STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDOLPH WILSON,

Defendant-Appellant.

UNPUBLISHED
March 12, 2002

No. 226312
Wayne Circuit Court
LC No. 99-005569

Before: Jansen, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree retail fraud, MCL 750.356c, and was thereafter sentenced as a fourth-offense habitual offender, MCL 769.12, to three to ten years of imprisonment. Defendant appeals as of right and we affirm.

Defendant first argues that he was denied the effective assistance of counsel because trial counsel failed to communicate a plea bargain to defendant that he would have accepted had he known of it. More specifically, defendant avers in an affidavit attached to his brief that trial counsel told him during the trial that the prosecution had previously offered a concurrent sentence if defendant pleaded guilty. Defendant did not otherwise move for an evidentiary hearing or new trial on this basis below, and his motion to remand for an evidentiary hearing was denied by this Court in an unpublished order entered on August 15, 2000. Consequently, our review of this issue is limited to mistakes apparent on the existing record. *People v Avant,* 235 Mich App 499, 507; 597 NW2d 864 (1999).

An attorney's failure to advise a client of a plea bargain offer may constitute ineffective assistance of counsel and a defendant has the burden of proving by a preponderance of the evidence that a plea offer was made and that counsel failed to communicate it to defendant. *People v Williams,* 171 Mich App 234, 241-242; 429 NW2d 649 (1988). A review of the existing record does not reveal any plea bargain offer made by the prosecution or that counsel failed to communicate such an offer to defendant. In fact, the final pre-trial conference summary and firm trial date contract indicates that defendant rejected the final settlement offer and requested a waiver trial, as indicated by defendant's signature on the document. Defendant's affidavit, alleging that there was a plea bargain offer that was not communicated to him, was prepared about six months after sentencing. Under these circumstances, defendant has not proved by a preponderance of the evidence that a plea offer was made and that counsel failed to

communicate it to him. Accordingly, defendant has not shown that he was denied the effective assistance of counsel.

Defendant next contends that the trial court erred when it sentenced him to a consecutive sentence to another sentence being served out of Sanilac County. Our review of this issue is severely impeded since defendant has failed to provide us with his presentence investigation report[1] and does not clarify the exact chronological order of the crimes committed. Defendant states in his brief that he had already been sentenced on his Sanilac County case when he was sentenced in the present case. Further, the record only indicates that defendant was on bond at the time the present offense was committed.

MCL 768.7b(2)(a) states that if a person has been charged with a felony, and pending disposition of that charge commits another felony, then upon conviction of the subsequent offense, the sentences imposed for both offenses may run consecutively. Here, the record indicates that defendant committed a felony in the present case while he was on bond for the matter pending in Sanilac County. The trial court had discretion under the clear terms of the statute to sentence defendant to a consecutive sentence because the felony in the present case was committed while defendant was on bond in a pending matter. Consequently, we reject defendant's contention that the trial court lacked authority to sentence him to a consecutive sentence as MCL 768.7b clearly provided the trial court with that authority.

Further, we also reject defendant's argument that even if the trial court had the authority to impose a consecutive sentence, it abused its discretion in doing so because defendant's sentence had already been enhanced and defendant is not a threat to society. We cannot agree with defendant that he is not a threat to society since his convictions date back to 1958 and he has apparently accumulated eleven felony convictions in his lifetime. There is simply no indication that the trial court abused its discretion in any way in sentencing defendant to a consecutive sentence.

Lastly, there was no abuse of discretion in the trial court's determination to enhance defendant's sentence under the retail fraud statute and the habitual offender statute. Because of defendant's prior conviction of retail fraud, his current offense of second-degree retail fraud was enhanced to first-degree retail fraud under MCL 750.356c. Further, defendant was charged as a fourth-offense habitual offender under MCL 769.12 based on his numerous prior felony convictions.

Defendant's contention that this double enhancement constituted "piling on" in terms of punishment and violates his right against double jeopardy was rejected by this Court in *People v Eilola,* 179 Mich App 315; 445 NW2d 490 (1989). In *Eilola,* this Court held that the habitual offender statute could be used to enhance the sentence of a defendant convicted of first-degree retail fraud as long as the prior retail fraud conviction was not used both to enhance the retail fraud conviction to first-degree retail fraud and to establish the defendant's status as a habitual

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[1] MCR 7.212(C)(7) directs that "[i]f an argument is presented concerning the sentence imposed in a criminal case, the appellant's attorney must send a copy of the presentence report to the court at the time the brief is filed."

offender. See *id.*, pp 321-325. Here, the prior retail fraud conviction was used to enhance defendant's present conviction to first-degree retail fraud, but was not used to establish defendant's status as a habitual offender. Rather, six other prior felony convictions were used under the habitual offender notice to establish defendant's status as a fourth-offense habitual offender. Consequently, there was no error when the trial court enhanced defendant's sentence under both the retail fraud and habitual offender statutes.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Patrick M. Meter