

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARRY J. COBURN,

Defendant-Appellant.

UNPUBLISHED

February 17, 1998

No. 196598

Oakland Circuit Court

LC No. 94-135753-FH

Before: Sawyer, P.J., and Wahls and Reilly, JJ.

PER CURIAM.

After an incident occurring on October 19, 1994, defendant was charged with operating a motor vehicle while under the influence of intoxicating liquor (OUIL), third offense, MCL 257.625(6)(d); MSA 9.2325(6)(d),¹ failure to stop at the scene of property damage accident, MCL 257.618; MSA 9.2318, driving on a suspended license, MCL 257.904(1)(b); MSA 9.2604(1)(b), and habitual offender, fourth offense, MCL 769.12; MSA 28.1084. On January 30, 1995, defendant pleaded guilty to the misdemeanor charges of failure to stop at the scene of a property damage accident and driving on a suspended license, and was sentenced to time served.

On October 2, 1995, defendant pleaded guilty to the charge of OUIL, third offense with the understanding, pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993),² that the court would sentence him to a term of one year in prison. At the subsequent sentencing hearing, the trial court informed defendant that, after reviewing the sentencing report, it was inclined to sentence him to a term of imprisonment greater than one year. Defendant then requested that his plea be set aside, his request was granted and the case proceeded to trial. On March 18, 1996, a jury found defendant guilty of OUIL, third offense. At defendant's sentencing hearing, held on May 15, 1996, defendant pleaded guilty to habitual offender, fourth offense. The trial court sentenced defendant to three to five years' imprisonment for the OUIL conviction. This sentence was then vacated and defendant was sentenced to three to twenty years' imprisonment for the habitual offender conviction. Defendant appeals as of right and we affirm.

On appeal, defendant first argues that the trial court erred when it failed to inform him of the sentence that it intended to impose prior to asking defendant whether he wanted to withdraw his guilty plea on the OUIL charge. We agree that the trial court should have informed defendant of the sentence it intended to impose, but conclude that defendant is not entitled to relief on appeal because defendant was not prejudiced by the trial court's error.

The Michigan Supreme Court, in *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982), announced the following rule:

[I]f the plea agreement offered to the court by the prosecutor and defendant includes a non-binding prosecutorial recommendation of a specific sentence, the judge may accept the guilty plea (after consideration of the presentence report), yet refuse to be bound by the recommended sentence. The judge retains his freedom to choose a different sentence. However, the trial judge must explain to the defendant that the recommendation was not accepted by the court, *and state the sentence that the court finds to be the appropriate disposition*. The court must then give the defendant the opportunity to affirm or withdraw his guilty plea. [*Id.* at 209-210 (emphasis added).]

The Court then explained the purpose of the rule:

Through this procedure, the defendant will be fully aware of all the consequences of his guilty plea. He will thus be able to make a knowing and intelligent waiver of his right to trial and its companion rights. Additionally, the judge will have full exercise of his sentencing discretion. [*Id.* at 210.]

Here, defendant's expectation regarding his sentence was based on a *Cobbs* plea rather than on an agreement with the prosecution. However, a *Cobbs* plea is analogous to a plea based on an agreement with the prosecution promising a non-binding sentencing recommendation. In both situations, the trial court retains the freedom to impose a different sentence than contemplated by the defendant at the time of his plea. See *Cobbs, supra* at 283; *Killebrew, supra* at 209-210. While *Cobbs* modified the rules regarding judicial participation in sentencing discussions, it also reaffirmed the principles stated in *Killebrew*. See *Cobbs, supra* at 282. Accordingly, when the trial court determined it would not be able to comply with its original appraisal of defendant's probable sentence, it should have informed defendant of the sentence it then intended to impose. *Killebrew, supra* at 209-210. This would have ensured that defendant was fully advised of the consequences of his guilty plea.

If a trial court fails to state the sentence that it finds to be the appropriate disposition, and the defendant nevertheless declines to withdraw his guilty plea, the defendant is denied the opportunity to make a knowing and intelligent waiver of his right to a trial and its companion rights and, as a result, the plea is rendered deficient. See *Killebrew, supra* at 210; *People v Parks*, 183 Mich App 647, 652-653; 455 NW2d 368 (1990); *People v McGuire*, 165 Mich App 198, 201; 418 NW2d 427 (1987); *People v Teed*, 164 Mich App 540, 542; 417 NW2d 495 (1987). The remedy in such a case is to vacate the sentence and provide the defendant with another opportunity to withdraw his guilty plea on remand. See *People v Scott*, 197 Mich App 28, 33; 494 NW2d 765 (1992); *Teed, supra* at 542.

Here, defendant did not decline to withdraw his guilty plea. Instead, upon being informed of the trial court's intention to impose a more severe penalty, defendant opted to exercise his right to a trial. Because defendant did not waive his right to trial, he cannot now complain that his waiver was defective. Put differently, because defendant ultimately did not plead guilty to the OUIL offense, he cannot now complain that his plea was deficient. If defendant was denied anything as a result of the trial court's error, it was the opportunity to knowingly and intelligently accept a plea bargain. However, because defendant had no right to a plea bargain, we hold that he was not prejudiced by the trial court's error.

Defendant next argues that the trial court improperly denied his motion for a directed verdict of acquittal on the OUIL charge. When reviewing a trial court's ruling on a motion for a directed verdict, this Court views all of the evidence presented up to the time of the motion in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Peebles*, 216 Mich App 661, 664; 550 NW2d 589 (1996).

The OUIL statute in effect at the time of the offense provided in pertinent part:

(1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if either of the following applies:

(a) The person is under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance. [MCL 257.625; MSA 9.2325, subsequently amended by 1994 PA 211.]

OUIL is proved without regard to the defendant's motive or intent, or to the results of his conduct. *People v Crawford*, 187 Mich App 344, 349-350; 467 NW2d 818 (1991). Instead, OUIL is a status crime focusing only on the fact that the defendant operated an automobile while intoxicated. *Id.* at 350.

In this case, Trevor Piasecki testified that, on the morning of defendant's arrest, he noticed a traffic backup. When he went to investigate, he saw that his friend's truck had been in a multiple-car accident. Witnesses to the accident told him that the driver who caused the accident had been driving a red truck. Piasecki went to look for the red truck and a few minutes later located a red and black truck in a nearby residential neighborhood. The truck was smoking and looked like it had hit something. Eventually, defendant approached the truck and told Piasecki that he had been involved in an accident. Piasecki testified that defendant smelled of alcohol, that defendant's eyes were red and glassy, that his speech was slurred, and that he stumbled as he walked. Defendant then got into the truck, drove across a yard, and drove fast down a road until his truck began smoking and steaming. Gary Schoeneman, who was with Piasecki that morning, testified that he overheard defendant say that he had been drinking and that he had been driving a little too fast. From this evidence, a rational trier of fact

could infer that defendant operated a vehicle while intoxicated. Accordingly, we hold that the trial court did not err in denying defendant's motion for directed verdict.

Finally, defendant argues that his sentence of three to twenty years' imprisonment as an habitual offender was disproportionately severe. We disagree. Sentencing decisions are subject to review by this Court on an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of the trial court's discretion if it violates the principle of proportionality. The principle of proportionality requires sentences to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 636.

The habitual offender statute provides that a person convicted as an habitual offender, fourth offense, may be sentenced to imprisonment up to a term of life, where the underlying felony is punishable upon a first conviction for a maximum of five years. MCL 769.12; MSA 28.1084. The OUIL statute in effect at the time of the offense provided that a person convicted of a third offense within ten years was "guilty of a felony, and shall be sentenced to imprisonment for not less than 1 year or more than 5 years." MCL 257.625(6)(d); MSA 9.2325(6)(d).³

The purpose of habitual offender sentence enhancements is to deter recidivism by increasing the punishment for subsequent offenders. *People v Hendrick*, 398 Mich 410, 416-417; 247 NW2d 840 (1976). Here, defendant's prior record reflects the need for such deterrence. At trial, defendant admitted that he was an alcoholic. Prior to his current OUIL conviction, defendant had six previous OUIL convictions. In this case, defendant was driving with a suspended license and fled the scene of the accident he caused. Thus, the evidence suggests that defendant's repeated behavior posed a substantial hazard. Considering the serious risk posed by defendant's history of drunk driving, the sentence was not disproportionate to the circumstances of the offense or offender. Accordingly, the trial court did not abuse its discretion in sentencing defendant to three to twenty years' imprisonment.

Affirmed.

/s/ David H. Sawyer

/s/ Myron H. Wahls

/s/ Maureen Pulte Reilly

¹ MCL 257.625(6)(d); MSA 9.2325(6)(d) was subsequently amended by 1994 PA 211 and renumbered as MCL 257.625(7)(d); MSA 9.2325(7)(d).

² In *Cobbs*, *supra* at 283, the Michigan Supreme Court held that "[a]t the request of a party, and not on the judge's own initiative, a judge may state *on the record* the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense."

³ See, *supra*, note 1.