

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH ROBERT ZORAN,

Defendant-Appellant.

UNPUBLISHED

June 17, 2021

No. 353218

Otsego Circuit Court

LC No. 18-005489-FC

Before: BOONSTRA, P.J., and MARKEY and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted¹ the trial court’s denial of his motion for resentencing and/or to withdraw his plea. We vacate the trial court’s order denying defendant’s motion to withdraw his plea and remand for proceedings consistent with this opinion.

During an altercation in February 2018, defendant hit the victim in the head several times with a hammer, killing him. Defendant pleaded guilty to second-degree murder pursuant to a *Killebrew*² agreement under which his sentence would be capped at 240 months. The trial court sentenced defendant to 240 months’ to life imprisonment. Thereafter, defendant moved to withdraw his plea under MCR 6.310(C) or, alternatively, for resentencing in conformity with the plea agreement and for correction of his sentence under MCR 6.429(A). Defendant contended that the sentence agreement was that defendant’s *maximum* sentence would not exceed 240 months, and that the trial court erred by instead imposing a *minimum* sentence of 240 months. Defendant argued that he was entitled to resentencing, or, alternatively, that he should have the opportunity to withdraw his plea because it was not understanding, voluntary, or accurate. Defendant also argued that his due process right to be sentenced on accurate information was violated because the

¹ *People v Zoran*, unpublished order of the Court of Appeals, entered July 1, 2020 (Docket No. 353218).

² *People v Killebrew*, 416 Mich 189, 206; 330 NW2d 834 (1982).

trial court relied on dismissed conduct when it sentenced defendant. Finally, defendant argued that the trial court erred by imposing a maximum sentence of life imprisonment because it was contrary to MCL 769.9(2).³ The trial court granted defendant's motion to correct an invalid sentence under MCL 769.9(2) and resentenced defendant to serve 240 to 480 months' imprisonment. In all other respects, the trial court denied defendant's motion.

On appeal, defendant argues that the trial court abused its discretion by denying his motion to withdraw his plea because there was an error in the plea-taking process. We agree.

We review for an abuse of discretion "a trial court's ruling on a motion to withdraw a plea." *People v Brown*, 492 Mich 684, 688; 822 NW2d 208 (2012). A trial court abuses its discretion when the outcome "falls outside the range of reasonable and principled outcomes." *People v Brinkey*, 327 Mich App 94, 97; 932 NW2d 232 (2019).

MCR 6.310(C) governs motions to withdraw a plea after sentencing. MCR 6.310(C)(3) provides, in relevant part:

If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea.

MCR 6.302(A) provides, "The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate."

MCR 6.302(C) addresses the voluntariness of a plea. MCR 6.302(C) provides, in relevant part:

(3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a sentence to a specified term or within a specified range or a prosecutorial sentence recommendation, the court may

* * *

(c) accept the agreement without having considered the presentence report;

* * *

If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow an agreement to a sentence for a specified term or within a specified range or a recommendation agreed to by the

³ Under MCL 769.9(2), a court may not "impose a sentence in which the maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence."

prosecutor, and that if the court chooses not to follow an agreement to a sentence for a specified term or within a specified range, the defendant will be allowed to withdraw from the plea agreement. A judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea.

In *People v Killebrew*, 416 Mich 189, 206; 330 NW2d 834 (1982), the Michigan Supreme Court outlined the procedures for sentence bargaining. It stated:

If the sentence bargain includes a sentence agreement, whereby the defendant agrees with the prosecuting attorney to plead guilty in exchange for a specific sentence disposition, the court must accept or reject the agreement or defer action until the judge has had the opportunity to consider the presentence report. [*Id.* at 206-207.]

If the trial court accepts the agreement, it must “inform the defendant, accept the plea, and embody the terms of the plea agreement in the judgment and sentence.” *Id.* at 207. If the trial court rejects the agreement, then it must give the defendant the opportunity to withdraw their plea. *Id.* at 210 n 10.

MCR 6.302(B) addresses the requirement that a plea be understanding. Under MCR 6.302(B)(2), a trial court is required to advise the defendant of the “the maximum possible prison sentence for the offense, including, if applicable, whether the law permits or requires consecutive sentences, and any mandatory minimum sentence required by law” In addition, “because the understanding, voluntary, and accurate components of [MCR 6.302(A)] are premised on the requirements of constitutional due process, a trial court may, in certain circumstances, be required to inform a defendant about facts not explicitly required by MCR 6.302.” *People v Blanton*, 317 Mich App 107, 119; 894 NW2d 613 (2016) (alteration in original). A defendant cannot make an understanding plea under MCR 6.302(B) when that defendant is not “fully informed about the penalties to be imposed” *Id.* When a defendant fails to make an understanding plea under MCR 6.302(B), there is a “clear defect in the plea proceedings” *Id.* (quotation marks and citation omitted).

Defendant asserts that the parties agreed that his maximum sentence would not exceed 240 months, and that the trial court failed to adhere to that agreement. However, it is clear from context that defense counsel and the prosecution agreed that defendant's *minimum* sentence would not be higher than 240 months. When placing the terms of the agreement on the record at the plea hearing, the prosecutor suggested to defense counsel that it may be better to “simply formaliz[e] the plea agreement at the middle of the guidelines range in case the guideline range turns out to be lower than [the prosecutor] calculated.” Defense counsel responded, “Well I think that we would still like the cap on there if it ended up being lower than [the prosecutor] scored then we would use that at the time of sentencing.” The sentencing guidelines apply only to a defendant's *minimum* sentence. *People v McCuller*, 479 Mich 672, 684; 739 NW2d 563 (2007). Therefore, although the trial court subsequently referred to the 240-month cap as the “maximum,” it appears that the attorneys and the court understood that 240 months was the maximum *minimum* sentence that could be imposed, and the trial court complied with the sentence agreement as it and the attorneys understood it to be.

Nevertheless, in light of the imprecise language used at the plea hearing, we agree with defendant's assertion that there was a defect in the plea-taking process and that his plea was not understanding, voluntary, or accurate. At the plea hearing, neither the attorneys nor the trial court ever explicitly stated that the 240-month cap applied to defendant's minimum sentence and the trial court failed to adequately explain to defendant that he was agreeing to a 240-month cap on only his minimum sentence. The trial court stated that "240 would be the cap. The maximum," without clarifying that it was referring to the maximum *minimum* sentence defendant could receive.

Further, it is apparent from the record that defendant did not understand the terms of the sentence agreement. After the attorneys and the trial court discussed the terms of the plea agreement, defendant stated that he was confused. When the trial court informed defendant that the statutory maximum penalty for second-degree murder was life imprisonment, defendant asked whether it was "after the cap" The trial court responded, "The cap relates to your actual sentence in this case. What I just stated to you is the maximum possible penalty under the law for that charge," which would give the impression that defendant's maximum sentence imposed would be the cap of 240 months. After accepting the factual basis for the plea from defendant, the trial court again said:

Okay, Mr. Zoran as we've discussed [] there is an agreement for a cap of 240 months for your sentence. I want to let you know that this is a sentence agreement between the prosecutor and your attorney. That's something that I've discussed with them off the record. I don't think that I'm gonna [sic] depart from that, but if I do I want you to understand that you would have the right to withdraw your plea today, and you'd be able to get all those rights back that we've talked about.

The above would also easily lead defendant to believe that he would be imposed a sentence of not more than 240 months, in total.

In addition, defendant provided an affidavit that stated that he received a sentence agreement that his maximum sentence would not exceed 240 months and that he believed he was promised that his minimum sentence would be less than 240 months. Because it does not appear that defendant was fully aware that the condition of his sentence agreement was that his *minimum* sentence would not exceed 240 months, his guilty plea was not understandingly, knowingly, voluntarily, and accurately made. See *Brinkey*, 327 Mich App at 102. Therefore, the trial court abused its discretion by denying defendant's motion to withdraw his guilt plea. See *id.* at 103.

Defendant also argues that he is entitled to resentencing because the trial court improperly relied on inaccurate information by considering dismissed charges as a factor at sentencing. We disagree.

"[T]he use of inaccurate information at sentencing may violate [a] defendant's constitutional right to due process." *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990). We review de novo issues of constitutional law. *People v Kennedy*, 502 Mich 206, 213; 917 NW2d 355 (2018). However, because defendant failed to preserve his argument that the trial court relied on inaccurate information, our review is for plain error. See *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003). There are three requirements to avoid forfeiture

under the plain error rule: “1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights.” *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

“A defendant is entitled to be sentenced by a trial court on the basis of accurate information.” *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). If a sentence is based on inaccurate information, then it is invalid. *Id.* The defendant bears the burden of proving that the information is inaccurate. See *People v Odom*, 327 Mich App 297, 314; 933 NW2d 719 (2019).

Defendant asserts that the trial court improperly stated that it was concerned that defendant was charged with three counts of possession of child sexually abusive material because those charges were dismissed as part of the plea deal. However, defendant failed to meet his burden to prove that he did not possess child sexually abusive material because he did not provide any evidence that those charges were false or even argue that he did not possess child sexually abusive material. See *Odom*, 327 Mich App at 314. Therefore, defendant’s right to the use of accurate information at sentencing was not violated.

Defendant also argues that the trial court should not have relied on the dismissed conduct under *People v Beck*, 504 Mich 605; 939 NW2d 213 (2019). However, in *Beck*, 504 Mich at 629, our Supreme Court considered the use of *acquitted* conduct, not the conduct underlying dismissed charges. In *People v McGraw*, 484 Mich 120, 134; 771 NW2d 655 (2009), our Supreme Court concluded that this Court should not have considered a dismissed charge for the scoring of offense variable (OV) 9. In this case, defendant has not argued that the trial court improperly considered dismissed conduct when scoring any of the OVs or the prior record variables. Further, defendant cannot show that the trial court *relied* on the dismissed conduct when it imposed sentence.

Finally, defendant additionally argues that his sentence was unreasonable and that the trial court did not properly justify the sentence. MCL 769.34(10) provides, “If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant’s sentence.”⁴ Because the trial court imposed a sentence within the sentencing guidelines range, we need not consider whether the sentence was reasonable. *People v Anderson*, 322 Mich App 622, 636; 912 NW2d 607 (2018).

We vacate the trial court’s denial of defendant’s motion to withdraw his guilty plea and remand with instructions to allow the defendant the opportunity to withdraw his plea or allow the plea to stand. We affirm in all other respects. We do not retain jurisdiction.

/s/ Mark T. Boonstra
/s/ Jane E. Markey
/s/ Deborah A. Servitto

⁴ Our Supreme Court’s decision in *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015), did “not alter or diminish MCL 769.34(10)” *People v Schrauben*, 314 Mich App 181, 196 n 1; 886 NW2d 173 (2016).