

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE CHARLES PETERS,

Defendant-Appellant.

UNPUBLISHED

November 23, 2021

No. 353688

Oakland Circuit Court

LC No. 2019-269713-FH

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

PER CURIAM.

Defendant appeals, by delayed leave granted,¹ his guilty-plea conviction of carrying a concealed weapon (CCW), MCL 750.227, felon in possession of a firearm (felon-in-possession), MCL 750.224f, possession a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and driving with a suspended license, second offense, MCL 257.904. The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to concurrent prison terms of 30 months to 30 years for the CCW and felon-in-possession convictions, as well as 290 days in jail for the driving with a suspended license conviction, these sentences to be served consecutively to the statutory two-year prison term for the felony-firearm conviction. Defendant received 290 days jail credit. We affirm.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In May 2018, defendant was pulled over while driving a vehicle without a valid driver’s license; notwithstanding a prior felony conviction, he was in possession of a handgun. At a June 27, 2019 plea hearing, the trial court made a sentencing evaluation under *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), stating that if defendant were to enter a plea, the trial court would sentence defendant to no more than one year of incarceration for the charges against him,

¹ See *People v Eddie Charles Peters*, unpublished order of the Court of Appeals, entered September 30, 2020 (Docket No. 353688).

apart from the mandatory two-year felony-firearm sentence. The trial court stated that its *Cobbs* evaluation was subject to certain preconditions:

The Court: You also understand I'm making [the *Cobbs*] representation subject to the preconditions that you abide by all the terms and conditions of your bond, you timely appear for your presentence interview and sentencing, you do not test positive for drugs, and you do not engage in criminal behavior prior to sentencing?

[*Defendant*]: Yes.

The trial court then asked defendant the following question:

And do you agree that if any of those preconditions to the [*Cobbs*] representation are violated, that you waive the right to withdraw your plea, I will not be bound by the [*Cobbs*] representation, and I'll be free to sentence you outside the [*Cobbs*] representation?

Defendant responded, "Yes, Your Honor."

Defendant's pre-sentence investigation report indicates that defendant reported for his presentence interview on July 17, 2019; however, defendant failed to report for and submit to alcohol and drug testing that same day, as the probation department had directed during the interview. At the sentencing hearing on September 18, 2019, the trial court stated that it believed that, under MCR 6.310(B)(3), it was no longer bound by its *Cobbs* evaluation because of defendant's failure to report for alcohol and drug testing at the time of his presentence interview. The trial court asked if defense counsel had "argument on that issue," to which defense counsel responded that she had discussed with defendant his failure to report for alcohol and drug testing, that defendant had known of the trial court's right to withdraw the *Cobbs* evaluation based on this failure, and that defense counsel thus had no argument to make because she knew the law. Defendant confirmed that he knew that the trial court had a right to withdraw the *Cobbs* evaluation.

On March 11, 2020, defendant filed a post-sentencing motion to withdraw his plea, arguing that he did not technically violate the terms of the *Cobbs* evaluation, and that the trial court should therefore allow him to withdraw his plea. Defendant further argued that the trial court erroneously relied on MCR 6.310(B)(3) because defendant had not committed "misconduct" under that rule. On May 14, 2020, the trial court issued a written opinion and order denying defendant's motion to withdraw his plea. The trial court reasoned that defendant's failure to undergo the alcohol and drug test constituted "misconduct" under MCR 6.310(B)(3) that relieved the trial court of its obligation to follow the *Cobbs* evaluation and prevented defendant from withdrawing his plea.

This appeal followed.

II. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's denial of a defendant's motion to withdraw a plea. *People v Pointer-Bey*, 321 Mich App 609, 615; 909 NW2d 523 (2017). An abuse of discretion occurs when a trial court's decision falls outside the range of reasonable and

principled outcomes. *Id.* We review de novo the interpretation and application of court rules. *People v Martinez*, 307 Mich App 641, 646; 861 NW2d 905 (2014), citing *People v Cole*, 491 Mich 324, 330; 817 NW2d 497 (2012). We also review de novo the language of plea and sentencing agreements, and apply the principles of contract interpretation. See *Martinez*, 307 Mich App at 651-652.

III. ANALYSIS

Defendant argues that the trial court erred by not allowing defendant to withdraw his plea after determining that it would no longer follow the *Cobbs* evaluation. We disagree.

We note that defendant has waived review of this issue by affirmatively approving the trial court's decision to withdraw the *Cobbs* evaluation. Waiver is defined as "the intentional relinquishment or abandonment of a known right." *People v Kowalski*, 489 Mich 488, 503; 803 NW2d 200 (2011) (citation omitted). "When defense counsel clearly expresses satisfaction with a trial court's decision, counsel's action will be deemed to constitute waiver." *Id.* at 503. At sentencing, defense counsel offered no argument concerning whether defendant had waived the right to withdraw his plea by committing misconduct under MCR 6.310(B)(3); in fact, counsel indicated that she had discussed with defendant his failure to report for alcohol and drug testing, that defendant had known of the trial court's right to withdraw the *Cobbs* evaluation based on this failure, and that defense counsel had no argument to make because she knew the law. Defense counsel then chose to request that the trial court nonetheless "consider your *Cobbs* in this matter," and never raised the issue of withdrawing defendant's plea. We therefore find that defendant and defense counsel "clearly expresse[d] satisfaction," *Kowalski*, 489 Mich at 503, with the trial court's decision to withdraw the *Cobbs* evaluation based on defendant's misconduct and to sentence defendant without being bound by that evaluation. Although defendant later moved the trial court to withdraw his plea, MCR 6.103(C)(3) requires that such a post-sentence motion be granted *if* "there was an error in the plea proceeding that would entitle the defendant to have the plea set aside." Because defense counsel never raised the issue of plea withdrawal and agreed that defendant had committed misconduct, there was no error in the plea proceeding that would warrant relief. See *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 449 (2003) (noting that a party waives review of an error when it expresses satisfaction with an action by the trial court, or contributes to the alleged error "by plan or negligence").

Notwithstanding defendant's waiver, we further conclude that the trial court did not err by denying defendant's motion to withdraw his plea, because defendant lost the right to withdraw his plea when he failed to report for alcohol and drug testing at the time of his presentence interview. A *Cobbs* evaluation occurs when the trial court makes an initial assessment of the case and shares with the parties what the sentence is likely to be, should the defendant plead guilty. *Cobbs*, 443 Mich at 283. This preliminary evaluation does not "bind the judge's sentencing discretion," although "a defendant who pleads guilty or nolo contendere in reliance upon a judge's preliminary evaluation with regard to an appropriate sentence has a right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation." *Id.* But the right to withdraw a plea after acceptance but before sentencing remains subject to MCR 6.310(B). *Martinez*, 307 Mich App at 648; *People v White*, 307 Mich App 425, 434; 862 NW2d 1 (2014). MCR 6.310(B)(3) provides:

(3) Except as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under subsection (2)(a) or (2)(b)[²] if the defendant commits misconduct after the plea is accepted but before sentencing. For purposes of this rule, misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing, violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing.

A *Cobbs* evaluation is a component of a plea agreement. *Martinez*, 307 Mich App at 646. In the context of plea agreements, this Court will apply contract interpretation principles so long as they serve the interests of justice; therefore, words are given their common meanings and unambiguous contracts will be enforced as written. See *id.* at 651-652.

As an explicit condition of the *Cobbs* evaluation in this case, defendant was required to appear at his presentence interview and at the sentencing hearing, and have no positive drug tests. Defendant argues that he did not violate the conditions of the *Cobbs* evaluation because the evaluation did not explicitly require that he complete drug and alcohol testing if recommended by the probation department during that interview. We disagree. The purpose of the presentence interview is to allow the probation department to investigate the defendant's background and character, verify material information, and present that information to the sentencing court to aid in sentencing. See MCR 6.425(A); MCL 771.14. This includes substance abuse history. See MCR 6.425(A)(1)(e). Implicit in the trial court's condition that defendant timely appear for his pre-sentencing interview was the requirement that defendant cooperate with and complete that interview, which defendant failed to do by failing to proceed as directed to another department in the same building, on the same day as the interview, for drug and alcohol testing.

Further, defendant's bond prohibited him from using alcohol and drugs, and the *Cobbs* evaluation was explicitly conditioned on defendant's abiding by the conditions of his bond, and on not testing positive for alcohol and drugs. Implicit in these conditions is the requirement that defendant submit to alcohol and drug testing when requested. It would be a strained interpretation to read the language of the *Cobbs* evaluation as permitting defendant to satisfy its conditions by simply avoiding alcohol and drug testing. We decline to interpret the unambiguous language of the evaluation in such a manner. *Martinez*, 307 Mich App at 351-352.

Defendant violated the conditions of the *Cobbs* evaluation and therefore violated "the terms of any sentencing or plea agreement" under MCR 6.310(B)(3). Defendant thus committed

² MCR 2.6310(2)(a) involves a sentencing agreement between the prosecution and defendant, whereas MCR 2.6310(2)(b) refers to a *Cobbs* evaluation, and provides that a defendant is entitled to withdraw his plea if "the plea involves a statement by the court that it will sentence to a specified term or within a specified range, and the court states that it is unable to sentence as stated; the trial court shall provide the defendant the opportunity to affirm or withdraw the plea, but shall not state the sentence it intends to impose." Again, in this case, when the trial court stated that it would not follow the *Cobbs* evaluation, it invited argument on the issue, but defense counsel affirmed the plea by stating that she had no argument and by asking the Court to nonetheless consider following the *Cobbs* evaluation.

“misconduct” under the court rule, and lost the right to withdraw his plea. See *id.*; see also *People v Kean*, 204 Mich App 533, 535-536; 516 NW2d 128 (1994); *People v Garvin*, 159 Mich App 38, 42-43; 406 NW2d 469 (1987).

Nonetheless, defendant argues on appeal that his failure to take a drug test was excused because he could not afford to pay for it. Neither defense counsel nor defendant raised this concern at any of the hearings before sentencing, or at the sentencing hearing. When defendant raised the issue in his post-sentencing motion, the court found that defendant’s belated excuse was not credible. This Court defers to the trial court’s credibility determinations. MCR 2.613(C); See *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008) (“This Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.”). In any event, the record shows that defendant failed to appear for the drug test, not that defendant had appeared for the test but was turned away because he was unable to pay for it. We find defendant’s argument unpersuasive.

Affirmed.

/s/ David H. Sawyer
/s/ Mark T. Boonstra
/s/ Michelle M. Rick