STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE MITCHELL,

Defendant-Appellant.

UNPUBLISHED
August 2, 1996

No. 174902; 174908
LC No. 93-2270; 93-2269

Before: Murphy, P.J., and Markman and Karl V. Fink,* JJ.

PER CURIAM.

In No. 174908, defendant appeals by right his 1994 jury trial conviction of bank robbery, MCL 750.531; MSA 28.799, and guilty plea to habitual offender - fourth offense, MCL 769.12; MSA 28.1084. In No. 174902, defendant appeals by right his 1994 guilty plea to bank robbery, MCL 750.531; MSA 28.799.[1] Defendant was sentenced to eighteen to forty years' imprisonment in No. 174908 and fifteen to thirty-five years' imprisonment in No. 174902. These proceedings followed the trial court's May 4, 1993 order withdrawing defendant's guilty plea. On appeal, defendant claims that the trial court improperly withdrew his initial guilty plea.[2] We affirm.

On April 16, 1993, defendant and the prosecutor entered into a plea and sentence agreement pursuant to which defendant was to plead guilty to two counts of bank robbery in exchange for an eight to twenty year sentence and the dismissal of the habitual offender count. At the conclusion of the plea hearing, the trial court orally accepted the plea and referred defendant to the probation department for a presentence investigation and report.

On May 4, 1993, defendant appeared for sentencing. After ascertaining the accuracy of the presentence report, the trial court stated:

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

> There is a sentence agreement, and I see no reason why it shouldn't be followed, so therefore, sir, if you have nothing further to say, this Court is, therefore, ready to impose sentence.

When the trial court indicated that defendant would receive no credit for time served, defendant became verbally abusive. He made repeated vulgar comments to the court. The trial court immediately stated that it would not accept defendant's plea and issued an order sua sponte withdrawing defendant's guilty plea. At a May 14, 1993 hearing, the trial court explained why it withdrew defendant's plea:

> The Court believes, as the Court of Appeals, and the Supreme Court has indicated, that the sentence ought to fit the defendant. No matter what he is convicted of, the sentence ought to fit him.
>
> . . . [B]ecause of his obvious attitude, and his obvious contempt not only for this Court, but for the law, the Court believes that the sentence of eight to twenty, is not a sentence that fits.
>
> And, so therefore, the Court will not accept the plea, will not impose sentence.
>
> I am going to set aside your plea. I am going to require you to go to trial, and if you are convicted of an offense, then the Court will be able to fashion the sentence which is more appropriately fit for the defendant.

On appeal, defendant claims that the trial court improperly withdrew an accepted plea and sentence agreement. This Court reviews trial court rulings regarding guilty pleas for an abuse of discretion. *People v Killebrew*, 416 Mich 189, 211; 330 NW2d 834 (1982).

Where, as here, a plea provides for a specific sentence disposition, MCR 6.302(C)(3) outlines the court's options:

> (a) reject the agreement; or
>
> (b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to the sentence agreed to or recommended by the prosecutor; or
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> (c) accept the agreement without having considered the presentence report; or
>
> (d) take the plea agreement under advisement.
>
> 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 the sentence disposition or recommendation agreed to by

> the prosecutor, and that if the court chooses not to follow it, the defendant will be allowed to withdraw from the plea agreement.

"The court must consider the PSIR before its "final acceptance of [a] sentence agreement," *Killebrew*, *supra*, and, by necessary implication, prior to imposing sentence." *People v Baker*, __ Mich App __; __ NW2d __ (Docket No. 181749, issued 2/27/96).

Defendant contends that here the trial court accepted the plea agreement and imposed sentence in accordance therewith. He argues that it consequently lacked authority to withdraw the plea. We disagree. "A court speaks through its written orders, not its oral statements." *People v Turner*, 181 Mich App 680, 683; 449 NW2d 680 (1989), citing *Tiedman v Tiedman*, 400 Mich 571, 576; 255 NW2d 632 (1977). With respect to sentences, this Court has held that it is the issuance of a written order or the remand of the defendant to jail to await execution of sentence that terminates a trial court's authority to modify its oral pronouncement of sentence. *People v Bingaman*, 144 Mich App 152, 158-159; 375 NW2d 370 (1984).

Here, the circumstances that resulted in the trial court's withdrawal of defendant's guilty plea occurred in the course of its oral acceptance of the plea and sentence agreement. The trial court had not yet issued a written order or remanded defendant to custody to await execution of sentence. Under *Killebrew*, the trial court's acceptance of the sentence agreement could not become final until it considered the presentence report - which occurred on the record at the May 4, 1993 hearing. It was during this hearing that defendant engaged in the outburst that caused the court to reconsider the merits of the sentence agreement included in the plea. Defendant's conduct evidenced a lack of respect for the Court and reflected on his acceptance of responsibility for his actions and his prospects for rehabilitation. Such issues are reasonable ones for a court to consider in determining a sentence. *People v Jeff Davis*, 196 Mich App 597, 601-602; 493 NW2d 467 (1992). In *Baker*, *supra*, this Court affirmed a trial court's vacation of a sentence agreement on the basis of information in a presentence report where the court had not yet issued its final acceptance of the sentence.[3] Here, the trial court similarly had not yet issued its final acceptance of the plea and sentence at the time it decided not to follow the sentencing agreement. The trial court's vacation of the plea immediately followed upon its oral indication that it would accept the plea and sentence agreement. Under these circumstances, where new information bearing on the merits of a sentence manifested itself in the course of the court's oral acceptance of the sentence agreement, before final acceptance thereof, we find no abuse of discretion in the court's consideration of such information and its resultant withdrawal of the guilty plea.

We accordingly affirm defendant's judgment of sentence.

Affirmed.

/s/ William B. Murphy
/s/ Stephen J. Markman
/s/ Karl V. Fink

[1] Defendant pled guilty prior to the December 24, 1994 effective date of amendments to Const 1963, art 1, § 20 that eliminated appeals by right by defendants who plead guilty.

[2] There were previous proceedings before this Court regarding the trial court's withdrawal of defendant's guilty plea. Such proceedings did not result in substantive disposition of the issue; accordingly there is no law of the case foreclosing defendant from pursuing the present appeal. See *People v Willis*, 182 Mich App 706, 708; 452 NW2d 888 (1990).

[3] We are aware of the holding in *People v Strong*, 213 Mich App 107, 112; 539 NW2d 736 (1995), that a trial court may not vacate sua sponte an *accepted plea* without the defendant's consent. *Strong* involved a sentence recommendation as opposed to a sentence agreement and this Court did not consider, as we do here and as was done in *Baker*, whether the plea had been formally accepted at the time the trial court attempted to vacate it. Here, the plea and sentence agreement had not been finally accepted when the court vacated it. *Baker* correctly held that MCR 6.310, which requires a defendant's consent to withdrawals of pleas under certain circumstances, is inapplicable where the court has not granted its final acceptance of a plea pursuant to MCR 6.302(c)(3).