# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>June 3, 2010 |
| v | No. 293142<br>Saginaw Circuit Court |
| DONALD LEE TOLBERT III,<br><br>Defendant-Appellant. | LC No. 07-029363-FC |

Before: BANDSTRA, P.J., and FORT HOOT and DAVIS, JJ.

PER CURIAM.

Defendant pleaded guilty to second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 22 1/2 to 50 years for second-degree murder, to run consecutive to a sentence of two years for felony-firearm. Defendant appeals by leave granted and we affirm.

Defendant's plea arises from the death of Charlie Hoskins, on June 2, 2007. On that date, defendant was in an altercation with several other people. Hoskins approached defendant and defendant picked up a handgun from the ground and struck Hoskins in the head with it. The gun discharged, shooting Hoskins in the head and killing him. Defendant was charged with open murder, assault with intent to rob while armed and two counts of felony firearm. On the second day of trial, defendant accepted the prosecution's offer, pleading guilty to second-degree murder and one-count of felony firearm, in exchange for which the remaining charges arising from the June 2, 2007 incident, as well as two unrelated charges in a separate case, were dismissed. Additionally, it was agreed, via a *Cobbs* agreement, that defendant would be sentenced to a minimum term not to exceed 23 years for the second-degree murder conviction.

Before sentencing, defendant moved to set aside his plea, on the basis that an adequate factual basis did not exist to show that he acted with the requisite malice to support a second-degree murder conviction. The trial court denied defendant's motion and sentenced him, in accordance with the *Cobbs* agreement, to a term of 22 1/2 to 50 years in prison for the second-degree murder conviction.

Defendant's sole argument on appeal is that the court erred by denying his motion to set aside his guilty plea to the charge of second-degree murder because a sufficient factual basis for that plea was not established. We disagree.

MCR 6.310(B)(1) provides for withdrawal of an accepted plea before sentencing. It reads as follows:

> [A] plea may be withdrawn on the defendant's motion or with the defendant's consent, only in the interest of justice, and may not be withdrawn if withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by subrule (C).

MCR 6.310(C) provides as follows:

> The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea. If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals.

A defendant does not have an absolute right to withdraw a guilty plea once it has been accepted. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997). "When a defendant moves to withdraw his guilty plea before sentencing, the burden is on the defendant to establish a fair and just reason for withdrawal of the plea." *Id.* The defendant bears the burden of establishing that withdrawal of the plea is supported by reasons based on the interest of justice. *People v Gomer*, 206 Mich App 55, 57; 520 NW2d 360 (1994). If sufficient reasons are provided, the burden shifts to the prosecutor to show that granting the motion will result in substantial prejudice to the prosecution. *Id.* To establish substantial prejudice, the prosecutor must show that his ability to prosecute is somehow hampered by the delay by more than mere inconvenience in preparing for trial. *Id*. at 57-58.

Under MCR 6.302(D)(1), "[i]f the defendant pleads guilty, the court, by questioning the defendant, must establish support for a finding that the defendant is guilty of the offense charged or the offense to which the defendant is pleading." See also *People v Watkins*, 468 Mich 233, 238; 661 NW2d 553 (2003). A factual basis is adequately established when the record supports the conclusion that "defendant pled guilty to an offense of which he might have been convicted at trial." *In re Guilty Plea Cases*, 395 Mich 96, 129; 235 NW2d 132 (1975). A court may accept a guilty plea based upon an inculpatory inference even if the defendant denies an element of the crime. *People v Thew*, 201 Mich App 78, 85; 506 NW2d 547 (1993).

The elements of second-degree murder are "(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse." *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998). Defendant's assertion of error involves only on the element of malice. In *People v Aldrich*, 246 Mich App 101, 123; 631 NW2d 67 (2001), this

Court provided the following guidance on the element of malice in the context of a charge of second-degree murder:

> The element of malice is defined as the intent to kill, the intent to cause great bodily harm, or the intent to do an act in wanton and wilful disregard of the likelihood that the natural tendency of such behavior is to cause death or great bodily harm. Malice for second-degree murder can be inferred from evidence that the defendant intentionally set in motion a force likely to cause death or great bodily harm. The offense of second-degree murder does not require an actual intent to harm or kill, but only the intent to do an act that is in obvious disregard of life-endangering consequences. [Internal quotation marks and citations omitted.]

Malice may also be inferred from the facts and circumstances of the crime, including the use of a deadly weapon, *People v Carines*, 460 Mich 750, 759; 597 NW2d 130 (1999), or the nature and location of a victim's wounds, *People v Unger*, 278 Mich App 210, 231; 749 NW2d 272 (2008).

To provide the factual basis for his guilty plea, defendant first testified that, during the altercation, he picked up a handgun from the ground and hit Hoskins on the head with it, and that the gun accidentally discharged, shooting Hoskins in the head. When asked whether Hoskins died as a result of defendant's act of striking him with the gun, defendant stated, "It was an accident, but, yes, sir." When asked whether he knew that a loaded firearm could discharge if he used it to strike someone in the head while his finger on the trigger, defendant denied placing his finger on the trigger, denied knowing that the gun was loaded, and denied that he knew that it "was even possible" that the gun would go off under the circumstances. Defendant acknowledged that it was "fair to say" that he possessed the gun that discharged killing the victim. However, both the prosecutor and the trial court expressed doubt that this was a sufficient factual basis for acceptance of the plea. Defense counsel then asked to question defendant. During this questioning, defendant acknowledged striking Hoskins in the head with the gun. The following exchange then took place:

> *Defense counsel*: And it's reasonable to believe that, you know, even striking someone with a heavy metal object, let alone the fact that it's a handgun, it's reasonable to believe that someone could get seriously injured or killed, correct?
>
> *Defendant*: Correct.
>
> *Defense counsel*: So as you struck Mr. Hoskins you knew there was a possibility someone could get killed? Yes?
>
> *Defendant*: Yes.

The prosecutor noted that this was different than what defendant had told the police after the incident, when he indicated "that he had the gun . . . and he told the police he fired the gun. He pulled the trigger. Now he's claiming he did not." The court then invited the prosecutor to question defendant further, and the subsequent exchange followed:

> *Prosecutor* (to defendant): . . . Is what you told the police the truth?

*Defendant*: What I just told the judge right now is the truth, that I hit him in the head with the gun and then it discharged.

*Prosecutor*: And it went off accidentally. You didn't have your finger on the trigger. You didn't pull the trigger.

*Defendant*: No, I didn't. The gun discharged, like I said.

*Court*: Okay. Well, I guess we don't have a—

*Defense counsel*: I think that's sufficient.

*Defendant*: I knew that this was a weapon, that it could cause great bodily harm, is what I'm saying. I knew that.

*Court*: Well, somebody has to pull the trigger that sent the bullet into the brain—

*Defendant*: And that was me.

*Court*: —and knew that that could happen.

*Defense counsel*: Well, he's acknowledged that he knew that someone—

*Court*: Well, he says it was an accident and the he didn't pull the trigger, so I don't think we have enough.

Defense counsel then proceeded to make further inquiry of defendant. Counsel asked defendant whether he knew that a gun is used for deadly force, to which defendant replied "right." counsel then asked, "[y]ou knew when you hit him he could be killed?" and defendant responded, "Well, yes, sir, I knew that." The following exchange, between defendant and the trial court, then occurred:

*Court*: Are you the one that's responsible for this gun discharging and killing the victim?

*Defendant*: Yes, sir. To make a long story short, yes, sir, I am responsible. And I acknowledge that. There's no way around. If it wasn't for me, he would still be here, and I acknowledge that. And I'm sorry that it happened, and I'm remorseful about the whole situation. I mean, I wish it would have never happened, but he did die by my hands, and I'm willing to take responsibility for that.

*Court*: Which means that you had something to do with pulling the trigger it sounds like?

*Defendant*: Well, yes, sir, it does.

*Court*: Okay. [Prosecutor?]

> *Prosecutor*: Am I to understand that he's now admitting that he pulled the trigger?
>
> *Court*: He said he pulled the trigger and that's what caused the bullet to go into the brain and kill him.
>
> *Prosecutor*: And, Mr. Tolbert, you realized at the time that by doing all of these things with that handgun, that is, picking it up, holding it, putting your finger on the trigger, striking the deceased with it, and pulling the trigger, that that was such a dangerous act that death would be a normal likely result?
>
> *Defendant*: At the time I did not realize that because that was not intended for that person. But now that it has happened, I am aware of, yes, that's what happened, yes, I am.

The trial court concluded, with concurrence from both the prosecutor and defense counsel, that defendant's "acknowledgement that he pulled the trigger that sent the bullet into the [victim's] brain" was sufficient to form the factual basis for defendant's guilty plea to second-degree murder. At sentencing, the trial judge recounted much of this exchange, denying defendant's motion to withdraw the plea, noting that defendant "finally convinced [the trial court] that yes, he did pull the trigger; and yes, he did intend to hit him with a gun; and yes, he understood that death or great bodily harm could follow."

Defendant asserts that the trial court had "adequate reason to doubt the voluntariness and accuracy of the plea." Considering the accuracy of the plea, the record unequivocally established that defendant's use of a firearm caused the victim's death. Defendant admitted that he knew that a loaded gun could cause death or serious injury even if he did not pull the trigger. Although the trial court focused on whether or not defendant pulled the trigger, it is sufficient to establish malice that he intended to hit the victim in the head with the gun, knowing that such action could be fatal. Indeed, defendant specifically acknowledged that he knew that striking Hoskins with the gun could cause him great bodily harm. Therefore, the admitted facts establish at least an inculpatory inference that "defendant intentionally set in motion a force likely to cause death or great bodily harm." *Aldrich*, 246 Mich App at 123. Even if an exculpatory inference can be drawn, that defendant did not intend to shoot Hoskins, the inculpatory inference that defendant acted with malice is sufficient. *Thew*, 201 Mich App at 85.

As for the voluntariness of his plea, defendant asserts that "[i]t is clear . . . that [he] had maintained his innocence and alleged that the underlying offense was an accident and that he did not intend the act to occur." That defendant maintained that the gun accidentally discharged does not render his plea involuntary, however. After terms of the prosecution's plea offer were discussed and clarified on the record, defendant indicated that he would accept it. A criminal plea entered pursuant to an agreement is voluntary if the terms of any plea agreement are disclosed and the court has inquired of defendant whether he has been "promised anything beyond what is in the agreement," whether he has been threatened, and whether it is his choice to plead guilty. MCR 6.302(C)(2), (4). Here, the court asked about the terms of the agreement and asked both defendant and counsel whether "there have been any other threats, promises, or inducements" to secure the plea. Defendant, the prosecutor, and defense counsel indicated that no representations beyond the agreement itself had been made or offered. Defendant may have

previously asserted his innocence, but there was no procedural legal bar to him changing his mind, nor is there anything inherent in the divergent positions taken that renders the latter logically invalid in light of the former.

Defendant also implies that the trial court should have vacated the plea of its own accord. In support he cites MCL 768.35, which provides as follows:

> Whenever any person shall plead guilty to an information filed against him in any court, it shall be the duty of the judge of such court, before pronouncing judgment or sentence upon such plea, to become satisfied after such investigation as he may deem necessary for that purpose respecting the nature of the case, and the circumstances of such plea, that said plea was made freely, with full knowledge of the nature of the accusation, and without undue influence. And whenever said judge shall have reason to doubt the truth of such plea of guilty, it shall be his duty to vacate the same, direct a plea of not guilty to be entered and order a trial of the issue thus formed.

It is clear from the transcript of the plea hearing that the court initially had some doubt about the factual basis for the plea. However, after defendant persisted and the court clarified his position, including his admission that he pulled the trigger, the factual basis was established. Further, the facts admitted were consistent with what defendant had been claiming about an accidental discharge. Additionally, there is no indication in the record that the plea was not "made freely, with full knowledge of the nature of the accusation, and without undue influence." Indeed, defendant's persistence in pursuing the plea belies this conclusion.

We affirm.

/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood
/s/ Alton T. Davis