

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY ALAN LEGGETT,

Defendant-Appellant.

UNPUBLISHED

April 26, 1996

No. 184209

LC No. 94-011497

Before: Young, P.J., and Holbrook, Jr., and J.R. Ernst,* JJ.

PER CURIAM.

Defendant pleaded guilty of armed robbery, MCL 750.529; MSA 28.797, and being a habitual offender - fourth offense, MCL 769.12; MSA 28.1084. He was sentenced to three to twenty years of imprisonment, and now appeals as of right. We affirm.

I

Defendant argues in different ways that he should have been permitted to withdraw his plea. He argues that the prosecutor would not have been prejudiced by withdrawal; his pleas were not voluntary in light of closed-head injury; there was no factual basis for the plea; and it was the product of false promises of leniency by defense counsel. In a separate issue defendant argues that counsel was ineffective for failing to explore potential defenses and for undermining defendant's attempt to withdraw his plea. Finally, defendant also argues that the court relied on the wrong sentencing guidelines when sentencing him.

II

Where a defendant moves to withdraw his plea before sentencing, the burden is on the defendant to establish reasons based on the interests of justice. The burden then shifts to the prosecutor

* Circuit Judge, sitting on the Court of Appeals by Assignment

to establish that substantial prejudice would result from allowing the defendant to withdraw the plea. *People v Thew*, 201 Mich App 78, 81; 506 NW2d 547 (1993).

Defendant's plea was entered on the first day of trial. After entering his plea, but before sentencing, defendant told his attorney that he did not commit the crime charged and wanted to withdraw his plea. Defendant's motion to withdraw was based on his contention that he did not pull a knife during the robbery. This issue had been addressed during the plea, however, and defendant conceded that he pulled a knife later in the incident while trying to escape.

We conclude that defendant did not show sufficient reasons for withdrawal, and thus the burden never shifted to the prosecution to show substantial prejudice. Defendant's actions constituted armed robbery because a robbery remains in effect until the robber escapes to a place of temporary safety. *People v Tinsley*, 176 Mich App 119; 439 NW2d 313 (1989). The use of a knife during the getaway elevates an unarmed robbery to an armed robbery.

Defendant's allegation that his plea was involuntary due to closed-head injury is not supported by the record. Although the record shows that defendant was beaten and suffered traumatic brain injury, the medical record also shows that defendant responded well to therapy and was discharged with minimal limitations. The medical records do not show that defendant was incapable of forming the intent necessary for the offense or that he would be unable to assist in the preparation of his defense.

We reject defendant's claim that there was not a sufficient factual basis for the armed robbery charge because there was no showing that he was armed. As stated above, defendant admitted pulling a knife to effectuate his escape (although he now says he was merely defending himself from those who tried to detain him). A sufficient factual basis was shown under *Tinsley*.

Defendant's claim that his plea was the product of a false promise of leniency by defense counsel is belied by the record. The prosecutor offered defendant a sentence of six to twenty years on the principal offense, and dismissal of the supplemental information charging defendant as a habitual offender. Defendant rejected that offer and instead sought a "*Cobbs*" plea¹. The court reviewed the record and opined that it would sentence defendant to three to twenty years of imprisonment if defendant pleaded as charged (armed robbery and habitual - fourth). Defendant agreed to plead under that arrangement. Because the sentence was disclosed, we find no merit in defendant's later unsworn assertion² that his attorney had promised he would receive a minimum sentence of only eighteen months.

These grounds do not constitute a sufficient reason to withdraw the plea. Thus, we do not reach the prosecutor's burden to show substantial prejudice.

III

We next turn to defendant's argument that trial counsel was ineffective for failing to explore "all possible defenses" to the armed robbery charge and sought to undermine defendant's attempt to withdraw his plea. The defendant must make a testimonial record in the trial court in connection with a

motion for a new trial or an evidentiary hearing, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), unless the details of the alleged deficiency are apparent on the already-existing record, *People v Juarez*, 158 Mich App 66, 73; 404 NW2d 222 (1987). Defendant did not move for a hearing, so our review is limited to facts already on the record.

There is no support in the record to verify defendant's claim that counsel did not explore available defenses.

Defendant's allegation that counsel undermined his effort to withdraw his plea is also not supported by the record. Counsel disclosed the defendant's request to withdraw his plea and explained the circumstances which had led to defendant's guilty plea. Those matters had also been discussed at the plea. As defendant notes, his allegations of impropriety against his attorney also led counsel to defend the actions she had taken. Under the circumstances, we find no error in counsel's conduct. Defendant was not entitled to withdraw his plea. His attempt to withdraw his plea was undermined by the facts of his case, not the actions of counsel.

IV

Finally, we address defendant's contention that the court improperly scored the guidelines. A scoring of an offense variable is to be upheld if there is "any evidence" supporting it. *People v Green*, 152 Mich App 16, 18; 391 NW2d 507 (1986).

Offense Variable 2 was properly scored at twenty-five points for bodily injury. The cashier indicated in her victim impact statement that she suffered injury to her right side, a sprained arm, and chest pains. Offense Variable 17 was properly scored at one point for the value of the property taken. Although defendant disputed the amount, the investigator's report showed that \$203 was recovered from defendant's pocket after the robbery. Thus, there was evidence to support the scoring of both variables.

Affirmed.

/s/ Robert P. Young, Jr.

/s/ Donald E. Holbrook

/s/ J. Richard Ernst

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

² When defendant submitted an affidavit to support a post-sentencing motion to withdraw his plea, he did not include this allegation. Thus, the only reference to this allegation was an unsworn statement at sentencing.