

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH LAMONT SMITH,

Defendant-Appellant.

UNPUBLISHED

April 19, 1996

No. 181745

LC No. 94003337

Before: Cavanagh, P.J., and Marilyn Kelly and J.R. Johnson,* JJ.

PER CURIAM.

Defendant pleaded guilty to second-degree murder and possession of a firearm during the commission of a felony. MCL 750.317; MSA 28.549, MCL 750.227b; MSA 28.424(2). The trial judge sentenced him to two years' imprisonment on the felony firearm count and consecutively to twenty-five to seventy-five years' imprisonment on the murder count.

Defendant appeals as of right. He argues that he should be allowed to withdraw his plea, because he misunderstood the plea agreement. He asserts that his counsel was ineffective for failing to adequately explain that the sentencing guidelines' range applied only to his minimum sentence. Finally, he argues that his sentence was disproportionate. We remand for an evidentiary hearing.

A trial judge may not accept a plea of guilty unless convinced that it was understood, voluntary and accurate. MCL 6.302; *People v Rodriguez*, 192 Mich App 1, 6; 480 NW2d 287 (1991). The judge must consider all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement and the age, experience and background of the offender. *Id.*

* Circuit judge, sitting on the Court of Appeals by assignment.

We recognize that, during the plea hearing, the judge informed defendant that: (1) the maximum penalty for second-degree murder was life imprisonment; (2) the minimum sentence would be between eight and twenty-five years in accordance with the plea agreement; and (3) the judge did not know the exact sentence at the time of the plea. Defendant acknowledged that he understood the consequences of his plea. However, because of defendant's youth, learning disability, limited education and lack of experience with sentencing, he may not have understood that the guidelines apply only to a minimum sentence. This is especially true as he alleges that defense counsel misinformed him with respect to the sentencing consequences.

We remand this matter for an evidentiary hearing. Defense counsel should be produced to testify whether she did in fact tell defendant that she was surprised by the sentence, as defendant alleges. Testimony should also be elicited as to whether she properly counseled defendant on the potential length of his sentence under the plea agreement.

If the judge finds that defendant was not misinformed and that the plea was entered into voluntarily, knowingly and intelligently, the conviction and sentence should stand.

We find that the sentence was proportionate to the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). The minimum sentence was within the guidelines' recommended range and is presumed proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant has not presented unusual circumstances to overcome the presumption. *Milbourn, supra*.

If the trial judge determines that the plea was not entered into voluntarily, knowingly and intelligently, defendant must be given the opportunity to withdraw his guilty plea.

Remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Marilyn Kelly

/s/ J. Richardson Johnson