

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH ALEXANDER FRANKLIN,

Defendant-Appellant.

UNPUBLISHED

November 16, 2010

No. 292469

Wayne Circuit Court

LC No. 08-014196-FH

Before: MURRAY, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of first-degree home invasion, MCL 750.110(2)(a), larceny of a building, MCL 750.360, and larceny of a firearm, MCL 750.357b. He was sentenced to 4 to 20 years' imprisonment for the first-degree home invasion conviction and was sentenced to time served for the remaining convictions. Defendant appeals of right. We vacate and remand for further proceedings.

Defendant first argues that the trial court's setting aside his guilty plea to second-degree home invasion, MCL 750.110(a)(3), was an abuse of discretion. Because defendant failed to raise this issue below; however, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The pivotal question is whether the trial court could, after concluding that it would not impose the sentence agreed upon by the parties, unilaterally set aside the plea and sentence agreement, or if it could only refuse to impose the agreed upon sentence and allow defendant the option to withdraw his guilty plea to second degree home invasion.

MCR 6.302(C)(3)(c) specifically permits a court to accept a plea agreement¹ without having considered a presentence report. "However, in such a situation, the court is not bound to follow the sentence disposition agreement until it has reviewed the presentence report." *People v Baker*, 215 Mich App 606, 608; 547 NW2d 62 (1996). If the court accepts the plea agreement

¹ In *People v Grove*, 455 Mich 439, 455-456; 566 NW2d 547 (1997), the Court noted that the term "agreement" under MCR 6.302(C) means the complete agreement reached by the parties, i.e., both the plea and the sentence agreement.

prior to reviewing the presentence report, MCR 6.302(C)(3) specifically indicates the court must inform the defendant of the following:

If the court accepts the agreement without having considered the presentence report . . . it must explain to the defendant that the court is not bound to follow the *sentence disposition* or recommendation agreed to by the prosecutor, and *that if the court chooses not to follow it* [the sentence disposition], *defendant will be allowed to withdraw from the plea agreement*. [MCR 6.302(C)(3) (emphasis supplied).]

Hence, MCR 6.302(C)(3) recognizes a distinction between the court's right not to be bound by the "sentence disposition" portion of the plea agreement, and a defendant's right to withdraw from the "plea agreement" if the court rejects the sentence disposition agreed to by the parties.

Here, the court initially accepted the plea agreement, which included defendant being placed on probation in accordance with the Holmes Youthful Training Act (HYTA), MCL 762.11 *et seq.*, *but only if he qualified* (in accordance with the sentence agreement), and ordered a presentence investigation report (PSIR).² This was consistent with MCR 6.302(C)(3)(c). Upon reviewing the report, the court noted at the sentencing hearing that defendant's successful participation in the HYTA would remove the second-degree home invasion conviction from his record and, after hearing from the victim, rejected the entire *plea agreement*, as opposed to simply the *sentence disposition*, because acceptance was not in the interests of justice.

Although the trial court was clearly not bound to accept the sentence portion of the plea agreement, it could not unilaterally set aside the plea itself. MCR 6.310(B)(2)(a) provides instruction on when a plea can be withdrawn. Regarding a withdrawal after acceptance of the plea but before sentencing, that subsection provides that:

(B) After acceptance but before sentence,

(2) the defendant is entitled to withdraw the plea if

(a) the plea involves a prosecutorial sentence recommendation or agreement for a specific sentence, and the court states that it is unable to follow the agreement or recommendation; the trial court shall then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea. [MCR 6.310(B)(2)(a).]

Here, the trial court indicated, as it was authorized to do, that it was not going to follow the sentence disposition agreed to by the parties. As a result of that conclusion, the court was

² Although defendant observes that the court admonished him for his manner of dress (comparing him to the city's "ex-mayor" and a "gangster" and noting he appeared ready to "par-tay [sic]"), defendant makes no claim that these comments tainted the court's rejection of his plea agreement.

required to “then state the sentence it intends to impose, and provide the defendant the opportunity to affirm or withdraw the plea.” *Id.* The trial court failed to do so in this case.

Case law supports the court rule’s recognition of defendant’s right to withdraw or affirm his plea after the court indicates its rejection of the sentence disposition. In *People v Siebert*, 450 Mich 500, 510; 537 NW2d 891 (1995), the Court held that:

However, it follows from *People v Killebrew*, [416 Mich 189; 330 NW2d 834 (1982)] that a prosecutor, like a defendant, is entitled to learn that the judge does not intend to impose the agreed-upon sentence, to be advised regarding what the sentence would be, and given an opportunity to withdraw from the plea agreement. The procedures outlined in *Killebrew* provide that the defendant may withdraw his plea when a sentence agreement or recommendation will not be satisfied in order to protect the defendant’s right “to make a knowing and intelligent waiver of his right to trial and its companion rights.” *Id.* at 210.

See, also, *People v Swirles*, 218 Mich App 133, 140; 553 NW2d 357 (1996) (“The only potential limit to the court’s sentencing discretion is the plea agreement itself, but the court is free to disregard the agreement as long as it affords the defendant the opportunity to withdraw his guilty plea.”).

Because the trial court failed to (1) inform defendant what sentence it intended to impose in place of the sentence agreement, and (2) allow defendant the option of withdrawing or affirming his plea after being informed by the court that it was not going to adhere to the sentence agreement reached by the parties, it committed a plain error. MCR 6.310 required such action (as defendant was required to be informed at the plea taking stage under MCR 6.302(C)(3)), and so we are compelled to vacate defendant’s conviction and sentence, and remand to allow defendant the opportunity to withdraw his plea to second degree home invasion, and if he does not do so, for resentencing in the court’s discretion. *People v Strong*, 213 Mich App 107, 113; 619 NW2d 736 (1995).

Based on this ruling, we need not consider the remaining issues presented on appeal.

Vacated and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio