STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL PATRICK MCCONNELL,

Defendant-Appellant.

UNPUBLISHED
November 24, 2020

No. 344498
Shiawassee Circuit Court
LC No. 2017-009737-FH

Before: JANSEN, PJ., and FORT HOOD and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant pleaded guilty to five counts of possession of child sexually abusive material (CSAM), MCL 750.145c(4)(a), and one count of using a computer to commit a crime, MCL 752.796; MCL 752.797(3)(d). Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to serve concurrent sentences of three to six years' imprisonment for the five counts of possession of CSAM, consecutive to 84 to 126 months' imprisonment for using a computer to commit a crime. Defendant appeals as on leave granted.[1] We remand for defendant to be permitted to withdraw his plea.

I. FACTUAL BACKGROUND

On May 7, 2016, a special agent with the Internet Crimes Against Children Task Force identified 10 videos containing suspected CSAM connected to defendant's IP address. Officers executed a search warrant and seized defendant's computer, cell phone, and external hard drive from his apartment, which contained thousands of CSAM images and videos. Defendant admitted

[1] Following our denial of defendant's delayed application for leave to appeal, *People v McConnell*, unpublished order of the Court of Appeals, entered August 15, 2018 (Docket No. 344498), our Supreme Court remanded the case for consideration as on leave granted, *People v McConnell*, 504 Mich 900 (2019).

that he had been viewing and downloading pornographic images of children for approximately 10 years over peer-to-peer file sharing networks.

The prosecution agreed that in exchange for defendant's entering a guilty plea to five counts of CSAM possession and one count of using a computer to commit a crime, it would dismiss five additional counts of CSAM possession, one additional count of using a computer to commit a crime, and one count of CSAM distribution, MCL 750.145c(3)(a). The written plea agreement, prosecutor, and court all noted that the plea included an enhancement for habitual offender, second offense. However, at the plea hearing, although the trial court advised defendant of the enhanced maximum sentence for using a computer to commit a crime, it advised defendant only of the *unenhanced* maximum sentence for the CSAM counts, stating that the maximum sentence for this offense was four years. Following the imposition of the enhanced maximum sentence of six years for these offenses, defendant filed a motion for resentencing and to correct an invalid sentence, which the circuit court denied.

The Attorney General filed a motion for a confession of error in this Court, acknowledging that the trial court erred when it failed to inform defendant of the habitual-offender enhancement to his sentences for CSAM possession. We rejected the confession of error because it did not concur with the relief sought by defendant—resentencing.[2] However, in his brief on appeal, defendant does seek alternative relief of being allowed to withdraw his plea.

II. ANALYSIS

Defendant filed his motion for resentencing and/or to modify an invalid sentence within six months of his sentencing. However, at that time, he did not include a request to withdraw his plea. Nonetheless, as the Attorney General acknowledges, the trial court failed to inform defendant at his plea hearing that the maximum sentence for CSAM, with the habitual-offender enhancement, was six years' imprisonment. Rather, the court advised defendant that the maximum possible sentence for the CSAM charges was only four years' imprisonment. Therefore, defendant's plea was defective pursuant to *People v Brown*, 492 Mich 684, 687; 822 NW2d 208 (2012).[3]

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[2] MCR 7.211(C)(7) provides:

> In a criminal case, if the prosecutor concurs in the relief requested by the defendant, the prosecutor shall file a confession of error so indicating, which may state reasons why concurrence in the relief requested is appropriate. The confession of error shall be submitted to one judge pursuant to MCR 7.211(E). If the judge approves the confession of error, the judge shall enter an order or opinion granting the relief. If the judge rejects the confession of error, the case shall be submitted for decision through the ordinary processes of the court, and the confession of error shall be submitted to the panel assigned to decide the case.

[3] *Brown*, 492 Mich at 687, stated: "We hold that MCR 6.302(B)(2) requires the trial court to apprise a defendant of his or her maximum possible prison sentence as an habitual offender before

Defendant primarily asks to be resentenced without the habitual-offender enhancement. The Michigan Supreme Court concluded in *Brown* that resentencing a defendant to the unenhanced maximum sentence that was misstated at the plea hearing was not a proper remedy for violations of MCR 6.302(B)(2). *Brown*, 492 Mich at 699. The Court cautioned that "[r]esentencing a defendant to a term within the range the court articulated at an erroneous plea hearing might lead to unfair results. It might create a binding 'pleaded to' sentence to which neither the prosecution nor the defendant agreed [and] . . . would modify an otherwise valid sentence." *Id.* at 700. The Court in *Brown* concluded that for violations of MCR 6.302, the proper remedy under MCR 6.310(C) is "that a defendant be informed of the maximum enhanced sentence before being given the opportunity to elect (1) to allow his plea and sentence to stand or (2) to withdraw it." *Brown*, 492 Mich at 699. We therefore deny defendant's request to be resentenced without the habitual-offender enhancement.

Strictly speaking, defendant did not file a motion specifically requesting to withdraw his plea within six months after sentencing as required by MCR 6.310(C)(1). MCR 6.310(D) provides:

> A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.

Because defendant did not move to withdraw his plea below, he is precluded from arguing on appeal that he is entitled to withdraw his plea because the circuit court did not comply with MCR 6.302(B)(2). See *People v Armisted*, 295 Mich App 32, 48; 811 NW2d 47 (2011). Thus, ostensibly, his sole avenue for relief is a motion for relief from judgment under MCR 6.500 *et seq*.

Nevertheless, under the circumstances of this case, we conclude that justice and judicial economy would both be better served by avoiding the need for a procedure with a foregone conclusion. As noted, defendant affirmatively asks to be permitted to withdraw his plea, albeit as alternative relief. The prosecutor's confession of error also expressly asks for this matter to be remanded to give defendant the opportunity to choose between allowing his plea and sentence to stand, or withdrawing his plea and having his conviction and sentence vacated. See *Brown*, 492 Mich at 702. The parties agree on the facts and the proper relief, and the law is unambiguous. Rather than waste resources requiring defendant to file another motion, we choose exercise our discretionary powers under MCR 7.216(A)(1) and (7) to treat the matter as if defendant had sought to withdraw his plea from the outset, and we grant that relief.

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accepting a guilty plea. Because defendant in this case was not so apprised, his guilty plea was defective."

The matter is remanded to the trial court so that defendant may elect to withdraw his plea. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Karen M. Fort Hood
/s/ Amy Ronayne Krause