STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 17, 2015
v	No. 327112 Wayne Circuit Court
RONALD TOWNSEND II Defendant-Appellee.	LC No. 14-002156-FC

Before: SAWYER, P.J., and BECKERING and BOONSTRA, JJ.

PER CURIAM.

The prosecution appeals by delayed leave granted[1] the trial court's order granting defendant's motion to withdraw his guilty plea. We reverse and remand for proceedings consistent with this opinion.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises out of a drive-by shooting in Inkster, Michigan on February 23, 2014. Three individuals were in an apartment when the glass door of the apartment was hit by gunfire. Two of the individuals in the apartment were struck with bullets and the other was injured by the shattered glass. After the shooting, the police found several .40 caliber Federal shell casings on the ground near the apartment, as well as impacts from the rounds in the apartment.

Defendant and his codefendant, Lamont Cooper, were arrested later that evening by Redford Police at a traffic stop where they were found smoking marijuana in their car, and a subsequent search of the car yielded a .40 caliber semi-automatic handgun and a magazine of Federal bullets. Later, at the Michigan State Police district headquarters, defendant and Cooper confessed to the drive-by shooting, stating that they only intended to scare one of the occupants

[1] *People v Townsend*, unpublished order of the Court of Appeals, issued June 18, 2015 (Docket No. 237112).

of the apartment. Defendant later filed a motion for a *Walker*[2] hearing (to suppress his confession), but withdrew the motion following his guilty plea.

Defendant pleaded guilty to conspiracy to commit assault with intent to murder, MCL 750.83, carrying a weapon with unlawful intent, MCL 750.226, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant admitted on the record at the plea hearing that he was at the location of the shooting on the night in question, that he went there with Cooper, that they conspired to murder an individual in the apartment, and that defendant was carrying a .40 caliber pistol.

Before sentencing, defendant wrote a letter to the trial court, seeking permission to withdraw his guilty plea. In the letter, defendant stated that his defense counsel had told him that if he did not plead guilty defense counsel would not represent him. Defendant also expressed his concern about the length of his sentence, and proclaimed his innocence.

At the subsequent sentencing hearing on June 3, 2014, defendant stated on the record, before his sentences were rendered, that he wished to withdraw his guilty plea. While defendant had sent the referenced letter, he did not file a formal written motion. The following colloquy took place among the trial court, defendant, the prosecutor, and defendant's counsel, Ronald McDuffie (McDuffie):

> *Mr. McDuffie* [defense counsel]: Thank you. Good morning, your Honor, for the record Ronald McDuffie. I had a chance to go over the Presentence [Investigation Report] with my client. The first thing, Judge, the defendant wants to ask the Court to allow him to withdraw his guilty plea. I'll let him articulate that, Judge.
>
> *The Defendant*: Your Honor, basically I want to withdraw my plea because my lawyer said he wouldn't represent me basically if I didn't take the plea. So he forced me to do so.
>
> *The Court*: Didn't you do so under oath?
>
> *The Defendant*: [Defense counsel] said if I didn't take the plea –
>
> *The Court*: Did I swear you under oath?
>
> *The Defendant*: Yes, you did.
>
> *The Court*: And didn't you confess to these crimes?
>
> *The Defendant*: Yes, I did, sir, yes.

[2] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

The Court: Ms. Towns, anything from the People on that?

Ms. [Kam] Towns [the prosecutor]: No, Judge, I would just indicate that not only was the defendant placed under oath and admitted his guilt but he was also asked by the Court, if anybody threatened or promised you anything, this is now the time to say it and I'm not aware of any comments that Mr. Townsend made that would suggest that he was threatened or promised anything inappropriate by his lawyer. The People would object to withdrawal of the plea.

The Court: Anything else, Mr. McDuffie?

The Defendant: No, Judge.

The Court: I don't find there's any reason to allow Mr. Townsend to withdraw his plea. The motion to withdraw the plea is denied.

The trial court sentenced defendant, pursuant to a *Cobbs*[3] agreement, to concurrent terms of 168 to 360 months' imprisonment for conspiracy to commit assault with intent to murder, 12 to 60 months' imprisonment for carrying a weapon with unlawful intent, 12 to 60 months' imprisonment for carrying a concealed weapon, to be served consecutively to the mandatory two-year term of imprisonment for felony-firearm.

On January 20, 2015, defendant filed his motion to correct an invalid sentence and to withdraw his plea, arguing that his guilty plea was coerced by defense counsel, that he was denied the effective assistance of counsel, and that his sentence was disproportionate.

On February 20, 2015, the trial court[4] held a hearing on defendant's motion to correct an invalid sentence and to withdraw his guilty plea. The trial court ordered an evidentiary hearing to consider defendant's claim that his guilty plea had been coerced by defense counsel and therefore was not voluntary, and that he was denied the effective assistance of counsel.

The evidentiary hearing on defendant's motion was held the following month. During the hearing, the trial court heard the testimony of McDuffie, defendant, defendant's grandmother, and defendant's father, Ronald Townsend.

McDuffie testified that he was a criminal defense attorney who had been practicing criminal law in Wayne County for 31 years and that 99% of his practice focused on the criminal law. McDuffie testified that he was retained by defendant to represent him and that it was defendant's grandmother who had originally retained him. McDuffie's representation of defendant began after defendant had already been bound over to circuit court and when plea

[3] *People v Cobbs*, 443 Mich 276, 285; 505 NW2d 208 (1993).

[4] The trial judge who accepted defendant's plea and denied defendant's request to withdraw his plea at sentencing, Judge Michael J. Callahan, had retired; defendant's motion hearing and all subsequent lower court proceedings were conducted by Judge Bruce U. Morrow.

negotiations were taking place. McDuffie did not recall exactly what he was paid and did not believe he had entered into a fee agreement with defendant. McDuffie received two payments on defendant's behalf, both from defendant's grandmother. McDuffie reviewed the discovery in the case, filed the motion for a *Walker* hearing, and discussed with defendant the contents of the discovery in the case and the nature of the charge of assault with intent to commit murder. On the day that the prosecutor made a formal offer to defendant for a plea bargain, McDuffie discussed with defendant withdrawing his motion for a *Walker* hearing if he accepted the plea bargain. McDuffie denied telling defendant to lie in open court, and he did not tell defendant what he should or should not do with regard to accepting an offer for a plea bargain.

Defendant vacillated over whether to plead guilty, but during his last jail interview with McDuffie, defendant indicated his willingness to plead guilty. When negotiating a plea bargain with the prosecutor, McDuffie was aware that Cooper was planning to testify against defendant. McDuffie also conceded that he told defendant that if he did not plead guilty, he would withdraw from the case. McDuffie testified as follows:

> Well, what I told defendant is that I wouldn't try this case. And I would file a motion to withdraw if he wanted to go to trial. And that's based on my thirty-one years of experience. Because if I don't think that there's at least a 50-50 chance of winning the case, I'm not just going to go through the motions of just doing the trial.
>
> So in this case, if the Judge allowed his statement in, which basically was inculpatory, it definitely wasn't exculpatory, I wasn't going to be the attorney to go to trial. And I told him that. Absolutely. But I didn't say: If you want to go to trial, you better plea[d] guilty if you want me to stay. I didn't put it in that context. But you have to appreciate [defendant's] history. He may have perceived it differently. But that wasn't the way it was intended.

Defendant testified that McDuffie was defendant's second counsel in this matter and that he visited defendant two to three times in the jail during the pendency of the proceedings. According to defendant, McDuffie read defendant all of the charges he was facing, but did not go over the intent that the prosecution had to prove for assault with intent to murder. Defendant stated that on May 9, 2014, McDuffie presented defendant with the prosecution's plea offer; McDuffie and defendant had not discussed plea matters before that time. Defendant stated that McDuffie did not discuss with him the minimum sentence for assault with intent to murder, nor did he discuss the sentencing guidelines for this offense or possible defenses to the charges. When asked why he pleaded guilty on May 9, 2014, defendant responded that "[McDuffie] said that if I didn't take this plea, he wouldn't represent me." Defendant stated that, on the day of his plea, he did not read the advice of rights form that was presented to him and that he did not understand the trial court's questions, but that he did not want to speak up.

Defendant's grandmother testified that McDuffie was paid $4,000 in total for his representation of defendant and that she delivered $1,000 to McDuffie personally after borrowing money from a bank. She stated that McDuffie seemed most concerned about obtaining his payment and had earlier threatened to quit representing defendant, but that when she paid him the $1,000 "[McDuffie] said he didn't have a choice [but to continue the

representation]." Defendant's grandmother stated in an affidavit presented to the trial court that, two weeks before defendant pleaded guilty, McDuffie was threatening to no longer represent defendant because he was owed money.

The trial court ruled from the bench, concluding that defendant was denied the effective assistance of counsel when he attempted to withdraw his plea at the sentencing hearing on June 3, 2014. The trial court questioned why McDuffie appeared at the evidentiary hearing without his file and without details concerning his financial arrangements with defendant for his representation. The thrust of the trial court's ruling appeared to be its concern that there was an "imbalance of power" between McDuffie and defendant throughout McDuffie's legal representation of defendant; the trial court characterized defendant as "a vulnerable defendant." The trial court did conclude, however, that Judge Callahan correctly accepted defendant's plea at the plea hearing and established a factual basis for the plea. The trial court allowed defendant to withdraw his guilty plea.

The trial court stayed this matter pending this appeal.

II. MOTION TO WITHDRAW GUILTY PLEA

The prosecution argues that the trial court abused its discretion in allowing defendant to withdraw his guilty plea where defendant has not met his burden of establishing that his defense counsel was ineffective at the plea hearing, and where the record reflects that his guilty plea was understanding, voluntary and knowing. We agree.

A trial court's ruling on a motion to withdraw a plea is reviewed for an abuse of discretion. *People v Brown*, 492 Mich 684, 688; 822 NW2d 208 (2012). An abuse of discretion occurs when the trial court renders a decision that "results in an outcome falling outside the range of principled outcomes." *People v Fonville*, 291 Mich App 363, 376; 804 NW2d 878 (2011). The trial court's factual findings are reviewed for clear error, and underlying questions of law are reviewed de novo. *People v Martinez*, 307 Mich App 641, 646-647; 861 NW2d 905 (2014). This case also involves the application and interpretation of MCR 6.310. This Court reviews de novo the trial court's interpretation and application of this court rule. *Cole*, 491 Mich at 330.

To the extent that the withdrawal of defendant's guilty plea raises constitutional issues, this Court reviews these issues de novo. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). Further, defendant's Sixth Amendment right to counsel extends to proceedings during the plea-bargaining process, and to establish ineffective assistance, defendant must establish that his counsel's representation was objectively unreasonable, and that but for counsel's errors, the result of his criminal proceedings would have been different. *Lafler v Cooper*, ___ US ___; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012). The issue whether defendant was denied effective assistance of counsel presents mixed questions of law and fact. *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008). The trial court's findings of fact are reviewed for clear error, and the ultimate constitutional issue concerning whether defendant received the effective assistance of counsel is reviewed de novo. *Id*.

A defendant's guilty plea is required to be knowing, voluntary and understanding. *Brown*, 492 Mich at 688-689; *Cole*, 491 Mich at 331; MCR 6.302(A). Because a plea of guilty requires a criminal defendant to waive serious constitutional protections, including the right to not incriminate himself, the right to a trial by jury and the right to confront his accusers in court, the Fourteenth Amendment's Due Process Clause mandates that a plea of guilty does not effectively waive those rights unless it is knowing and voluntary. *Cole*, 491 Mich at 332-333. A plea is voluntary where a defendant is aware of the direct consequences of his decision to plead guilty. *Id*. at 333. Constitutionally-sound guilty pleas are "intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences[ ]" of pleading guilty. *Id*. at 333, quoting *Brady v United States*, 397 US 742, 748; 90 S Ct 1463; 25 L Ed 2d 747 (1970).

The relevant standards for determining whether a plea withdrawal is appropriate are set forth in MCR 6.310(B) and (C). Pursuant to MCR 6.310(B)(1), a defendant may withdraw his guilty plea before sentencing "in the interest of justice," and if withdrawal would not substantially prejudice the prosecution because of reliance on the plea. To satisfy the requirement that the plea withdrawal be in the interest of justice, a defendant must show a "fair and just reason" for seeking a plea withdrawal. *Fonville*, 291 Mich App at 378, quoting *People v Wilhite*, 240 Mich App 587, 594; 618 NW2d 386 (2000).

> Fair and just reasons include reasons like a claim of innocence or a valid defense to the charge. Things that are not considered fair and just reasons are dissatisfaction with the sentence or incorrect advice from the defendant's attorney. [*Fonville*, 291 Mich App at 378 (footnotes omitted).]

MCR 6.310(C) provides that within six months following sentencing, a defendant may seek to withdraw his guilty plea if the trial court determines "there was an error in the plea proceeding that would entitle the defendant to have the plea set aside[ ]. . . ." In other words, a defendant seeking to withdraw his plea after sentencing must establish that a defect took place during the plea-taking proceeding. *Brown*, 492 Mich at 693.

Where a defendant asserts that he was denied the effective assistance of counsel with regard to his decision to plead guilty, the dispositive issue is whether defendant "tendered the plea voluntarily and understandingly." *People v Armisted*, 295 Mich App 32, 48; 811 NW2d 47 (2011), quoting *People v Swirles (After Remand)*, 218 Mich App 133, 138; 553 NW2d 357 (1996). Defense counsel is presumed to have provided defendant with adequate assistance, and it is also presumed that defense counsel "made all significant decisions in the exercise of reasonable professional judgment." *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012).

As a preliminary matter, the trial court stated at the hearing on defendant's motion to withdraw his guilty plea that it considered defendant's oral statement on the day of sentencing to be a presentence motion to withdraw his guilty plea. Additionally, in his brief on appeal, defendant advances the argument that the motion that the trial court was considering, leading to the order from which the prosecution appeals, involved a continuing presentencing motion to withdraw his guilty plea. However, our review of the record contradicts the trial court's conclusion that the motion it was considering on February 20, 2015 and March 27, 2015 was a

motion presented to the court before sentencing, and further contradicts defendant's claim that the trial court was considering a continuing presentencing motion.

The trial court denied defendant's oral request to withdraw his plea prior to sentencing. Defendant subsequently, on January 20, 2015, filed a motion to withdraw his guilty plea and to correct his invalid sentence. It is the disposition of that motion that is the subject of this appeal; thus, defendant's motion was properly considered a *post*-sentence motion to withdraw his plea. However, the characterization of defendant's motion is ultimately immaterial, because regardless of whether defendant's motion to withdraw his guilty plea is considered pursuant to MCR 6.310(B) or (C), withdrawal of his guilty plea was not warranted where there were no errors in the plea-taking process, defendant was not denied the effective assistance of counsel, and the withdrawal of the plea would not serve the interests of justice.

Our review of the plea hearing transcript reveals that the trial court fully and carefully complied with the requirements of MCR 6.302 in determining that defendant's guilty plea was knowing, understanding and voluntary. Indeed, defendant's subsequent assertions in the lower court and this Court that he was coerced by defense counsel to plead guilty are contradicted by his clear and unequivocal sworn testimony in open court during his plea hearing that his plea was not the result of promises or threats not disclosed to the court and that it was his choice to plead guilty. In other words, our review of the plea hearing transcript confirms that defendant acted voluntarily and with awareness of the serious consequences of entering a guilty plea. *Cole*, 491 Mich at 333. Defendant also signed a written settlement offer and notice of acceptance on the day of his guilty plea. While it is very apparent that defendant is now dissatisfied with his sentence given that his codefendant apparently received a lower sentence on the conspiracy to commit assault with intent to murder conviction, this is not a fair and just reason for seeking plea withdrawal under MCR 6.310(B). *Fonville*, 291 Mich App at 378. Moreover, where there were no errors in the plea-taking proceeding, defendant was not entitled to plea withdrawal pursuant to MCR 6.310(C). *Brown*, 492 Mich at 692.

Further, we find that the trial court erred in determining that defendant was denied the effective assistance of counsel regarding his plea agreement, and that the trial court's reasoning was flawed in several respects. First, the trial court erred by focusing on defense counsel's performance at the June 3, 2014 sentencing hearing, rather than at the May 9, 2014 plea hearing where defendant gave a knowing, voluntary and understanding guilty plea on the record. Moreover, there is simply no evidence to rebut the presumption that defense counsel's performance during the plea negotiation process was the result of adequate and competent assistance of counsel, or that his decisions resulted from the exercise of sound professional judgment. *Vaughn*, 491 Mich at 670. Indeed, it is clear from the evidentiary hearing transcript that defense counsel's representation of defendant during plea negotiations "was within the range of competence demanded of attorneys in criminal cases." *People v Effinger*, 212 Mich App 67, 70; 536 NW2d 809 (1995), citing *People v Thew*, 201 Mich App 78, 89-90; 506 NW2d 547 (1993). Defense counsel testified that he reviewed the contents of discovery with defendant, he filed a motion seeking a *Walker* hearing, he discussed with defendant the nature of his charges, he met with defendant to discuss the prosecutor's plea offer, and he did not tell defendant what action he should take with regard to any plea offers.

Defendant argues that he is actually innocent and that he was coerced to plead guilty by defense counsel's threats. However, it is improper for a defendant to produce evidence, after the fact, that contradicts his sworn statements made under oath during a guilty plea proceeding in open court. *People v White*, 307 Mich App 425, 429-431; 862 NW2d 1 (2014). In *White*, this Court affirmed the lower court's denial of the defendant's request for an evidentiary hearing concerning the voluntariness of his guilty plea and whether his defense counsel was ineffective, even where the defendant had produced affidavits of his own and of his family stating that defense counsel had coerced him to plead guilty. During his plea hearing, the defendant expressed that he was satisfied with defense counsel's advice, and stated that his plea was his own choice and that no promises or threats were made to him to compel his plea. *Id*. at 429. This Court quoted with approval its prior holding in *People v Serr*, 73 Mich App 19, 28; 250 NW2d 535 (1976):

> It is the opinion of this [C]ourt that where a defendant has been found guilty by reason of his own statements as to all of the elements required to be inquired into by GCR 1963, 785.7, and his attorney also confirmed the agreement and the defendant has been sentenced, neither he nor his attorney will be permitted thereafter to offer their own testimony to deny the truth of their statements made to induce the court to act. To do so would be to permit the use of its own process to create what amounts to a fraud upon the court. This is based on public policy designed to protect the judicial process. [*White*, 307 Mich App at 430-431.]

See also *Armisted*, 295 Mich App at 49 (concluding that where the defendant testified under oath at the plea proceeding that he fully understood his plea and sentencing agreement, his subsequent affidavit regarding mistaken advice from defense counsel concerning his minimum sentence was "insufficient to contradict or overcome his previous sworn statements" at his plea hearing).

Finally, our Supreme Court has recognized that "[r]equests to withdraw pleas are generally regarded as frivolous where circumstances indicate that the true motivation behind the motion is sentencing concerns." *People v Ward*, 459 Mich 602, 614; 594 NW2d 47 (1999), amended 460 Mich 1204 (1999). On the record before this Court, where defendant tendered a knowing, voluntary, and understanding plea, and the trial court erred in its legal analysis on the ultimate issue whether defendant was denied the effective assistance of counsel, the trial court's decision allowing defendant to withdraw his guilty plea was outside the range of principled outcomes, and amounted to an abuse of discretion. *Fonville*, 291 Mich App at 376.

III. PROPORTIONALITY OF SENTENCE

Next, the prosecution argues that defendant cannot contest on appeal the proportionality of his agreed-upon sentence; defendant argues in response that his sentence is disproportionate. We note that the prosecution is not the aggrieved party regarding defendant's sentence. See MCR 7.203(A); *Kieta v Thomas M Cooley Law School*, 290 Mich App 144, 147; 799 NW2d 579 (2010). Defendant has not been granted leave to appeal his sentence. Thus, it does not appear that either party currently possesses the standing to seek appellate review of defendant's sentence in this case.

Further, review of the proportionality of defendant's sentence is precluded by *People v Cobbs*, 443 Mich 276, 285; 505 NW2d 208 (1993) and *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005). Although defendant argues that our decisions in *People v Ward*, 206 Mich App 38; 520 NW2d 363 (1994) and *People v Blount*, 197 Mich App 174; 494 NW2d 829 (1992), indicate that a defendant may challenge the proportionality of a sentence received pursuant to a sentencing agreement if he also challenges the validity of his plea, these cases did not involve *Cobbs* agreements. *Cobbs*, 443 Mich at285, makes clear that a defendant who pleads guilty with knowledge of the sentence to be imposed waives appellate review of the sentence's proportionality. Further, *Blount* and *Ward* involved sentencing agreements and were decided prior to *Wiley*. *Wiley*, 472 Mich App at 154, makes clear that "a defendant waives appellate review of a sentence . . . by understandingly and voluntarily entering into a plea agreement to accept that specific sentence." See also *People v Billings*, 283 Mich App 538, 551; 770 NW2d 893 (2009) (citing *Wiley* for the principle that a defendant who enters into a plea agreement including a specific sentence waives appellate review of that sentence). Here, as discussed above, we have concluded that defendant's plea agreement was entered into understandingly and voluntarily, and that defendant had knowledge of the sentence to be imposed. We therefore conclude that appellate review of the proportionality of defendant's sentence is precluded.

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

/s/ David H. Sawyer
/s/ Jane M. Beckering
/s/ Mark T. Boonstra