

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES RENARD DUDLEY,

Defendant-Appellant.

UNPUBLISHED

January 20, 2009

No. 281979

Jackson Circuit Court

LC No. 06-003934-FC

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his plea-based conviction of armed robbery, MCL 750.529. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was initially charged with two counts of armed robbery, in two separate cases. The prosecutor filed a second habitual offense notice, predicated on an alleged March 20, 2000, conviction for delivery of a controlled substance. As part of a combined plea agreement, defendant agreed to plead guilty to the robbery charge in the instant case, and to plead guilty to a lesser charge of larceny from a person in the companion case. The prosecutor agreed to dismiss the habitual offender charge from each case, and to defendant being sentenced to concurrent terms within the guidelines.

At the plea hearing, the trial court read the agreement into the record, questioned defendant about the lack of other agreements or threats, and emphasized that the plea agreement involved both files. Defendant pleaded guilty to the offenses and the court accepted his plea. However, at the sentencing hearing, defendant's attorney told the court that defendant had written him indicating his desire to withdraw his guilty plea. According to defense counsel, defendant had accused him of "a number of sundry inappropriate behaviors" and that defendant wished to withdraw his plea and have the court appoint another lawyer. The court explained to defendant that if he withdrew his plea it meant that he would have to proceed with the second charge of armed robbery, because the plea agreement applied to both cases and was an "all or nothing" deal. Defendant reasserted his wish to withdraw his plea and obtain another attorney. When the trial court asked defendant his reason for withdrawing the plea, defendant stated that he felt his attorney had "misrepresented" him "on several occasions" and had not performed adequately. The court denied defendant's motion to withdraw his plea.

Defendant filed two separate delayed applications for leave to appeal. In Docket No. 277079, a panel of this Court denied defendant's application for leave to appeal the larceny conviction. *People v Dudley*, unpublished order of the Court of Appeals, entered May 3, 2007 (Docket No. 277079). In the instant case, a separate panel initially denied leave, but then granted reconsideration, and granted leave to appeal. *People v Dudley*, unpublished order of the Court of Appeals, entered February 12, 2008 (Docket No. 281979).

Defendant now argues that the court abused its discretion in refusing to allow him to withdraw his plea. He asserts that his plea was illusory because he could not have been charged as a habitual offender, since his previous conviction was for a misdemeanor offense. He further argues that trial counsel provided ineffective assistance by failing to verify the habitual charge, or to argue that the plea was illusory during defendant's motion hearing or at sentencing.

A trial court's denial of a defendant's motion to withdraw a guilty plea is reviewed for an abuse of discretion. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997). An abuse of discretion occurs when the trial court's decision falls outside a range of principled outcomes. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Our review of defendant's claim of ineffective assistance of counsel is limited to the mistakes apparent on the existing record, because defendant did not seek a *Ginther*¹ hearing before the trial court. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

There is no absolute right to withdraw an accepted guilty plea. *People v Gomer*, 206 Mich App 55, 56; 520 NW2d 360 (1994). A court may permit a guilty plea to be withdrawn in the interest of justice before sentencing unless withdrawal of the plea would substantially prejudice the ability to prosecute the defendant because of the prosecutor's reliance on the plea. MCR 6.310(B)(1). In the absence of a procedural error in receiving the plea, a defendant must "establish a fair and just reason for withdrawal of the plea." *Harris, supra* at 131; *People v Jackson*, 203 Mich App 607, 611; 513 NW2d 206 (1994). Examples of fair and just reasons for withdrawal include when the plea resulted from fraud, duress or coercion, *Gomer, supra* at 58, when the plea involved erroneous information coupled with actual prejudice to legal rights, *People v Jackson*, 417 Mich 243; 334 NW2d 371 (1983); *People v Shannon*, 134 Mich App 35, 38; 349 NW2d 813 (1984), or "if the bargain on which the plea was based was illusory," i.e., "the defendant received no benefit from the agreement," *Harris, supra* at 132. If the facts indicate that the "plea is voluntary, it will be upheld regardless of whether the defendant received consideration in return." *Id.* at 132-133. However, because defendant did not raise in the trial court, as a basis for withdrawing his plea, the issue that his plea was illusory since he could not be sentenced as a habitual offender, he cannot now directly raise it on appeal. MCR 6.310(D).

With reference to defendant's "backdoor" attempt to secure relief through a claim of ineffective assistance of counsel for what he could not obtain directly on appeal, we also reject defendant's claim. MCL 769.10 provides for enhanced sentencing if a person commits a felony after having been convicted of a felony or an attempt to commit a felony. This Court has held that a plea bargain is illusory if it is "induced by the prosecution's promise to forgo prosecution

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

of defendant as a habitual offender” where such prosecution would not be possible. *People v Bollinger*, 224 Mich App 491, 493; 569 NW2d 646 (1997). However, contrary to *Bollinger*, defendant’s plea was not solely premised on dropping the habitual offender status. Defendant was also provided a reduced charge from armed robbery to larceny from a person in the companion case and concurrent sentences within the guidelines. Consequently, aside from dismissal of the habitual offender status, defendant received other, independent and significant benefits for his plea. Given these circumstances, the plea bargain was not illusory and had value. *People v Taylor*, 418 Mich 954; 344 NW2d 7 (1984). Further, we would note that, consistent with our Supreme Court’s recent ruling in *People v Gardner*, 482 Mich 41, 68; 753 NW2d 78 (2008), defendant’s conviction for either of the current charges would have permitted his being sentenced as a habitual offender on the remaining charge. Hence, the prosecutor’s agreement to not seek any enhancement of either charge was not illusory. Although defendant correctly asserts that “[w]here the benefits of the bargain are grossly exaggerated, the plea is not voluntary, and it should be vacated . . . the fact that the defendant may have received reduced . . . consideration from [a] promise by the prosecutor would not by itself invalidate the plea.” *People v Peete*, 102 Mich App 34, 37-39; 301 NW2d 53 (1981).

To the extent that defendant’s claim rests on an implicit assertion that his plea resulted from ineffective assistance of counsel, the proper focus is on whether the plea was made voluntarily and understandingly. *In re Oakland Co Prosecutor*, 191 Mich App 113, 120; 477 NW2d 455 (1991). “Whether a plea is unintelligently made depends on whether counsel’s advice was within the range of competence demanded of attorneys in criminal cases, not on whether counsel’s advice was right or wrong.” *People v Haynes*, 221 Mich App 551, 558-559; 562 NW2d 241 (1997), citing *In re Oakland Co Prosecutor*, *supra* at 122. In addition, “requests to withdraw pleas are generally regarded as frivolous where the circumstances indicate that the defendant’s true motivation for moving to withdraw is a concern regarding sentencing.” *Haynes*, *supra* at 559, citing *People v Holmes*, 181 Mich App 488, 492; 449 NW2d 917 (1989). There is no indication in the record that defendant failed to comprehend the proceedings or did not voluntarily waive his right to trial and accept a guilty plea. To permit defendant to withdraw his plea by circumventing procedural requirements through vague assertions of ineffective assistance of counsel would effectively preclude finality in these circumstances and allow defendants repeated opportunities to try to enhance the benefits obtained through plea-bargaining.

We acknowledge that during sentencing, defense counsel specifically recognized that defendant had no prior felony history. Presumably, counsel should have provided this as a supporting reason for defendant’s motion to withdraw his plea, after he made the decision to argue that defendant’s plea should be withdrawn. However, “[w]here the facts in a case indicate a plea is voluntary, whether or not defendant received consideration in return, the plea will be upheld.” *Peete*, *supra* at 38. More specifically, “where the value of a bargain is genuine, is valid, and is known to a defendant, that plea will be upheld.” *Id.* Thus, the fact that the prosecutor could not have sought enhanced sentencing against defendant on one of the underlying charges does not, standing alone, serve to invalidate the plea or render counsel ineffective. Although counsel erred in failing to raise or emphasize defendant’s lack of a prior

felony history, because the plea was not illusory and defendant obtained a substantial benefit from his bargain, counsel cannot be deemed to have been ineffective.

Affirmed.

/s/ Michael J. Talbot
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher