

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERANCE JEROME MCINTYRE,

Defendant-Appellant.

UNPUBLISHED

June 17, 1997

No. 178056

Genesee Circuit Court

LC No. 93-049661-FC

Before: Corrigan, C.J., and Kelly and Hoekstra, JJ.

PER CURIAM.

Defendant appeals by right his guilty pleas to second-degree murder, MCL 750.317; MSA 28.549, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). The court sentenced defendant to a thirty-five to seventy-five year term of imprisonment and to a consecutive two year term of imprisonment, respectively. We affirm.

Defendant first contends that his pleas were invalid because the sentencing court departed from the sentencing agreement with the prosecution, without providing defendant an opportunity to withdraw his pleas. Defendant's failure to move to withdraw his pleas in the lower court precludes appellate review of this issue. MCR 6.311(C); *People v Nowicki*, 213 Mich App 383, 385; 539 NW2d 590 (1995). Moreover, a review of the record reveals the absence of any sentencing agreement. Indeed, during the plea, the court specifically noted the absence of any agreement regarding sentence. Defendant stated that he understood the conditions of his pleas. Therefore, defendant's claim is without merit.

Defendant further argues that he was denied the effective assistance of counsel because his attorney told him that the sentencing guidelines would fall within a lower sentencing range than they actually did. Both defense counsel and the trial court told defendant that the sentence might not match the guidelines. Further, defendant denied that any other promises were made beyond the plea bargain. Accordingly, defendant made his pleas voluntarily and understandingly and defendant was not denied the effective assistance of counsel on this basis. *People v Swirles (After Remand)*, 218 Mich App

133; 553 NW2d 357 (1996); *In re Oakland Co Prosecutor*, 191 Mich App 113; 477 NW2d 455 (1991).

Defendant also contends that he was denied the effective assistance of counsel because his attorney was unprepared to respond to the prosecution's challenge to the sentencing guidelines. A review of the guidelines' scoring reveals that, although two of the offense variables were improperly scored, the guidelines' range remained the same. Because defendant was not prejudiced by defense counsel's alleged unpreparedness, he was not denied the effective assistance of counsel on this ground. *People v Lavearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant also claims that he was denied the effective assistance of counsel because his attorney failed to demand that he be allowed to withdraw his pleas after the court departed from the sentence agreement. Defendant had no right to withdraw his plea because the record reveals no sentence agreement. Defense counsel was not required to make a futile motion, *People v Rodriquez*, 212 Mich App 351, 356; 538 NW2d 42 (1995); therefore, counsel was not ineffective.

Finally, defendant asserts that his sentence is disproportionate, *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Given the facts of the crime, the sentence was proportionate. Defendant was on probation for felonious assault when he executed an innocent, sixteen-year-old stranger and shot two other innocent victims who were attending a housewarming party. Moreover, defendant's plea was offered in exchange for the dismissal of several other charges and the record shows that defendant committed a greater offense, which the sentencing court may consider as an aggravating factor. *People v Duprey*, 186 Mich App 313, 318; 463 NW2d 240 (1990); *People v Purcell*, 174 Mich App 126, 130; 435 NW2d 782 (1989).

Affirmed.

/s/ Maura D. Corrigan
/s/ Michael J. Kelly
/s/ Joel P. Hoekstra