

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD BROWN, JR.,

Defendant-Appellant.

UNPUBLISHED

November 28, 2006

No. 263600

Wayne Circuit Court

LC No. 04-002090-01

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted, challenging the sentences imposed pursuant to his plea-based convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to a prison term of six to fifteen years for the assault conviction, and a consecutive two-year term for the felony-firearm conviction. He asserts that he is entitled to specific enforcement of an earlier offer encompassing more favorable terms. We affirm.

Defendant was originally charged with assault with intent to commit murder, MCL 750.83, assault with intent to do great bodily harm, felonious assault, MCL 750.82, carrying a concealed weapon in a motor vehicle, MCL 750.227(2), felon in possession of a firearm, MCL 750.224f, and felony-firearm. On March 18, 2004, at a pretrial conference, the prosecutor offered to accept defendant's pleas of guilty of assault with intent to do great bodily harm and felony-firearm, in exchange for the prosecutor's dismissal of the remaining charges and the habitual offender notice, and an agreement to a sentence of five to ten years for the assault conviction and a consecutive two-year term for the felony-firearm conviction. Defendant expressly rejected that offer on the record after questioning by the court, and elected to proceed with a bench trial. The prosecutor then formally revoked the offer. Defendant contends that there was an off-the-record agreement to give defendant a week in which to accept the offer.

Eight days later, the parties returned to court and defense counsel stated that defendant wished to take advantage of the offer, but the prosecutor had taken the position that because eight days had passed, the offer was no longer available. The prosecutor's new offer was seven to fifteen on the assault, with a consecutive two-year term on the felony firearm. Defense counsel stated that he had been ineffective in failing to secure the plea offer during the week it was open, and sought to withdraw. The court appointed new counsel. Ultimately, defendant

accepted an offer of six to fifteen years and tendered his guilty plea. Defendant now seeks to obtain the benefit of the revoked offer.

In *Santobello v New York*, 404 US 257; 92 S Ct 495; 30 L Ed 2d 427 (1971), the United States Supreme Court recognized a constitutional right to relief, rooted in the Due Process Clause of the United States Constitution, for violation of an authorized plea agreement. See *People v Gallego*, 430 Mich 443, 449-451; 424 NW2d 470 (1988). However, “[a] defendant’s right under *Santobello* . . . to have the prosecutor perform his promise in a plea bargaining agreement does not inure to a defendant until after he has pled guilty or performed part of the plea agreement to his prejudice in reliance upon the agreement.” *In re Robinson*, 180 Mich App 454, 459; 447 NW2d 765 (1989).

Defendant did not accept the purported off-the-record offer before it expired, and has not identified any prejudice to his defense due to reliance on the offer. While defendant contends that he is nonetheless entitled to relief pursuant to *Cooper v United States*, 594 F2d 12 (CA 4, 1979), that decision was effectively overruled by *Mabry v Johnson*, 467 US 504, 507; 104 S Ct 2543; 81 L Ed 2d 437 (1984). Because defendant’s guilty plea was not induced by the offer, and defendant rendered no performance which would prejudice him, he is not entitled to relief. *Id.* at 510-511; *People v Heiler*, 79 Mich App 714, 720-721; 262 NW2d 890 (1977). Nor does the counsel’s statement that he was ineffective in his inability to appear a day earlier provide a basis for the requested relief. There is no evidence in the record to support that defendant communicated his change of heart and acceptance of the offer to defense counsel on a timely basis, and nothing to indicate that defense counsel should have anticipated that his inability to appear would result in the offer being withdrawn. In addition, the prosecutor was not obliged to further extend the offer.

Affirmed.

/s/ Helene N. White

/s/ Brian K. Zahra

/s/ Kirsten Frank Kelly