STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2016
v	No. 328285 Berrien Circuit Court
MARY ALICE FAHER, Defendant-Appellant.	LC No. 2014-007836-FH

Before: K. F. KELLY, P.J., and O'CONNELL and BOONSTRA, JJ.

PER CURIAM.

Defendant pleaded *nolo contendre* to four counts of securities fraud, MCL 451.2501. The trial court sentenced her to 23 months' to 10 years' imprisonment. Defendant filed a delayed application for leave to appeal her sentence, which this Court granted.[1] We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

The parties stipulated to the following facts in support of defendant's negotiated plea:

> Since 2004, Defendant has been licensed to sell series 3, series 7, and series 65 securities. Defendant was employed as an independent contractor by The Diversified Group from March 1, 2011 to November 2, 2012. All of the following sales of securities took place in Berrien County.
>
> On August 22, 2011, Defendant met with James Long and William Hayes at her office in St. Joseph. Defendant had previously provided investment services for the men during her prior employment with Fifth Third Bank. Defendant marketed The Diversified Group's limited partnerships to the men making the following representations: the investment provided a guaranteed 10.44% interest rate and could be liquidated with a 30 to 45 day notice period. Based on Defendant's representations and their prior relationship, the men

[1] *People v Faher*, unpublished order of the Court of Appeals, entered August 13, 2015 (Docket No. 328285).

invested a total of $654,800 with Diversified. Both men state that had they been informed of the true nature of the investment, they would not have invested in it.

On August 19, 2011, Defendant met with Robert and Donna Nunley at their home in Saint Joseph. Defendant knew the Nunleys from her former employment at Fifth Third Bank and solicited them for a presentation. Defendant informed them that an investment with The Diversified Group was completely safe, that it was making fantastic money for investors, and could be liquidated with 30 days' notice. There was no discussion of any risk factors. Ms. Nunley asked Defendant directly regarding liquidity and risk factors as Defendant was asking them to invest essentially their life savings in one account. Defendant advised the account could be liquidated at any time and that there was no risk.

In August of 2012, Defendant solicited Judith Freel to invest with The Diversified Group. Ms. Freel is a Niles resident. Defendant acted as Freel's investment advisor. Freel told Defendant that she wanted to move her investments out of stocks and into a safer investment. Defendant suggested The Diversified Group's limited partnership, which in fact was a highly speculative real estate investment. Defendant indicated to Freel that the investment was safe, that she would not lose money, and that the rate of return was 10%. Defendant indicated to Freel that she could withdraw her funds at any time. Freel was not informed of any risks associated with the investment. Freel invested $70,000, her life's savings.

Bruce Binger of Benton Harbor also invested in The Diversified Group based on Defendant's representations. Binger knew Defendant when she was employed at Fifth Third Bank. Defendant informed Binger that the investment was safe, that he would not lose any of his money and that the account was liquid on 30 days' notice. Binger was not informed of any risks associated with the investment or that he would not realize a complete return on investment, assuming successful marketing of the land contract, for 30 years. Mr. Binger lost his $100,000 in the 4 different land contracts he invested in.

The parties stipulate and agree that in each instance, Defendant, through lack of performing due diligence in connection with the sale of a security, made statements that were false or misleading in a material aspect or omitted to disclose a material fact necessary to make a statement not false or misleading. The parties further stipulate that the recitation of these facts form a sufficient factual basis for acceptance of pleas of *nolo contendre* to each count.

The plea agreement, as reflected in a letter from the prosecution to defendant's counsel, stated in part:

There is no agreement regarding sentencing. As agreed, the sentencing guideline range will be 5 to 23 months or 7 to 23 months depending on the judge's interpretation of OV 4. We will not seek to have the judge impose an upward departure from the adopted guideline range, but retain the right to allocute

> for a sentence within that range. We understand that you are free to allocute for any sentence you deem to be appropriate and that if the judge imposes a sentence below the guidelines, that would not be considered a downward departure under MCL 769.34(4)(a).

The plea agreement also provided for "full restitution . . . for all of the victims of [defendant's] conduct."[2] Defendant's plea was in exchange for her testimony against other individuals involved with The Diversified Group.

The presentence information report (PSIR) completed for defendant's convictions for securities fraud stated a total prior record variable (PRV) score of 22 points (Level C) and a total offense variable (OV) score of 55 points (Level V), placing the minimum guidelines range at 7 to 23 months. At sentencing, the trial court accepted the PSIR's scoring of offense variables, which scored OV 4 at 10 points, OV 9 at 25 points, OV 10 at 10 points, and OV 16 at 10 points, to arrive at a 55-point score Defense counsel did not object to the scoring. The trial court stated, "it's a sentencing guideline case, and the guideline range is seven months to 23 months." It sentenced defendant to 23 months to 10 years' imprisonment. This appeal followed.

II. SCORING OF OVs

Defendant challenges the scoring of certain OVs. Specifically, defendant argues that OVs 4, 9, and 10 should have been assessed at 0 points each, which would have placed her in a lower sentencing guideline range.

Defendant has waived this challenge to her sentences. Waiver is "the intentional relinquishment or abandonment of a known right." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011). Waiver of a right differs from forfeiture, which is defined as "the failure to make the timely assertion of a right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (citations omitted). Generally, "[o]ne who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error," *Kowalski*, 489 Mich at 503, while forfeiture does not extinguish an error, *Carter*, 462 Mich at 215. "[A] defendant waives appellate review of a sentence that exceeds the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence." *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005). Further, a defendant waives challenges to scoring errors at sentencing by failing to object to the accuracy of those scores at sentencing or in a motion for resentencing, or in a motion to remand filed in this Court. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-312; 684 NW2d 669 (2004).

Here, although the letter reciting the terms of the plea agreement does contain the line "there is no agreement regarding sentencing," the remainder of the paragraph makes it clear that, while a specific sentence may not have been agreed to, the parties did agree to a guidelines range of either 5 to 23 months or 7 months to 23 months, depending the trial court's interpretation of

[2] At sentencing, the trial court noted that defendant's conduct had resulted in "a loss of over two and a half million dollars to seventy-some different people."

OV 4. The parties thus agreed to narrow the issues at sentencing to that variable; defendant essentially agreed to one of two specific sentencing guidelines ranges, the only variable being the trial court's scoring of OV 4. Then, at sentencing, not only did defense counsel not object to the scoring of OV 4 or any other variable, defendant herself was asked by the trial court if she had any additions or corrections to the PSIR. She affirmatively stated that she did not. Thus, although the plea agreement itself did not waive a challenge to the scoring of OV 4, defendant waived it at sentencing. See *Kimble*, 470 Mich at 310-312.

Further, even if we were to review defendant's challenge to OV 4, we would find it meritless. A trial court's factual determinations under the sentencing guidelines are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).

OV 4 deals with victims' psychological injury, and 10 points should be assessed where "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34. "[T]he fact that treatment has not been sought is not conclusive." MCL 777.34(2). The record supports a score of 10 points for OV 4. At sentencing, several victims made statements regarding their anger toward defendant. Moreover, defense counsel and defendant made statements about the victims' anger and feelings of betrayal. This Court has held that evidence that a victim was left feeling "pretty angry," and "try[ing] to block out the memory" of a crime was sufficient to uphold a score of 10 points under OV 4. *People v Waclawski*, 286 Mich App 634, 681; 780 NW2d 321 (2009). Therefore, the evidence on the record supports that the victims suffered severe psychological injury and was adequate to uphold the trial court's assessment of 10 points under OV 4.

Here, defendant understandingly and voluntarily entered a plea for a specific minimum-sentence range (or, more precisely, one of two specific ranges depending on the scoring of one OV). In exchange, as referred to at sentencing, the prosecution agreed to limit the charges against defendant, not to charge her with racketeering, and not to seek an upward departure from the negotiated guidelines range. Defendant received a sentence that she had bargained for and to which she agreed. Accordingly, she has waived appellate review of that sentence. *Wiley*, 472 Mich at 154; also see generally *People v Cobbs*, 443 Mich. 276, 285 & n 11; 505 NW2d 208 (1993) (explaining that a defendant who pleads guilty with knowledge of the sentence—either from a sentence bargain, prosecutorial recommendation, or a judge's statement of the sort discussed in *Cobbs*—must be expected to be denied appellate relief on the ground that the plea demonstrates the defendant's agreement that the sentence is proportionate). Thus, simply put, defendant got what she agreed to in her plea deal, and cannot now complain about it. And to the extent that the trial court's decision on OV 4 may be reviewable, we find no error in that score. *Hardy*, 494 Mich at 438.[3]

[3] Even if we found the trial court's score of OV 4 to be in error, defendant's sentence would still be within the corrected guidelines range of 5 to 23 months and, as stated, would still be within the range of minimum sentences to which defendant specifically agreed.

III. CONSTITUTIONAL CHALLENGE

Defendant next argues that her sentence was improper under *People v Lockridge*, 498 Mich 358, 392; 870 NW2d 502 (2015), and *Alleyne v United States*, 133 S Ct 2151; 186 L Ed 2d 314 (2013), because her minimum sentence was the result of judicial-fact finding. We disagree.

The trial court sentenced defendant within a sentencing range to which she had agreed. Nothing in *Lockridge* indicates that cases such as *Cobbs* and *Wiley* were overruled, or that the ability of a defendant and prosecutor to bargain for a particular lawful sentence has been curtailed. See generally *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982). Further, when a sentencing court imposes a sentence pursuant to the terms of a plea agreement bargained for and accepted by the defendant, the sentence is not affected by the court's perception of the mandatory or advisory nature of the sentencing guidelines; thus the constitutional concerns underpinning *Lockridge* and *Alleyne* are not implicated. See *Amezcue v Ochoa*, 577 Fed App'x 699, 700–701 (CA 9 2014) (finding plea and stipulation to sentence waived claim that the sentence violated the defendant's right to a jury trial); see also *United States v Cieslowski*, 410 F3d 353, 356, 363–364 (CA 7, 2005) (concluding that a sentence imposed under a plea agreement "arises directly from the agreement itself" and not from the sentencing guidelines). We therefore find defendant's constitutional challenge to her sentences unpersuasive.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Finally, defendant argues that she was denied the effective assistance of counsel when her defense counsel failed to object to the scoring of defendant's OVs. Because this issue was not included in defendant's statement of questions presented, it has been waived. *People v Bennett*, 290 Mich App 465, 484 n 4; 802 NW2d 627 (2010). Further, in light of the fact that defendant accepted a plea agreement that provided for a sentence within a particular range, and the trial court sentenced defendant within that range, it cannot be said that defense counsel's failure to object to the scoring of any offense variables was the result of deficient performance. See *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001) (counsel is not required to make meritless objections). Further, to the extent that the plea agreement contemplated defense counsel making an argument with regard to OV 4, as stated above we find no error in the trial court's scoring of that variable, and any objection by defense counsel would have been meritless. *Id*.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Peter D. O'Connell
/s/ Mark T. Boonstra