STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 22, 2010
v	No. 291059 Ionia Circuit Court
ERNEST TERELL AUSTIN, Defendant-Appellant.	LC No. 2008-013933-FH

Before: SERVITTO, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his guilty plea-based conviction for possession with intent to deliver 50 grams or more but less than 450 grams of cocaine, MCL 333.7401(2)(a)(*iii*). Defendant was sentenced to 78 months to 20 years in prison. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that his plea was not knowingly and voluntarily made because his trial counsel rendered ineffective assistance in advising him about the minimum sentence he would receive, and therefore, that the trial court should have granted his motion to withdraw the plea. We disagree.

"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).

A claim of ineffective assistance of counsel is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id*.

There is no absolute right to withdraw an accepted guilty plea. *People v Gomer*, 206 Mich App 55, 56; 520 NW2d 360 (1994). When a defendant moves to withdraw his guilty plea after sentencing, the burden is on the defendant to establish "that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside." MCR 6.310(C). To the extent a defendant's claim rests on an assertion that his plea was due to ineffective assistance of counsel, the proper focus is on whether the plea was made knowingly and voluntarily. *In re*

Oakland Co Prosecutor, 191 Mich App 113, 120; 477 NW2d 455 (1991). "[W]hether 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*, 191 Mich App 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." *Id*. at 559, citing *People v Holmes*, 181 Mich App 488, 492; 449 NW2d 917 (1989). Therefore, counsel's incorrect prediction concerning a defendant's sentence is generally regarded as insufficient to support a claim of ineffective assistance of counsel, or to establish good cause for withdrawal of a plea. *Id*.

In this case, the trial court did not abuse its discretion in refusing to allow defendant to withdraw his plea. Defendant's dissatisfaction with his sentence is not grounds for withdrawal of his plea. See *id*. Nor can he show that counsel provided ineffective assistance to the extent necessary to support a withdrawal of defendant's plea. Defendant argues, with hindsight, that counsel should have foreseen the imposition of 50 points for offense variable (OV) 15, as well as the proper point scoring for the other prior record variables (PRVs) and OVs. However, counsel's advice, while ultimately incorrect, was within the range of competence demanded of attorneys, given the preliminary nature of sentence calculations. Both defense counsel and the prosecutor arrived at the same preliminary calculation. More importantly, defendant was clearly and repeatedly informed prior to his plea that counsel's calculation was preliminary, and that it bound neither the prosecutor nor the court to a specific sentence duration other than one "at the bottom end of the guidelines . . . whatever that guideline number may be." Specifically, at the time defendant entered his plea, the prosecutor described the nature of the plea agreement as follows:

> [A]s part of this agreement, there is a Killebrew[1] agreement that the defendant will receive the bottom end of the guidelines in regard to his plea in Count 1, whatever that guideline number may be. For the record, having scored him preliminarily at District Court, we believe the guidelines to be 51 to 85 months. Again, he's got a Killebrew agreement to the bottom end, whatever that number may be but we're not going to Killebrew the 51 as the number, just whatever it would be.

Any erroneous advice on counsel's part is insufficient to demonstrate that the plea was unknowing and involuntary. See *In re Oakland Co Prosecutor*, 191 Mich App at 124. Here, as in *Oakland Co Prosecutor*, the record demonstrates, at most, "good faith evaluations of a reasonably competent attorney" that turned out to be incorrect. *Id*. (internal quotation marks and citation omitted).

Moreover, defendant received a substantial benefit from his bargain, with the reduction of charges and the dismissal of other cases against him. Therefore, he cannot show that the basis for the plea was illusory. Nor has defendant ever asserted his innocence or another defense.

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[1] *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982).

Therefore, this is clearly not a case where defendant has been improperly induced by promises of leniency in order give up a meritorious defense. See *id*. at 124-125. Under the circumstances, we conclude that, because defendant did not establish an error in the plea proceeding that would entitle him to have the plea set aside, see MCR 6.310(C), the trial court did not abuse its discretion in denying his motion to withdraw.

Defendant next argues that his plea must be vacated because it was not supported by an adequate factual basis. We disagree.

As noted above, a "trial court's denial of a defendant's motion to withdraw a guilty plea is reviewed for an abuse of discretion." *Harris*, 224 Mich App at 131.

> A factual basis to support a plea exists if an inculpatory inference can be drawn from what the defendant has admitted. This holds true even if an exculpatory inference could also be drawn and the defendant asserts that the latter is the correct inference. Even if the defendant denies an element of the crime, the court may properly accept the plea if an inculpatory inference can still be drawn from what the defendant says. [*People v Jones*, 190 Mich App 509, 511-512; 476 NW2d 646 (1991) (citations omitted).]

The elements of possession with intent to deliver are "(1) that the recovered substance is a narcotic, (2) the weight of the substance, (3) that the defendant was not authorized to possess the substance, and (4) that the defendant knowingly possessed the substance intending to deliver it." *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). Possession with the intent to deliver requires both possession and intent. *Id*. However, "[a]ctual delivery is not required to prove intent to deliver." *People v Fetterley*, 229 Mich App 511, 517; 583 NW2d 199 (1998). Intent may be proved from the facts and circumstances, and minimal circumstantial evidence is sufficient. *Id*. at 517-518. Intent to deliver may be inferred from the amount of a controlled substance possessed by the accused, as well as the manner in which it is packaged and other circumstances surrounding the arrest. *People v Hardiman*, 466 Mich 417, 422 n 5; 646 NW2d 158 (2002), citing *People v Wolfe*, 440 Mich 508, 524; 489 NW2d 748 (1992); *Fetterley*, 229 Mich App at 518.

The trial court did not abuse its discretion in denying defendant's motion to withdraw his plea on the ground that an insufficient factual basis was established for the plea. Defendant admitted that he was present in a hotel room with more than 50 grams of "an illegal substance." The amount of the cocaine, and defendant's presence in the hotel room, supports a finding that defendant did not possess the cocaine for personal use, but intended to deliver it to another. The trial court elicited a sufficient factual basis for the plea.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering