STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 23, 2010
v	No. 293738 Livingston Circuit Court
NICHOLAS COLE SINNETT, Defendant-Appellant.	LC No. 08-017122-FC

Before: CAVANAGH, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's denial of his motion to withdraw his guilty plea for unarmed robbery, MCL 750.530. We reverse and remand to the trial court.

Defendant's conviction arises from his unauthorized taking of a diamond ring that was owned by someone who had met with him under the pretense that defendant was interested in purchasing it. Before defendant absconded with the ring, it was alleged that he acted nervously and that he placed his hand inside a breast pocket of his jacket leading the victim to believe that defendant may have been armed. Although defendant was initially charged with armed robbery, he was permitted to plead guilty to unarmed robbery. Between the time of the plea proceeding and his sentencing, defendant wrote several letters to the trial court. In those letters defendant challenged the factual basis of his plea, indicating that he never threatened the victim or had his hand in his jacket pocket before the victim voluntarily gave him the ring to inspect. Defendant admitted, however, to committing a larceny. Defendant repeatedly asserted his innocence with regard to the unarmed robbery guilty plea and, in at least one letter, requested that he be allowed to withdraw his plea.

At the sentencing hearing and before sentencing, defendant again requested to withdraw his guilty plea in this matter. The court refused to consider the motion to withdraw the plea, stating that the request "should be done more formally and it can be done after sentencing." The sentencing hearing proceeded and concluded with defendant being sentenced to 20 to 50 years, an upward departure from the guidelines range of 50 to 200 months.

After sentencing, defendant filed a motion to withdraw his guilty plea, or for an evidentiary hearing, primarily arguing that he was actually innocent of unarmed robbery. Defendant admitted that he was guilty of larceny only. The court denied the motion. Defendant

then filed this delayed application for leave to appeal, which was granted by order entered on October 6, 2009.

Defendant argues that he should have been allowed to withdraw his guilty plea because, prior to sentencing, he repeatedly challenged the factual basis for the plea, asserted his innocence, and moved to withdraw his plea. We agree. 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).

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*, 224 Mich App at 131. When a defendant asserts his innocence before sentencing, a court should be liberal in considering a request to withdraw a guilty plea. *People v Bencheck*, 360 Mich 430, 432; 104 NW2d 191 (1960). However, the request need not be granted where it is obviously frivolous. *People v Hundley*, 181 Mich App 137, 138; 449 NW2d 121 (1989). And a defendant's true motive in requesting a withdrawal must be based on a concern other than sentencing. *People v Camargo*, 163 Mich App 581, 584; 415 NW2d 211 (1987).

Defendant argues that he should have been permitted to withdraw his plea before sentencing under MCR 6.310(B) because he repeatedly asserted his innocence and disavowed the factual basis for the plea to an assaultive crime in several letters to the court prior to sentencing, at his presentence investigation interview, as well as at the sentencing hearing prior to sentencing. We agree.

A conviction for unarmed robbery requires proof that, in the course of committing a larceny, the defendant used force or violence against a person or assaulted or put a person in fear, although not armed with a dangerous weapon. See MCL 750.530; *People v Johnson*, 206 Mich App 122, 125-126; 520 NW2d 672 (1994). In this case, it was alleged that defendant had his right hand over the upper left breast pocket of his coat when he told the victim to give him the ring thus placing the victim in fear before he fled with the ring. At the plea hearing, the court attempted to establish the factual basis for the plea. The following exchange between the court, attorneys, and defendant occurred:

> *The Court:* . . . He intended when he reached his hand in his pocket that that to scare her. Isn't that an essential element? I think it is. This is not the time to pussyfoot around stuff like that.
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> *Mr. Novelli [defense counsel]:* No, it's not pussyfooting around, it's just that the plea –
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> *The Court:* Well if he reached inside his jacket to scratch himself that – that would not be the armed robbery, if any jury would believe that.

Ms. Cavanaugh [the prosecution]: Judge, I believe the element can be that he put her in fear. . . . That he put her – that she was afraid and he intended to put her in fear.

The Court: I think he had to intend that. I mean he can't reach – scratch himself and inadvertently scare her.

Mr. Novelli: What we're struggling over is the reaching, Judge, not the other circumstances that would be enough to justify or being reasonably apprehensive. . . .

The Court: Well, put it this way, if he reached in there (inaudible) would understand that she could be scared that he was reaching for a weapon. That would be sufficient, I believe. Is that true, Mr. Sinnett?

Mr. Sinnett [defendant]: Yes, sir.

The Court: You think – she could really think you were reaching – she could reasonably think when you go like this and say give me the ring and you reach inside your breast pocket like that, she could reasonably believe that you were reaching for a weapon. Is that true?

Mr. Sinnett: Yes, sir.

The Court: Are you satisfied on that then? All right. All right. I think that's sufficient then. And then you actually took the – you actually took the diamond ring, is that true?

Mr. Sinnett: Yes.

The Court: And you fled the scene, is that correct? You ran away.

Mr. Sinnett: After we discussed a lot more, sir.

In the time between the plea hearing and the sentencing hearing, defendant wrote several letters to the trial court repeatedly stating that he never reached inside, or had his hand in, his breast pocket. Defendant indicated that the victim voluntarily gave him the ring to examine and, after further discussion, he fled with the ring. Thus, he admitted to larceny, but not unarmed robbery. Defendant also repeatedly claimed in his letters that he did nothing to threaten the victim into giving him the ring. Apparently, defendant passed a polygraph in that regard. The presentence investigation report indicates, in defendant's description of the offense, that his intentions were to "run with the ring," but that he "never threatened [the victim] in any way[,] shape or form." Further, at defendant's sentencing hearing, defendant's attorney indicated that defendant "asked me to withdraw the plea" and requested that the charge be reduced to larceny on the ground that the results of a polygraph test defendant underwent were favorable. We conclude that defendant should have been permitted to withdraw his guilty plea before sentencing.

As stated above, when a defendant asserts his innocence before sentencing, a court should be liberal in considering a request to withdraw a guilty plea. *Bencheck*, 360 Mich at 432. "Doubts concerning substantiation of defendant's reasons for withdrawal are to be resolved in defendant's favor." *People v Lewis*, 176 Mich App 690, 693-694; 440 NW2d 12 (1989). In *Lewis*, this Court accepted that a letter sent to the trial court was considered a motion. *Id*. Although in *Lewis* the defendant did not assert his innocence in the one letter requesting to withdraw his plea, defendant's statements that were incorporated into the presentence report included his claim of innocence and were found sufficient to assert his innocence. *Id*. at 694. In our case, defendant repeated in several letters to the court his claim of innocence to the charge of unarmed robbery. The presentence report also included his claim of innocence to the charge. And before sentencing his attorney requested on defendant's behalf that defendant be allowed to withdraw his plea. Thus, defendant's request should have been granted unless the request was obviously frivolous. See *Bencheck*, 360 Mich at 432; *Hundley*, 181 Mich App at 138.

If a defendant merely states a belief in his innocence but fails to indicate how his earlier factual recital supporting his guilty plea was faulty, the request to withdraw may be deemed frivolous. *Lewis*, 176 Mich App at 694. In this case, defendant repeatedly stated in letters to the court before sentencing that he did not have his hand in his pocket and did not threaten the victim into giving him the diamond ring. This claim is arguably supported by the fact that defendant met with the victim for the purpose of discussing a sale of the ring, i.e., he did not have to use force or a threat of force to obtain the ring. However, defendant readily admitted to larceny of the ring.

Further, review of the colloquy that took place at the plea hearing does tend to support defendant's claim that he did not admit to reaching inside or having his hand in his breast pocket before being handed the ring. Again the Court stated: "Well, put it this way, **if** he reached in there (inaudible) would understand that she could be scared that he was reaching for a weapon. That would be sufficient, I believe. Is that true, Mr. Sinnett?" To which defendant responded in the affirmative. However, defendant did not admit that he actually **did** reach "in there" or threaten the victim in any way. And defendant indicated that even after he had the ring in his hand, he and the victim actually had a discussion "a lot more" before he fled with the ring. Thus, under MCR 6.302(D)(1), it does not appear that the plea was accurate with regard to its factual basis. Pursuant to MCR 6.302(A), a court may not accept a plea of guilty unless it is convinced that the plea is understanding, voluntary, and accurate. In light of this factual discrepancy, as well as the facts that defendant admitted to committing a larceny, and that the focus of defendant's letters was the accuracy of his plea, not sentencing concerns, we conclude that defendant's request to withdraw his plea was not obviously frivolous. Thus, the trial court abused its discretion in denying defendant's motion to withdraw his plea. In light of our resolution of this issue, we need not consider defendant's other claims on appeal.

Defendant's conviction is reversed, his sentence vacated, and this matter is remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher