

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 2, 2013

v

SHAWN ALLEN MCINTOSH,
Defendant-Appellant.

No. 307943
Wayne Circuit Court
LC No. 07-009767
07-009768
07-011809

Before: MURPHY, C.J., and O’CONNELL and BECKERING, JJ.

PER CURIAM.

Defendant, Shawn Allen McIntosh, appeals by delayed leave granted the trial court’s order denying his motion for relief from judgment. This appeal arises from defendant’s involvement in a series of carjackings over the first four months of 2007. In connection to the carjackings, the prosecution brought charges against defendant in four separate cases: 07-009767, 07-009768, 07-009769, and 07-011809. Pursuant to a *Cobbs*¹ agreement, defendant pleaded no contest to the charges in case nos. 07-009767, 07-009768, and 07-011809 in exchange for the prosecution’s dismissal of case no. 07-009769 and, in each of the three remaining cases, for a sentence on the “low end of the guidelines”—which the trial court explicitly stated would be either 126 months or 135 months—plus a consecutive two-year sentence for possessing a firearm during the commission of a felony (felony-firearm), MCL 750.227b. On appeal, defendant contends that the trial court in case no 07-009767 both improperly scored offense variable (OV) 19, MCL 777.49, and violated the terms of the *Cobbs* agreement by sentencing him to a minimum 171-month term of imprisonment. Because it appears that the trial court did not realize it was sentencing outside the express terms of the *Cobbs* agreement as set forth on the record, we remand for further proceedings so that the trial court can either sentence defendant in accordance with the *Cobbs* agreement, if possible, or afford defendant an opportunity to withdraw his plea.

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

I. PERTINENT FACTS AND PROCEDURAL HISTORY

In case no. 07-009767, the prosecution charged defendant with the following offenses, allegedly committed in Detroit on February 25, 2007: one count of carjacking, MCL 750.529a; two counts of armed robbery, MCL 750.529; one count of assault with intent to murder, MCL 750.83; and one count of felony-firearm. In case no. 07-009768, the prosecution charged defendant with the following offenses, allegedly committed in Detroit on February 25, 2007: one count of carjacking and one count of felony-firearm. In case no. 07-009769, the prosecution charged defendant with the following offenses: one count of attempted carjacking and one count of felony-firearm. In case no. 07-011809, the prosecution charged defendant with the following offenses, allegedly committed in Detroit on April 19, 2007: two counts of carjacking; one count of third-degree fleeing and eluding, MCL 750.479a(3); and one count of felony-firearm.

On April 8, 2008, the prosecution extended defendant a settlement offer for a *Cobbs* agreement. Pursuant to the offer, defendant would plead to the charges in case nos. 07-009767, 07-009768, and 07-011809 in exchange for the prosecution's dismissal of case no. 07-009769 and, in each of the three remaining cases, for a sentence on the "low end of the guidelines"—either 126 months or 135 months—plus a consecutive two-year sentence for felony-firearm.

On the same day, the trial court held a plea hearing, where it articulated its *Cobbs* evaluation and the agreement between the prosecution and defendant as follows:

THE COURT: [I]’ve indicated a Cobbs of what I call two plus low end of the guidelines. All right.

And even right now there’s a dispute over what the low end of the guidelines are. All right. Your attorney has calculated those to be 126 months. Okay. There’s four carjackings involved here, four separate cases, two for the gun, and then it’s either 126, as your attorney believes the guidelines are, the prosecutor said the lowest end of the guidelines are 135 I think.

[THE PROSECUTOR]: That’s correct.

THE COURT: And what I’m going to have to do is I’ll go through the guidelines. It’s either going to be 126 or 135. There isn’t any issue about that. The only issue is which one of those two, all right.

But after having negotiated all of this, [defense counsel] says, well, you know, Judge, if he pleads, would you be -- and he accepts responsibility, even though it’s going to be a no contest plea, all right, would you be willing to give him the low end of the guidelines, whatever the low end turns out to be? All right. He’s going to advocate at the time of sentencing 126. The prosecutor’s going to advocate 135. And I said if [defendant] is willing to accept responsibility, I would be willing to give him low end, whatever that may be. All right. Do you understand that?

DEFENDANT MC INTOSH: (Nods in the affirmative).

THE COURT: Is that a yes?

DEFENDANT MC INTOSH: Yes.

* * *

THE COURT: Okay. And Counsel, that's what we've discussed off the record as part of the plea bargain? I mean we've been going back and forth all day but I'm just concisely summarizing what we ultimately have discussed on the record.

[THE PROSECUTOR]: Yes.

THE COURT: Because the offers were different all day long.

[DEFENSE COUNSEL]: That's correct, Your Honor.

THE COURT: Bottom line is two plus low end of the guidelines, and they've written up I think, what, four separate plea bargain forms?

[THE PROSECUTOR]: Three. The People are agreeing to dismiss Case No. 07-dash-9769; that would be Attempt Carjacking/Felony Firearm.

THE COURT: Okay. So 69 would be dismissed. You would be pleading on the other three. All right.

Defendant then pleaded no contest to the charges in case nos. 07-009767, 07-009768, and 07-011809. After defendant provided his pleas, the trial court questioned him as follows:

THE COURT: And you understand you're subject to the penalties I've previously discussed, that is, two plus low end of the guidelines, whatever that may be, either 126 or 135? And obviously they're life offenses. I won't give you life. I -- maximum would be 25 years. Do you understand that?

DEFENDANT MC INTOSH: Yes.

The court ultimately found a sufficient factual basis for defendant's plea and that defendant's plea was freely and voluntarily made.

At sentencing, the court sentenced defendant to two years' imprisonment for the felony-firearm conviction and to 135 months to 25 years' imprisonment for the carjacking conviction in case no. 07-009768. In case no. 07-011809, the court sentenced defendant to two years' imprisonment for the felony-firearm conviction, one to five years' imprisonment for the fleeing-and-eluding conviction, and 135 months to 25 years' imprisonment for the carjacking convictions. However, in case no. 07-009767, the trial court sentenced defendant to two years' imprisonment for the felony-firearm conviction, 2 to 10 years' imprisonment for the assault convictions, 171 months to 25 years' imprisonment for the two armed robbery convictions, and 171 months to 25 years' imprisonment for the carjacking conviction. The court opined that the sentence was "the low end of the guidelines" and "consistent with the Cobbs evaluation." When

calculating the guidelines in case no. 07-009767, the trial court accepted the prosecution's request to score 10 points for OV 19 on the basis that defendant fled to Kentucky when the police sought to arrest him.

In November 2008, defendant moved the trial court in case no. 07-009767 for leave to withdraw his plea on the basis that his plea agreement was illusory. The court denied the motion. In May 2009, defendant sought leave to appeal, which this Court denied. *People v McIntosh*, unpublished order of the Court of Appeals, issued June 23, 2009 (Docket No. 292092). Notably, defendant did not argue that the trial court erroneously scored OV 19 or violated the *Cobbs* agreement. Then, in August 2010, defendant moved the trial court for relief from judgment, arguing that the court had erroneously scored OV 19, the court violated the *Cobbs* agreement by imposing a 171-month minimum sentence after it stated in its *Cobbs* evaluation that it would sentence him to a minimum of either 126 months or 135 months, and that his initial appellate counsel was ineffective by failing to raise the issues involving OV 19 and the *Cobbs* agreement. The court denied defendant's motion, concluding that defendant's plea and sentence pursuant to the *Cobbs* agreement precluded him from challenging the scoring of OV 19 and that defendant failed to show that his appellate counsel's performance was deficient and prejudicial.

We granted defendant leave to appeal. *People v McIntosh*, unpublished order of the Court of Appeals, issued June 19, 2012 (Docket No. 307943).

II. ANALYSIS

Defendant raises three arguments on appeal: (1) the trial court erroneously scored 10 points for OV 19; (2) the trial court violated the *Cobbs* agreement by sentencing him to a minimum of 171 months imprisonment in case no 07-009767; and (3) his first appellate counsel deprived him of the effective assistance of counsel by failing to raise the issues regarding OV 19 and the *Cobbs* agreement. Although defendant generally has not presented his arguments in the context of a review of his motion for relief from judgment under MCR 6.508(D), we will review them as such.

A. STANDARD OF REVIEW

We review for an abuse of discretion a trial court's denial of a defendant's motion for relief from judgment. *People v Fonville*, 291 Mich App 363, 375-376; 804 NW2d 878 (2011). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Id.* at 376.

B. DEFENDANT'S BURDEN OF ESTABLISHING ENTITLEMENT TO RELIEF

"A defendant in a criminal case may move for relief from a judgment of conviction and sentence." *People v Swain*, 288 Mich App 609, 629; 794 NW2d 92 (2010), citing MCR 6.502(A). "Such motions are governed by MCR 6.500 *et seq.*" *Id.* "A defendant has the burden to establish entitlement to relief." *Id.* at 630 (citation omitted). Under MCR 6.508(D)(3), a court may not grant relief to a defendant if the motion

alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. As used in this subrule, “actual prejudice” means that,

(i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;

(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(iv) in the case of a challenge to the sentence, the sentence is invalid.

The court may waive the “good cause” requirement of subrule (D)(3)(a) if it concludes that there is a significant possibility that the defendant is innocent of the crime.

In this case, defendant’s motion for relief from judgment alleges two grounds for relief that he could have raised in his prior appeal of his conviction and sentence: the scoring challenge to OV 19 and the failure to sentence in accordance with the *Cobbs* evaluation. Therefore, defendant must demonstrate (1) good cause and (2) actual prejudice to be entitled to relief.² See MCR6.508(D)(3)(a)-(b).

C. GOOD CAUSE

Defendant argues that his first appellate counsel’s failure to raise the issues regarding OV 19 and the *Cobbs* agreement constituted ineffective assistance and, thus, good cause under MCR 6.508(D). “The requirement of ‘good cause’ can be established by proving ineffective assistance of counsel.” *Swain*, 288 Mich App at 631, citing *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). Thus, we must determine whether defendant has demonstrated that his first

² Defendant does not assert innocence in this appeal; thus, waiver of the good-cause requirement is inapplicable. See MCR 6.508(D).

appellate counsel deprived him of effective assistance by failing to raise either the OV 19 issue or a violation of the *Cobbs* agreement.

“The test for ineffective assistance of appellate counsel is the same as that for trial counsel.” *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002); see also *People v Reed*, 449 Mich 375, 378, 382, 390; 535 NW2d 496 (1995). “To demonstrate ineffective assistance of counsel, defendant must show that his attorney’s conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived of a fair trial.” *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003), citing *Reed*, 449 Mich at 390.

“An appellate attorney’s failure to raise an issue may result in counsel’s performance falling below an objective standard of reasonableness” *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993). However, “[a] deliberate, tactical decision not to pursue a particular claim is not the type of circumstance envisioned by [MCR 6.500 *et seq.*] to constitute ‘good cause’ for failure to raise an issue in the appeal as of right.” *Id.* at 647-648. Thus, in the present case, the essential inquiry is whether a reasonable appellate attorney could conclude that the trial court’s scoring of OV 19 and defendant’s 171-month sentence in case no. 07-009767 in light of the *Cobbs* agreement were not worthy of mention on appeal. See *Reed*, 449 Mich at 391 (“The question is whether a reasonable appellate attorney could conclude that the comments made by the prosecutor were not worthy of mention on appeal.”).

1. OV 19

As an initial matter, we conclude that the trial court erroneously determined that defendant waived any challenge to the scoring of OV 19 because of his plea pursuant to a sentencing agreement. Our Supreme Court has held that “a defendant waives appellate review of a sentence that exceeds the guidelines by understandingly and voluntarily entering into a plea agreement to accept that specific sentence.” *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005); see also *People v Vitale*, 179 Mich App 420, 422; 446 NW2d 504 (1989). In this case, however, defendant did not plead no contest with knowledge of the 171-month sentence in case no. 07-009767 and did not receive the specific sentence agreed to in the *Cobbs* agreement, i.e., a low-end sentence of either 126 or 135 months. Thus, defendant did not waive a challenge to the scoring of OV 19.

A court should score 10 points for OV 19 when “[t]he offender otherwise interfered with or attempted to interfere with the administration of justice.” MCL 777.49(c). “The phrase ‘interfered with or attempted to interfere with the administration of justice’ is broad.” *People v Steele*, 283 Mich App 472, 492; 769 NW2d 256 (2009) (citation omitted). “It includes acts constituting obstruction of justice, but is not limited to those acts.” *Id.* Indeed, “conduct that ‘interfered with or attempted to interfere with the administration of justice’ does not have to necessarily rise to the level of a chargeable offense” *People v Barbee*, 470 Mich 283, 287; 681 NW2d 348 (2004). Furthermore, the “administration of justice” process does not commence until after completion of the sentencing offense; thus, a court may consider post-offense conduct when scoring OV 19. *People v Smith*, 488 Mich 193, 202; 793 NW2d 666 (2010). “The investigation of crime is critical to the administration of justice.” *Barbee*, 470 Mich at 288.

We conclude that the trial court did not erroneously score OV 19 at 10 points because there is evidence supporting its scoring decision. See *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006) (“Scoring decisions for which there is any evidence in support will be upheld.”). Specifically, defendant was involved in two carjackings on February 25, 2007. Then, on April 19, 2007, defendant was involved in two more carjackings: a carjacking of Donald Haire and a carjacking of George Pettis. Only this time, one of the victims of the Haire carjacking immediately notified the police. As a result, the police, with sirens and lights engaged, pursued defendant, who did not stop the stolen vehicle until he crashed into another vehicle. Defendant then exited the vehicle and fled on foot. One of the officers yelled at defendant to stop, but defendant continued to run. Defendant ultimately got away and fled to Kentucky, where he was later apprehended. On the basis of these facts, the court could conclude that defendant attempted to interfere with the administration of justice. See MCL 777.49(c). Once the victim of the Haire carjacking identified defendant as the carjacker and the police commanded defendant to stop, defendant chose to avoid apprehension by fleeing the police in the stolen vehicle, then on foot, and later by moving to Kentucky. The trial court could reasonably infer that defendant fled for purposes of avoiding arrest and prosecution for the April 19 offenses and also the February 25 offenses.

Accordingly, defendant has failed to establish good cause on this basis because counsel was not ineffective for failing to raise a futile claim and a reasonable appellate attorney could conclude that a challenge to the scoring of OV 19 was not worthy of mention on appeal. See *Reed*, 449 Mich at 391, 402.

2. COBBS AGREEMENT

In *Cobbs*, our Supreme Court articulated the manner in which a trial court may participate in the plea negotiation process:

At the request of a party, and not on the judge’s own initiative, a judge may state *on the record* the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense.

* * *

The judge’s preliminary evaluation of the case does not bind the judge’s sentencing discretion, since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources. *However, a defendant who pleads guilty or nolo contendere in reliance upon a judge’s preliminary evaluation with regard to an appropriate sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation.* [*Cobbs*, 443 Mich at 283 (emphasis added and in original).]

Similarly, this Court has held that a trial court errs by not following a *Cobbs* agreement and sentencing the defendant without affording him an opportunity to withdraw his guilty plea. *People v Chappell*, 223 Mich App 337, 341-342; 566 NW2d 42 (1997).

In this case, the trial court did not sentence defendant in accordance with the *Cobbs* agreement. The *Cobbs* agreement provided that the court would sentence defendant to the low end of the guidelines, which would be either the 126 months advocated by defendant or the 135 months advocated by the prosecution. However, the court sentenced defendant to a minimum of 171 months. Moreover, the trial court did not give defendant an opportunity to withdraw his plea, as it appears from the record that the trial court mistakenly believed that it was sentencing defendant in accordance with the *Cobbs* agreement. Therefore, the trial court erred. See *id.*; *Cobbs*, 443 Mich at 283. A reasonable appellate attorney could not conclude that the *Cobbs* issue in case no. 07-009767 was not worthy of mention on appeal. See *Reed*, 449 Mich at 391. Therefore, appellate counsel's failure to raise this issue was professionally unreasonable. See *Gonzalez*, 468 Mich at 644.

In addition, we conclude that appellate counsel's deficiency prejudiced defendant. See *id.* In this case, the trial court erred by failing to recognize at sentencing that a minimum sentence of 171 months was contrary to the *Cobbs* agreement that provided defendant with a "low end of the guidelines" minimum sentence of either 126 or 135 months. Defendant's trial counsel failed to raise this error at sentencing. And, then, appellate counsel failed to raise this issue in the first appeal. Had appellate counsel done so, defendant would have been entitled to a remand in order for the trial court to determine whether it would sentence defendant in accordance with the *Cobbs* agreement, if possible³, and, if not, to allow defendant an opportunity to withdraw his plea and either attempt to enter into a new plea agreement or go to trial. See *Chappell*, 223 Mich App at 342-343. Consequently, both defendant's no-contest plea and his waiver of his right to a jury trial in case no. 07-009767 were induced by a concession by the state, i.e., the agreement to a low-end minimum sentence of either 126 or 135 months, to which the state is no longer bound because the trial court ultimately failed to accept it. Defendant did not receive the benefit of his bargain but, nevertheless, was held to both his plea and his waiver of his constitutional right to a jury trial. Our Supreme Court has explained that

the waiver of a jury trial cannot be knowing or voluntary when the waiver was induced by reliance on a total package of concessions by both parties to which one party—the state—is no longer bound. If the judge refuses to agree to the state's concessions, the defendant may refuse to waive his constitutional rights. [*People v Killebrew*, 416 Mich 189, 207; 330 NW2d 834 (1982).]

In a claim of ineffective assistance of counsel, "[t]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged." *People v Toma*, 462 Mich 281, 316; 613 NW2d 694 (2000), quoting *Strickland v Washington*, 466 US 668, 696; 104 S Ct 2052; 80 L Ed 2d 674 (1984). We view defendant's 171-month minimum sentence in case

³ Under Michigan's sentencing guidelines act, a trial court may depart from the statutory minimum range only when substantial and compelling reasons exist to do so, and it states on the record the reasons for departure. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001).

no. 07-009767 to be the result of a proceeding that was fundamentally unfair because of the failure to afford defendant an opportunity to withdraw his plea; accordingly, defendant has demonstrated prejudice. See *id.*; *Gonzalez*, 468 Mich at 644.

Therefore, we conclude that defendant has established good cause under MCR 6.508(D).

D. ACTUAL PREJUDICE

As previously mentioned, MCR 6.508(D)(3)(b) specifies four circumstances of actual prejudice, including the following circumstances pertinent to this case:

(ii) in a conviction entered on a plea of guilty, guilty but mentally ill, or nolo contendere, the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand;

(iii) in any case, the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case;

(iv) in the case of a challenge to the sentence, the sentence is invalid.

We conclude that each of these circumstances is satisfied in this case. Both defendant's plea and his waiver of his right to a jury trial were involuntary because they were induced by a concession by the state—an agreement to a low-end minimum sentence of either 126 or 135 months—to which the state is no longer bound because the trial court ultimately failed to accept it. See *Killebrew*, 416 Mich at 207; MCR 6.508(D)(3)(b)(ii). “[W]hen the judge determines that sentencing cannot be in accord with the previous assessment, that puts the previous understanding to an end, and the defendant must choose to allow the plea to stand or not” *People v Williams*, 464 Mich 174, 180; 626 NW2d 899 (2001). Here, the trial court should have recognized that a minimum sentence of 171 months was not in accord with the *Cobbs* agreement, at which point it should have determined whether it could and would honor the *Cobbs* agreement, and if not, provided defendant an opportunity to withdraw his plea. The trial court essentially denied defendant the benefit of his bargain but held him to his plea and waiver. This Court has held that “a constitutionally invalid jury waiver is a structural error that requires reversal.” *People v Cook*, 285 Mich App 420, 427; 776 NW2d 164 (2009). The failure to afford defendant an opportunity to withdraw his plea and, consequently, his waiver of his right to a jury trial was “[an] irregularity . . . so offensive to the maintenance of a sound judicial process” that defendant's convictions in case no. 07-009767 should not be allowed to stand. See MCR 6.508(D)(3)(b)(iii). Moreover, the imposition of the sentence contrary to the terms of the *Cobbs* agreement without affording defendant the opportunity to withdraw his plea rendered defendant's sentence invalid, MCR 6.508(D)(3)(b)(iv). See *People v Wybrecht*, 222 Mich App 160, 167; 564 NW2d 903 (1997) (stating that a sentence is invalid if based on a tangible legal or procedural error).

Accordingly, defendant is entitled to relief under MCR 6.508(D) by having shown both good cause and actual prejudice. The trial court's failure to grant defendant's motion for relief

under MCR 6.508(D) fell outside the range of principled outcomes. See *Fonville*, 291 Mich App at 376.

E. RELIEF

Defendant requests that this Court order specific performance of the *Cobbs* agreement. We decline to do so. The appropriate remedy in this case is to remand in order for the trial court to either resentence defendant in accordance with the *Cobbs* agreement—if the trial court finds that it is possible and desirable to do so—or to afford defendant an opportunity to withdraw his plea. See *Cobbs*, 443 Mich at 283; *Chappell*, 223 Mich App at 341-342. Accordingly, we remand to the trial court for further proceedings.⁴

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Peter D. O’Connell
/s/ Jane M. Beckering

⁴ We note that, in *Williams*, 464 Mich at 180, our Supreme Court emphasized that, when “informing a defendant that the sentence will not be in accordance with the *Cobbs* agreement, the trial judge is not to specify the actual sentence that would be imposed if the plea is allowed to stand.”