

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LARRY ANDREW PHILON,

Defendant-Appellant.

UNPUBLISHED

December 3, 1999

No. 217887

Jackson Circuit Court

LC No. 97-082593 FH

Before: Jansen, P.J., and Hoekstra and J. R. Cooper*, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his plea-based conviction of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty in return for the dismissal of a charge of habitual offender, third offense, MCL 769.12; MSA 28.1084, and an agreement by the prosecution to refrain from charging him with other deliveries. The parties agreed that defendant would not be required to make any representations as to his guilt or innocence regarding other alleged deliveries.

Prior to sentencing defendant moved to withdraw his plea, claiming innocence and duress. The trial court denied the motion. Defendant then challenged the scoring of Offense Variable (OV) 25, contemporaneous criminal acts, at fifteen points based on the three alleged but uncharged sales. Defendant denied that these alleged sales had occurred. The trial court held an evidentiary hearing, and found that the prosecution established by a preponderance of the evidence that defendant made the alleged sales. The trial court declined to change the guidelines, and sentenced defendant to ten- to twenty-years' imprisonment, with credit for fourteen days. The minimum term was within the guidelines as scored by the court.

Defendant filed a postjudgment motion to withdraw his plea, or for specific performance of the plea bargain, or for resentencing. He argued that the prosecution violated the plea agreement when it

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

requested a hearing on the use of the other alleged sales as a basis for the scoring of OV 25, thereby forcing him to deny the sales. Defendant also challenged the accuracy

of the information used to score Prior Record Variable (PRV) 2. The trial court denied the motion, concluding that the terms of the plea agreement did not preclude the use of the other uncharged deliveries in the calculation of the guidelines. In addition, the court noted that defendant failed to object to the scoring of PRV 2 at the time of sentencing.

Defendant argues on appeal that the trial court abused its discretion by denying his motions to withdraw his guilty plea. We disagree. A motion to withdraw a plea before sentencing may be granted “in the interest of justice” unless to do so would result in substantial prejudice to the prosecution. MCR 6.310(B). Defendant’s motion made before sentencing was based on a claim that he was innocent and that he entered a plea to one charge to avoid other charges. Defendant did not carry his burden of establishing that under the circumstances it was in the interest of justice to withdraw the plea. *People v Jackson*, 203 Mich App 607, 611-612; 513 NW2d 206 (1994).

Absent a clear abuse of discretion, a trial court’s decision on a motion to withdraw a plea after sentencing will not be disturbed on appeal. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). The trial court did not abuse its discretion by denying defendant’s postjudgment motion to withdraw his plea, or for specific performance of the plea bargain, or for resentencing. The plea agreement did not include a provision that the other alleged sales could not be considered in the calculation of the guidelines. No such condition was stated on the record. A contemporaneous criminal act considered in the scoring of OV 25 need not have resulted in a separate conviction. *People v Polus*, 197 Mich App 197, 200; 495 NW2d 402 (1992).

Defendant argues that he was sentenced on the basis of inaccurate information for the reason that PRV 2 was scored incorrectly. We disagree. Defendant’s contention that the issue was raised as soon as the inaccuracy was discovered, MCR 6.429(C), is supported only by his own self-serving affidavit. Moreover, application of the guidelines presents a cognizable claim only if (1) a factual predicate is wholly unsupported; (2) a factual predicate is materially false; and (3) the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). If the sentence is proportionate, an error in the calculation of the guidelines provides no basis for relief. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998). In this case, even assuming *arguendo* that the guidelines were scored incorrectly, defendant is not entitled to resentencing. He has not established that the sentence he received was disproportionate to his circumstances or to those of the offense. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). The instant conviction represented defendant’s fourth felony conviction. He had a history of assaultive crimes, including a conviction of second-degree murder. Resentencing is not warranted. *Raby, supra*.

Affirmed.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jessica R. Cooper