumstances indicate that the defendant's true motivation for moving to withdraw is a concern regarding sentencing." *People v Haynes*, 221 Mich App 551, 559; 562 NW2d 241 (1997).

The procedures governing the acceptance of a guilty plea are currently set forth in MCR 6.302. MCR 6.302(A) provides:

[t]he court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out subrules (B)-(E).

The procedures required under MCR 6.302(B) to (E) are designed to allow a court to determine whether the plea is understanding, voluntary, and accurate:

Under MCR 6.302(B), which relates to an understanding plea, the court must speak directly to the defendant and determine that he or she understands the name of the offense and the maximum possible prison sentence, the trial rights being waived, and loss of the right to appeal. Pursuant to MCR 6.302(C), which relates to a voluntary plea, the court must make inquiries regarding the existence and details of any plea agreements and whether the defendant was promised anything beyond what was in the agreement, if any, or otherwise. The court must also ask the defendant whether he or she had been threatened and if the plea was his or her choice. MCR 6.302(D), which relates to an accurate plea, requires the court to establish a factual basis for a guilty plea and state why a plea of nolo contendere is appropriate. Finally, under MCR 6.302(E), the court must make additional inquiries, including whether the prosecutor and defense counsel are "aware of any promises, threats, or inducements other than those already disclosed on the record, and whether the court has complied with subrules (B)-(D)." [*People v Plumaj*, 284 Mich App 645, 648 n 2; 773 NW2d 763 (2009).]

The trial court complied with the requirements of MCR 6.302. Defendant argues that his plea was nevertheless invalid because he was not informed of the guidelines for his offense. However, defendant has produced nothing, including his own affidavit or one from his trial counsel, to show this to be the case. Moreover, the trial court correctly noted that MCR 6.302 does not contain a requirement that a defendant be informed of the sentencing guidelines.

Defendant has not shown an error in the plea proceeding that would entitle him to have the plea set aside.

Defendant next argues that his trial counsel rendered ineffective assistance by waiving a preliminary examination and by failing to allocute for leniency during sentencing.

Because there was no evidentiary hearing below, this Court's review of defendant's ineffective assistance claim is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). A claim of ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact, if any, for clear error, and review de novo the constitutional issue arising from the claim. *Id.* To establish ineffective assistance of counsel, the defendant must show that his or her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the error, the result of the proceedings would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

Defendant argues that his counsel rendered ineffective assistance by waiving a preliminary examination. However, as noted by the trial court, defendant signed the waiver of the preliminary examination. Defendant has presented nothing to suggest that he did not freely and knowingly elect to waive the preliminary examination. A defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). He has not done so here. In addition, this Court has held that a defendant's guilty plea acts as a waiver of a claim of ineffective assistance where the issue relates solely to the state's capacity to prove factual guilt. *People v Vonins (After Remand)*, 203 Mich App 173, 175; 511 NW2d 706 (1993). Defendant has not shown that he is entitled to relief based on his waiver of the preliminary examination.

Defendant also argues that counsel rendered ineffective assistance by failing to allocute at sentencing. However, defendant cannot show that counsel's actions were objectively unreasonable where defendant and the prosecution had already agreed to a specific sentence. Nor can defendant show outcome determinative prejudice because he cannot show that, had counsel requested leniency, the trial court would have imposed a lesser sentence notwithstanding the sentencing agreement.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello