

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS MCMICHAEL III,

Defendant-Appellant.

UNPUBLISHED

November 18, 2021

No. 351869

Wayne Circuit Court

LC No. 18-003933-01-FH

Before: CAVANAGH, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

Defendant pleaded guilty to possession with intent to deliver between 50 and 449 grams of heroin, MCL 333.7401(2)(a)(iii), and was sentenced to 5 to 20 years’ imprisonment with no credit for time served. He appeals as on leave granted¹ an order denying his motion for withdrawal of his guilty plea, arguing that his plea was neither knowing nor voluntary when he was not informed that the instant offense would be subject to mandatory consecutive sentencing because it was committed while he was on parole. For the reasons stated in this opinion, we reverse and remand for the trial court to grant defendant an opportunity to withdraw or renew his guilty plea.

I. BACKGROUND

Defendant was charged with multiple felony offenses as a result of a traffic stop on May 2, 2018. At that time, defendant was serving parole for an earlier offense. Pursuant to an agreement with the prosecutor, defendant pleaded guilty to the single count of possession with intent to deliver 50 to 449 grams of heroin with a sentencing agreement of 5 to 20 years. The prosecutor agreed to dismiss the remaining charges² and the habitual offender and repeat drug

¹ *People v McMichael*, 953 NW2d 195 (Mich, 2021).

² Specifically, defendant was also charged with possession of between 50 and 449 grams of heroin, MCL 333.7403(2)(a)(iii); possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); third-degree fleeing and eluding, MCL 257.602a(3); and assaulting, resisting, or obstructing a police officer causing injury, MCL 750.81d(2).

offender notices. Relevant to this appeal, the following exchange occurred at the plea hearing regarding defendant's parolee status:

The Court: Do you understand that this would be a parole violation or could be a parole violation that your parole could be modified, extended or revoked and a prison term imposed for your violation of parole?

The Defendant: Yes, I do, Your Honor.

Satisfied with defendant's responses, the trial court accepted the guilty plea. At a later date, the trial court sentenced defendant in accordance with the sentencing agreement.

Following the imposition of his sentence—and with new representation—defendant moved to withdraw his guilty plea, arguing that his prior counsel was ineffective and that he was not informed that the sentence for the offense committed while on parole would run consecutive to the underlying sentence. The trial court denied defendant's motion.

II. ANALYSIS

As noted, defendant argues on appeal that his plea was deficient because the trial court did not inform him at the plea hearing that mandatory consecutive sentences were required because the instant offense was committed while he was on parole. See MCL 768.7a(2).³ We agree that defendant's plea was invalid and remand the case to the trial court for defendant to have an opportunity to withdraw or reaffirm his plea after full disclosure of the trial court's consecutive-sentencing authority.⁴

Following sentencing, a guilty plea may be withdrawn if “there was an error in the plea proceeding that would entitle the defendant to have the plea set aside.” MCR 6.310(C)(3). Thus, “[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). MCR 6.302(A) provides that “[t]he court may not accept a plea of guilty . . . unless it is convinced that the plea is understanding, voluntary, and accurate.” This subrule requires that the defendant “be informed of the consequences of his or her plea and, necessarily, the resultant sentence.” *Brown*,

³ MCL 786.7a(2) provides that “[i]f a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense.”

⁴ A trial court's ruling on a motion to withdraw a guilty plea is reviewed for an abuse of discretion. *People v Brown*, 492 Mich 684, 688; 822 NW2d 208 (2012). A trial court abuses its discretion when its decision “falls outside the range of principled outcomes.” *People v Warren*, 505 Mich 196, 203; 949 NW2d 125 (2020). A trial court also abuses its discretion when it makes an error of law. *People v Swain*, 288 Mich App 609, 628-629; 794 NW2d 92 (2010). “The interpretation of court rules is reviewed de novo.” *Warren*, 505 Mich at 203.

492 Mich at 693. Before accepting a guilty plea, the trial court “must place the defendant or defendants under oath and personally carry out subrules (B)-(E).” MCR 6.302(A).

Defendant argues that the trial court violated MCR 6.302(B)(2), which at the time of defendant’s plea required the court to advise the defendant of “the maximum possible prison sentence for the offense[.]”⁵ The Supreme Court has directed us to consider whether the defendant is entitled to withdraw his plea in light of *People v Warren*, 505 Mich 196; 949 NW2d 125 (2020).

In *Warren*, the defendant committed a felony while out on bond for a prior crime. *Id.* at 200-201. The defendant pleaded guilty to both offenses, but the trial court did not inform him that it had discretion to impose consecutive sentences for those offenses because the second felony was committed while the disposition of the first felony was pending. *Id.* at 201. The Supreme Court held that MCR 6.302(B)(2) “requires the trial court, in cases in which such advice is relevant, to advise a defendant of its discretionary consecutive-sentencing authority and the possible consequences of that authority for the defendant’s sentence.” *Id.* at 218-219. The Court reasoned that this requirement was consistent with the intent of MCR 6.302(B)(2) that a defendant be advised of the maximum sentence possible from pleading guilty. *Id.* at 217. The Court also found it reasonable to read MCR 6.302(B)(2) as requiring disclosure of the maximum sentence resulting from all offenses, not just each singular offense. *Id.* at 211-212. The Court remanded to the trial court to allow the defendant to either withdraw his guilty plea or reaffirm the plea. *Id.* at 200, citing *Brown*, 492 Mich at 702.

Defendant argues that his plea was defective under *Warren*’s interpretation of MCR 6.302(B)(2) because he was not informed by the trial court of the mandatory consecutive sentencing. After the parties filed their appellate briefs, however, this Court addressed this issue in *People v White*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 352999). *White* held that the trial court was not required by MCR 6.302(B)(2) to inform the defendant of the mandatory consecutive sentencing for parole violations because, in contrast to *Warren* and other relevant cases, the mandatory consecutive sentencing at issue related to a past offense as to which the defendant was not then pleading guilty, rather than to two pending charges as in *Warren*. *Id.* at ___; slip op at 7. However, *White* nevertheless requires reversal given its additional holding that MCR 6.302(A) and due-process principles required the trial court to inform the defendant of the mandatory consecutive sentencing. See *id.* at ___; slip op at 8-10. The Court stated that “[i]n addition to the mandates of MCR 6.302(B)(2), a plea must be voluntarily and understandingly made for purposes of MCR 6.302(A) and constitutional due process.” *Id.* at ___; slip op at 8. And it noted that for a plea to be voluntary, “a defendant must be made fully aware of the direct consequences of his or her plea.” *Id.* at ___; slip op at 6. The Court then concluded that the mandatory consecutive sentence was a direct consequence of the plea, because it “necessarily extended the range of [the defendant’s] punishment, increasing the minimum amount of time

⁵ MCR 6.302(B)(2) was amended effective September 16, 2020, to provide that the trial court must advise the defendant of “the maximum possible prison sentence for the offense, *including, if applicable, whether the law permits or requires consecutive sentences . . .*” MCR 6.302(B)(2) (emphasis added).

defendant must serve in prison and increasing the maximum amount of time that he may have to serve in confinement.” *Id.* at ___; slip op at 9.

Accordingly, applying *White* to this case, the trial court’s failure to inform defendant of the mandatory consecutive sentencing for parole violations violated MCR 6.302(A) and due-process principles. The prosecution suggests that defendant is not entitled to relief because he was not prejudiced by the trial court’s error. However, it cites no caselaw for the proposition that a defendant must make a showing of prejudice under the circumstances of this case. The defendant in *White* was required to establish “actual prejudice” because he was raising this issue in a postappeal motion governed by MCR 6.508(D)(3)(b) (requiring the defendant to demonstrate “actual prejudice from the alleged irregularities that support the claim for relief.”). See *id.* at ___; _____. In contrast, in this case defendant filed a timely postsentencing motion.

Further, the prosecutor miscomprehends the effect of mandatory consecutive sentencing for parole violations. The prosecutor focuses on the fact that defendant will be eligible for parole after he serves the five-year minimum sentence for the instant offense. However, defendants are not guaranteed parole prior to the completion of the maximum sentence, and thus the effect on the maximum sentence must be considered. As a panel of this Court explained:

When a defendant is to serve consecutive sentences, the [Department of Corrections] does not make two separate parole determinations, i.e., it does not discharge a prisoner from one sentence at which point he begins to serve the other. Rather, the Department combines the defendant’s minimum sentences to establish a single combined minimum and combines his maximum sentences to establish a single combined maximum. MCL 791.234(4). For example, a prisoner sentenced to consecutive terms of 5 to 10 years and 10 to 20 years will become eligible for parole after 15 years (the combined minimum terms) and will be entitled to discharge after 30 years (the combined maximum terms). [*People v Robinson*, unpublished per curiam opinion of the Court of Appeals, issued February 21, 2017 (Docket No. 329903), p 2 n 3.⁶]

Thus, what matters is not merely defendant’s minimum possible sentence (i.e., his earliest release date), but also defendant’s *maximum* possible sentence. See *White*, ___ Mich App at ___; slip op at 9. According to the Offender Tracking Information System, defendant’s maximum discharge date is October 10, 2061, more than 23 years above what the duration would be if defendant served only the 20-year maximum sentence for the instant offense. Accordingly, it is clear that his combined maximum sentence has been extended because of the mandatory consecutive sentencing.

⁶ “Although MCR 7.215(C)(1) provides that unpublished opinions are not binding under the rule of stare decisis, a court may nonetheless consider such opinions for their instructive or persuasive value.” *Cox v Hartman*, 322 Mich App 292, 307; 911 NW2d 219 (2017).

Defendant also argues that his trial counsel below rendered ineffective assistance regarding his guilty plea. This claim is rendered moot by our ruling that defendant may withdraw or reaffirm his plea on remand.⁷

We remand this case to the trial court for defendant to have an opportunity to withdraw or reaffirm his plea under circumstances consistent with this opinion. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Douglas B. Shapiro
/s/ Michael F. Gadola

⁷ Defendant also contends that his counsel erred by not providing him with the dashcam video evidence and by pressuring him to waive the preliminary examination. The issue concerning the dashcam video is also seemingly moot as defendant, if he has not already done so, can view the video before retrial should he withdraw his plea. As to the preliminary examination claim, if it is not also moot, defendant may pursue that claim through the *Ginther* hearing that has been held in abeyance pending the outcome of this appeal. *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).