

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY LEE BROOKS,

Defendant-Appellant.

UNPUBLISHED
October 16, 1998

No. 198912
Roscommon Circuit Court
LC No. 95-003083 FH
96-003102 FH
96-003229 FH
96-003230 FH

Before: Whitbeck, P.J., and McDonald and T. G. Hicks*, JJ.

MEMORANDUM.

In these four cases, defendant pleaded guilty to larceny by conversion over \$100, MCL 750.362; MSA 28.594. The trial court sentenced defendant to concurrent terms of forty to sixty months' imprisonment. Defendant appeals as of right. We affirm defendant's convictions but remand for resentencing. We decide this appeal without oral argument pursuant to MCR 7.214(E).

Because defendant's motion to withdraw his pleas was advanced before the imposition of sentence, the trial court had discretion to allow the withdrawal of the pleas upon a showing that withdrawal was supported by reasons based on the interest of justice and upon a showing that the prosecutor would not be substantially prejudiced by permitting the withdrawal of the pleas. MCR 6.310(B); *People v Gomer*, 206 Mich App 55, 57-58; 520 NW2d 360 (1994); *People v Spencer*, 192 Mich App 146, 150-151; 480 NW2d 308 (1991).

In support of defendant's motion, he asserted, in part, a claim of innocence and the existence of "a meritorious defense to several of those counts, that defense being that he substantially complied with the contract that he entered into" Defendant fails to provide citation to any authority for the proposition that substantial compliance constitutes a defense to a charge of larceny by conversion over \$100. Assuming without deciding that such a defense exists, defendant failed below, and likewise has failed on appeal, to indicate whether the defense

* Circuit judge, sitting on the Court of Appeals by assignment.

applies to any or all of the charges that gave rise to the instant convictions or whether the defense applies only to two additional charges of larceny by conversion for which plea-based convictions were secured, but which are not subject to the instant appeal. Our review of defendant's admissions made in support of his pleas fails to demonstrate that defendant substantially complied with the terms of the construction contracts entered into between defendant and the victims. Instead, defendant's admissions establish that his failure to complete these projects was the result of his conversion of the victims' deposits to his own use. Under the record facts of these cases, defendant failed to establish that the withdrawal of his pleas was supported by reasons based on the interests of justice, *Gomer, supra* at 57; *Spencer, supra* at 151, and, therefore, the trial court did not abuse its discretion when it denied defendant's motion to withdraw his pleas, *Spencer, supra* at 150.

Our review of the record discloses an absence of support for defendant's claim that he was deprived of an impartial sentencing court. *People v Lobsinger*, 64 Mich App 284, 289-291; 235 NW2d 761 (1975).

Our review of the record does disclose, however, that the trial court deprived defense counsel of his right to advise the court of circumstances he believed the court should consider when fashioning an appropriate sentence. MCR 6.425(D)(2)(c). When counsel sought to incorporate into the PSIR facts concerning defendant's alleged substantial compliance with the terms of the construction contracts, the trial court immediately interrupted counsel and informed counsel that it would not listen to any comments concerning substantial compliance. The court's action deprived defendant of his right to explain information contained in the PSIR, MCR 6.425(D)(2)(b), and deprived defense counsel of the right of allocution by precluding counsel from advising the court of factors counsel believed to be of mitigating value. MCR 6.425(D)(2)(c); *People v Berry*, 409 Mich 774, 779-781; 298 NW2d 434 (1980). This requires resentencing. *Id.* at 781.

Affirmed in part; sentence vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Gary R. McDonald

/s/ Timothy G. Hicks