

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ANTHONY LEWIS,

Defendant-Appellant.

UNPUBLISHED

March 3, 1998

No. 166331

Kent Circuit Court

LC No. 92-060440-FH

Before: Markey, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Defendant appeals as of right his plea-based conviction of possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v); MSA 14.15(7403)(2)(a)(v).¹ We affirm.

Defendant's sole contention on appeal is that the trial court erred in denying his presentence motion to withdraw his guilty plea. A defendant may, but does not have an absolute right to, withdraw a guilty plea after it is accepted. MCR 6.310(A), (B). Where the defendant moves to withdraw his plea prior to sentencing, he bears the burden of establishing a fair and just reason for withdrawal of the plea. If the defendant is able to do so, the burden then shifts to the prosecutor to establish that substantial prejudice would result from allowing the defendant to withdraw the plea. *People v Jackson*, 203 Mich App 607, 611-612; 513 NW2d 206 (1994). A fair and just reason for withdrawal of the plea may be established, for example, by showing that the plea was the product of fraud, duress, or coercion, or that the plea was induced by inaccurate legal advice and that the defendant either refuses or is unable to recount a factual basis for the plea or can establish the existence of a meritorious defense. *Id.* at 613. An unfulfilled promise of leniency or a misleading statement by defense counsel can also be the basis for setting aside the plea. *People v Schirle*, 105 Mich App 381, 385; 306 NW2d 520 (1981). A trial court's ruling on a motion to withdraw a guilty plea prior to sentencing is reviewed for an abuse of discretion. *People v Kennebrew*, 220 Mich App 601, 605; 560 NW2d 354 (1996).

We find no such abuse of discretion in this case. First, it appears from the circumstances under which the motion was made that it was motivated purely by a concern regarding sentencing, which is not a valid basis for withdrawing a plea. *People v Haynes (After Remand)*, 221 Mich App 551, 559; 562

NW2d 241 (1997). Second, defendant failed to establish that he had a meritorious defense; he offered no evidence to support his conclusory assertion of innocence or to contradict his prior admission that he had been in the possession of cocaine. *People v Holmes*, 181 Mich App 488, 494-495; 449 NW2d 917 (1989). Third, the record shows that defendant had several weeks to consider the plea bargain offered by the prosecution and had a full opportunity to discuss it with counsel and the trial judge prior to tendering his plea, which belies his assertion that he was pressured into pleading guilty. In addition, there is nothing in the record to support his assertion that counsel was unwilling or unable to defend him at trial. Fourth, defendant's post-conviction affidavit alleging an unfulfilled promise of leniency is insufficient to warrant relief where, as here, it is not supported by the record, defendant admitted that the entire agreement was the dismissal of a more serious charge in exchange for his plea to the charge of possession of cocaine, and that no one had promised him anything else. *People v Weir*, 111 Mich App 360, 361; 314 NW2d 621 (1981); *Schirle, supra*; *People v Sanders*, 54 Mich App 541, 544-545; 221 NW2d 243 (1974). In fact, the record indicates that defendant was not promised sentencing under MCL 333.7411; MSA 14.15(7411). Rather, his attorney stated that he would be requesting § 7411 status at the time of sentencing. This is supported by the facts that before accepting defendant's plea, the court stated that it had not agreed upon any possible sentence and that counsel renewed his request for § 7411 status when defendant appeared for sentencing. Therefore, the trial court properly concluded that defendant had failed to establish a fair and just reason for withdrawal of his plea.

Affirmed.

/s/ Jane E. Markey

/s/ Richard A. Bandstra

/s/ Stephen J. Markman

¹ Defendant's conviction predated the 1994 amendment of Const 1963, art 1, § 20, which eliminates appeals by right in guilty plea cases.