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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2019
v	No. 346638 Oakland Circuit Court
ROBERT LEE GERMAN, Defendant-Appellant.	LC No. 2012-243191-FC

Before: RONAYNE KRAUSE, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted[1] his reissued *nolo contendere* plea convictions for six counts of assault with intent to murder (AWIM), MCL 750.83, six counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, conspiracy to commit murder, MCL 750.316(1)(a); MCL 750.157a(a), and carrying a concealed weapon (CCW), MCL 750.227. Defendant was sentenced to 225 months to 70 years' imprisonment for each AWIM conviction, two years' imprisonment for each felony-firearm conviction, life in prison with the possibility of parole for the conspiracy to commit first-degree murder conviction, and three to five years' imprisonment for the CCW conviction. On appeal, defendant argues: (1) the trial court abused its discretion in denying defendant's motion to withdraw his pleas; and (2) the trial court erred in denying defendant's request to strike the inaccurate reference regarding defendant's alleged gang affiliation from the presentence investigation report (PSIR). We affirm.

I. STATEMENT OF FACTS

This case arises from a shooting at the Rolladium Skating Rink. Defendant was attending a party at the Rolladium on December 23, 2011, along with Cheyenne Ingram and Treandis

[1] *People v German*, unpublished order of the Court of Appeals, entered January 24, 2019 (Docket No. 346638).

Jamison. At the rink, defendant, Ingram, and Jamison had an altercation with members of a Pontiac gang called the "Goon Squad." Following the fight, defendant, Ingram, and Jamison exited the arena and reentered with handguns. Upon reentry, defendant, Ingram, and Jamison began shooting into the crowd, wounding six individuals. Defendant was arrested and confessed to the shooting.

Ingram and Jamison were originally codefendants arising out of the same incident. Both were eventually convicted by a jury of, in relevant part, six counts of AWIM, MCL 750.83, and one count of conspiracy to commit first-degree murder, MCL 750.157a and MCL 750.316(1)(a). They each appealed, and, in relevant part, this Court affirmed Ingram's and Jamison's convictions. *People v Jamison*, unpublished per curiam opinion of the Court of Appeals, issued April 24, 2014 (Docket No. 312460); *People v Ingram*, unpublished per curiam opinion of the Court of Appeals, issued April 24, 2014 (Docket No. 312656). Following Ingram and Jamison's convictions and sentencing, defendant pleaded *nolo contendere* to all counts. Both defense counsel and the prosecutor confirmed on the record that there was no plea agreement. The trial court did not inform defendant that his conspiracy conviction required a mandated life sentence with the possibility of parole. Defendant was later sentenced.

In 2018, Defendant filed a motion to withdraw his plea and to amend the PSIR. Defendant argued that the trial court erred in taking his *nolo contendere* pleas in two respects: (1) the trial court did not inform defendant that the minimum sentence for the conspiracy to commit murder conviction was life without parole, and (2) the trial court did not inform defendant that the felony-firearm convictions mandated a sentence of two years' imprisonment that was to run consecutive to the sentences for AWIM. Additionally, defendant argued that the PSIR contained inaccurate statements that defendant is a member of the gang known as either "1st Infantry" or the "Eastside Boys Gang" (1st E). The trial court entered an order setting aside defendant's plea for the conspiracy to commit murder charge, but denied defendant's motion for withdrawal of the remainder of his pleas and for amendment of the PSIR. The trial court concluded that there had been error in the plea-taking process for the conspiracy to commit murder charge, but there was no error in the process for the taking of the additional pleas.

II. PLEA WITHDRAWAL

Defendant argues that the trial court abused its discretion by refusing to allow him to withdraw his *nolo contendere* pleas to the entirety of the charges against him. Defendant argues that he was not properly informed that his felony-firearm convictions carried mandatory two-year consecutive sentences. Defendant also argues that his defective plea to the conspiracy to commit murder charge was not independent of the other charges and rendered his entire plea defective. We disagree.

A. STANDARD OF REVIEW AND APPLICABLE LAW

A trial court's denial of a motion for plea withdrawal is reviewed for abuse of discretion. *People v Smith*, 502 Mich 624, 631; 918 NW2d 718 (2018). An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and principled outcomes. *People v Blanton*, 317 Mich App 107, 117; 894 NW2d 613 (2016). Interpretation of court rules is subject to de novo review. *Id.*

Within six months after sentencing, a defendant may move to withdraw a plea under MCR 6.310(C).[2] "A defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process." *People v Brown*, 492 Mich 684, 693; 822 NW2d 208 (2012). A plea is defective if the defendant was not made "fully aware of the direct consequences of the plea," which includes the "penalty to be imposed." *Blanton*, 317 Mich App at 118 (quotations and citations omitted). Failure to do so may render the defendant's plea not truly voluntary and understanding under MCR 6.302(B). *Id*. at 118-119. The "trial court must inform the defendant of any consecutive and/or mandatory sentencing requirements" even though doing so is not explicitly required by MCR 6.302(B). *Id*. at 119 (quotation omitted).

B. FELONY-FIREARM PLEA

We initially reject defendant's contention that he was not properly notified of the consecutive sentences for his felony-firearm convictions. The trial court and defendant engaged in the following colloquy at the plea hearing:

> *The Court*: Do you understand that you're pleading no contest to those—those charges?
>
> *The Defendant*: Yes, sir.
>
> *The Court*: Do you understand the most time I can give you on the Assault with Intent to Murder is up to life in prison?
>
> *The Defendant*: Yes.
>
> *The Court*: And you understand that the most—that you also get an additional two years for the Possession of a Firearm?
>
> *The Defendant*: Yes, your Honor.

Defendant was unambiguously informed that he would serve sentences of two years in addition to his AWIM convictions.[3] Additionally, defendant confirmed before sentencing that he had received and reviewed the PSIR, which explicitly stated in plain terms that his felony-firearm sentences would be served consecutively to his AWIM sentences, and he believed everything in

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[2] Because the trial court reissued the judgment of sentence on February 2, 2018, defendant's motion to withdraw his plea is within the six-month period required by MCR 6.310(C).

[3] Because defendant was not subject to a consecutive sentence for the CCW conviction, the trial court did not err by failing to mention CCW in this section of the colloquy. MCL 750.227b(1); *People v Cortez*, 206 Mich App 204, 207; 520 NW2d 693 (1994) (citations omitted) ("[A] defendant is not guilty of felony-firearm if the underlying felony is the carrying of a concealed weapon. Although the presence of a second underlying felony allows defendant's felony-firearm conviction to stand, it follows that the felony-firearm sentence may run consecutively only to that second underlying felony.").

the PSIR was accurate. Although defendant did not necessarily have an absolute right to withdraw his plea at that time, MCR 6.310(B), he did not indicate that he was misinformed.

We conclude that defendant has failed to demonstrate an error in his felony-firearm pleas.

C. CONSPIRACY PLEA AND PLEA PROCEEDINGS

The prosecution conceded that defendant was not properly informed that his conspiracy to commit murder conviction required a mandatory paroleable life sentence. The trial court permitted defendant to withdraw his plea to that charge. Defendant contends that as a consequence, he should have been permitted to withdraw all of his pleas. We disagree.

Defendant's argument is premised on the theory that he entered into a "multi-count plea," such that he really entered into a *single* and indivisible plea to all fourteen counts against him. Defendant relies on opinions from this Court in which defendants were permitted to withdraw their plea agreements entirely due to a defect in particular pleas. *Blanton*, 317 Mich App at 126; *People v Pointer-Bey*, 321 Mich App 609, 627; 909 NW2d 523 (2017). Critically, however, those cases really did involve negotiated "package deal" plea agreements with the prosecution, which included the dismissal of some charges in exchange for pleas to others. *Blanton*, 317 Mich App at 111, 125-126; *Pointer-Bey*, 321 Mich App at 613-614. In *Blanton*, this Court concluded that there had been a demonstrated intent by the prosecution and by the defendant to treat the defendant's plea agreement as an indivisible contract. *Blanton*, 317 Mich App at 125-126. In *Pointer-Bay*, this Court implicitly made the same finding, and concluded that the plea proceedings were defective. *Pointer-Bey*, 321 Mich App at 617.

In contrast, there was explicitly no plea agreement in this matter between defendant and the prosecution. Defendant received no concessions in exchange for his pleas, and he stated that he chose to enter *nolo contendere* pleas "because of potential civil liability." Defendant did not explicitly state, in so many words, that he was entering an individual plea to each of the fourteen charges. However, we do not deem that dispositive. It is clear from the record that defendant's pleas were not pursuant to an agreement with the prosecution or otherwise intended to be a "package deal." Consequently, we reject the premise of defendant's argument, and we conclude that *Blanton* and *Pointer-Bey* are inapplicable.

We recognize that defendant did have a *Cobbs* agreement with the trial court. Under *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993), the trial court can inform a defendant of a predicted appropriate sentence, and the defendant may withdraw a plea if the court determines at sentencing that it must impose a sentence exceeding that prediction. The prosecutor is not a party to this agreement. *Id*. at 284. "MCR 6.302 is silent on *Cobbs* agreements." *People v Brinkey*, 327 Mich App 94, 99; 932 NW2d 232 (2019). To the extent the *Blanton*'s contractual analysis applies, the trial court did not violate the agreement. The trial court stated that it would sentence defendant within the sentencing guidelines, and it did sentence defendant within the sentencing guidelines. Therefore, defendant did not demonstrate that he pleaded *nolo contendere* under a violated contractual arrangement that would entitle him to withdraw all of his pleas. Each separate *nolo contendere* plea is independent, so defendant is not entitled to withdraw all of his pleas.

III. ACCURACY OF PRESENTENCE INVESTIGATION REPORT

Defendant argues that the information contained in the PSIR regarding his alleged affiliation with the 1st E is inaccurate and unsupported by the record. Defendant further claims that it was error for the trial court to deny his motion to correct the PSIR, and that he is entitled to remand for resentencing under *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), and to have the PSIR amended. We disagree.

A. STANDARD OF REVIEW AND APPLICABLE LAW

Generally, this Court reviews the trial court's decision regarding a challenge to the accuracy of information in the PSIR for an abuse of discretion. *People v Waclawski*, 286 Mich App 634, 689; 780 NW2d 321 (2009). Defendant may have waived this issue by affirmatively informing the trial court at sentencing that "his information obtained [sic] in the report is all accurate." *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000). However, we will give defendant the benefit of the doubt that he only referred to his own statement contained within the PSIR, and thus we will treat this issue as merely unpreserved and thus reviewed for plain error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Defendant must therefore show that an obvious error occurred, and that error either affected the outcome of the proceedings or undermined the fundamental fairness of the proceedings. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"There is a presumption that the information contained in the PSIR is accurate unless the defendant raises an effective challenge. When a defendant challenges the accuracy of the information, the defendant bears the burden of going forward with an effective challenge." *People v Lloyd*, 284 Mich App 703, 705; 774 NW2d 347 (2009) (citations omitted). Whether a defendant has satisfied the requirement for an effective challenge with a flat denial of a contrary factual assertion, or whether an affirmative factual showing is required, is dependent on the nature of the dispute. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003).

B. RESENTENCING

Defendant first argues that the allegedly incorrect information regarding his membership in the 1st E entitles him to resentencing under *Lockridge*. However, *Lockridge* only applies to sentences affected by the previously mandatory nature of the sentencing guidelines. See *People v Steanhouse*, 500 Mich 453, 461-462; 902 NW2d 327, 330 (2017). The sentencing guidelines are not at issue in defendant's appeal. Nor does the record indicate that defendant's alleged 1st E affiliation had any bearing on the trial court's sentencing decision. Defendants have a "due process right to be sentenced on the basis of accurate information." *People v Mitchell*, 454 Mich 145, 173; 560 NW2d 600 (1997). Remand is only available when necessary to determine whether the trial court considered the inaccurate information in its sentencing decision. *People v Maben*, 313 Mich App 545, 556; 884 NW2d 314 (2015). "If it is determined that the disputed matter played no part in the sentencing decision, defendant's sentence is affirmed and the trial court need only strike the disputed matter from the presentence report." *People v Thompson*, 189 Mich App 85, 88; 472 NW2d 11 (1991). Thus, we deny defendant's request to remand for resentencing under *Lockridge*.

C. CORRECTION OF PSIR

Defendant argues that, even if the allegedly inaccurate information did not impact his sentencing, it nonetheless should be stricken from the PSIR because of the ramifications to defendant's status with the Department of Corrections, such as his security classification. We have recognized the importance of striking inaccurate information from the PSIR for this purpose: "If the court finds the challenged information inaccurate or irrelevant, it must strike that information from the PSIR before sending the report to the Department of Corrections." *People v Spanke*, 254 Mich App 642, 649; 658 NW2d 504 (2003), overruled in part on other grounds by *People v Barrera*, 500 Mich 14; 892 NW2d 789 (2017). Thus, we will evaluate whether defendant is entitled to have information regarding defendant's alleged gang affiliation stricken from the PSIR.

As an initial matter, it is not clear that the PSIR would be inaccurate irrespective of the truth of defendant's averment that he has never been a member of the 1st E. The PSIR states that defendant, Jamison, and Ingram "have been identified by the Oakland County Gang Task Force as being members of the 1st Enfantry Gang." It further states that defendant "was identified by both the FBI and the Oakland County gang taskforce as being a member of the 1st Enfantry." The PSIR also states that defendant "denies any gang affiliation." Notably, the PSIR does not affirmatively state that defendant is or was *actually* a gang member, in contrast to the PSIR at issue in *People v Norfleet*, 317 Mich App 649, 668; 897 NW2d 195 (2016) (evaluating the PSIR statement that the defendant "is affiliated with the major street gang in Detroit, MI called Young Boys, Inc."). Defendant avers, consistent with his statement reported in the PSIR, that he "ha[s] never been a member of the 1st Infantry or the Eastside Boys gangs." However, he does not dispute whether any law enforcement organizations had identified him as being a gang member.

Presuming defendant has raised an effective challenge to the PSIR, "the prosecution must prove by a preponderance of the evidence that the facts are as the prosecution asserts." *Lloyd*, 284 Mich App at 705. Defendant provides no evidence in support of his averment that he was not a gang member, but because proving a negative can be difficult, we do not regard that lack of support as dispositive. *People v Walker*, 428 Mich 261, 268; 407 NW2d 367 (1987), overruled in part on other grounds by *Mitchell*, 454 Mich at 176 (1997). Nevertheless, considerable other evidence, including the contents of the police report that defendant agreed could be used as a basis for his plea, indicates that the identification of defendant as a gang member is not unreasonable. Notably, the event at the skating rink was determined to have been sponsored by the 1st E, suggesting that attendees were also gang affiliated. Furthermore, members of the Goon Squad gang, who defendant identified as gang members, were in the fight with defendant and his codefendants. Defendant also reported that he previously received two gunshot wounds which were "gang related," and left high school because of a "gang related incident." Therefore, the prosecution met its burden to demonstrate adequate factual corroboration of defendant's *possible* affiliation with the 1st E.

Defendant finally argues that the trial court erred because it did not explicitly evaluate the merits of the information presented by defendant and the prosecution, nor did the trial court explain on the record the reasons for denying defendant's motion to amend the PSIR. Defendant cites cases in which the trial courts failed to articulate their responses to the defendants' PSIR

challenges at sentencing. *People v Brooks*, 169 Mich App 360, 365; 425 NW2d 555 (1988); *People v Edenburn*, 133 Mich App 255, 258; 349 NW2d 151 (1983); *People v Hoyt*, 185 Mich App 531, 535; 462 NW2d 793 (1990); *People v Harrison*, 119 Mich App 491, 496-497; 326 NW2d 827 (1982). We are not persuaded, at least under the circumstances of this case, that the trial court erred by failing to do so at a hearing on defendant's later motion to withdraw his plea and to amend the PSIR.

Because the PSIR does not affirmatively state that defendant actually is or was a gang member and includes his denial of gang membership, we find neither clear error nor prejudice to defendant. Therefore, the trial court did not err in denying defendant's motion to amend the PSIR.

IV. CONCLUSION

Defendant was properly notified of the sentences for his felony-firearm convictions. Because defendant did not plead as part of a package deal that would make his entire plea indivisible, he is not entitled to withdraw the entirety of his pleas. The trial court did not err by denying defendant's motion to correct the PSIR. Defendant is not entitled to remand for resentencing under *Lockridge*, nor is defendant entitled to have the PSIR amended.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher