STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALAN LEE THOMPSON,

Defendant-Appellant.

UNPUBLISHED
August 30, 1996

No. 180894
LC No. 94-0530-FH

Before: White, P.J., and Sawyer and R.M. Pajtas,* JJ.

PER CURIAM.

Defendant was charged with breaking and entering an occupied dwelling with the intent to commit larceny, MCL 750.110; MSA 28.305, larceny in a building, MCL 750.360; MSA 28.592, and habitual offender, fourth, MCL 769.12; MSA 28.1084. After a jury trial began, defendant pleaded guilty, pursuant to a plea bargain, of breaking and entering with intent to commit larceny, and habitual offender, second. Defendant moved to withdraw his plea before sentencing, which motion was denied. Defendant was sentenced within the guidelines to 6 to 22 1/2 years' imprisonment. He appeals of right, arguing the trial court abused its discretion in denying his pre-sentence motion to withdraw his plea and in ordering payment of restitution, and that he is entitled to resentencing because the court considered a constitutionally infirm conviction for spouse abuse as a sentencing factor and regarded the instant offense as "stalking-type" conduct. We affirm.

Visiting Judge Roman J. Snow presided over trial. On August 4, 1994, a jury was impaneled and the prosecution's first witness, Katherine Brown Holmes, defendant's former girlfriend and the victim, testified. Following her testimony, defendant indicated he wished to plead guilty to breaking and entering an occupied dwelling with intent to commit larceny, MCL 750.110; MSA 28.305, and habitual offender, second, MCL 769.10; MSA 28.1082. In exchange for the plea the prosecution dismissed the larceny in a building charge and the habitual offender, fourth, charge. The prosecution also agreed to dismiss charges in a second file and recommend a sentence within the guidelines range of thirty to eighty-four months.

In support of the plea, defendant admitted he intended to steal, and did steal, from Ms. Holmes' apartment after he entered through a broken window, which he broke further to permit entry, and that he had a guilty plea conviction of escape from a corrections center.

Ms. Holmes had testified that defendant is the father of her youngest son and that on December 23, 1993 she lived at 814 Geneva Street in Grand Rapids, with her two children and

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*Circuit Judge sitting on the Court of Appeals by assignment.

fiance. Holmes testified that she left home for work around 6:15 a.m. on December 23, locked all the windows and doors, gave no one permission to enter, and arrived home from work at about 3:15 p.m. Holmes testified that the front door was broken, the couch and chair were cut up, the stereo was torn up, Kool-Aid was poured into the TV, there were eggs, juice and food all over the living room, all the clothes in her bedroom closet were thrown around, the items in the refrigerator had been thrown around, and her VCR, answering machine and a clock were missing. Holmes testified it cost her around $1,000 to repair or replace the items, and that she had no insurance.

Holmes testified that defendant had come to her apartment two days earlier, on December 21, 1994, to see his son and that she and defendant had had a discussion. She testified that an argument ensued, and defendant told her that she would "never have nothing," and that he would destroy anything she had. On cross-examination, Holmes testified she had thrown a phone at defendant and hit him on December 21, and that she had been convicted of attempted obstruction of justice in 1988, a crime of dishonesty. After this testimony, defendant entered his plea and sentencing was set for September 8, 1994.

On August 12, 1994, defendant filed a motion to withdraw his plea, arguing only that Judge Snow had previously sentenced him and he should not sentence him again. The case was assigned to Judge Johnston, and the motion to withdraw was heard on September 13, 1994, the date set for sentencing. Defense counsel at that time argued defendant did not want to withdraw his plea on the basis asserted in the motion, but rather, wanted to withdraw his plea on the basis that defendant informed him while talking in lock-up that a witness would testify regarding an alibi defense. Defense counsel stated on the record that it was the first time he had heard of this and that he had spoken to the alleged alibi witness about two weeks before and was given different infor-mation than defendant was giving him now. Defendant stated that the alibi witness was the co-defendant's brother and he did not know his whereabouts earlier, so he could not be subpoenaed. Under questioning by the court, defendant stated the alleged alibi witness was the brother of the man who implicated him and led to his arrest. Defendant also acknowledged that he had made a confession in this case the day he was arrested, February 10, 1994.

Judge Johnston denied the plea:

> THE COURT: Well, there are several issues that address themselves by way of this rather surprising motion. First of all, alibi is a defense of which prior notice must be given to the prosecutor and this case resulted from arrest on February 10, 1994. The case was in trial in August at the beginning of the month in front of a visiting judge who was brought in here, because of a very high case load in this circuit, to try the case.
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> Now, if Mr. Thompson felt there was a viable defense he had between February 10th and the first part of August to work it out, a period of almost six months. Apparently, this alleged alibi witness wasn't discovered until towards the end of August when Mr. Thompson told counsel, Mr. Tevlin, about his existence. Evidently, Mr. Tevlin did interview Mr. Sturdivant, the brother or brother-in-law of co-defendant Lee Sturdivant, and found that he would testify in a certain way apparently inconsistent with alibi.

Subsequently, today Mr. Thompson tells Mr. Tevlin that this fellow Sturdivant has changed his mind and will now support an alibi, and that basis is seeking withdrawal of the plea and a new trial.

Now, here we are in the middle of September on a December 19th, 1993, offense following a February 1994 arrest. As stated previously, the offense involves the breaking and entering of Mr. Thompson's estranged girlfriend's home, one Katherine Brown, on Geneva. During the breaking and entering a $200 VCR was stolen but, more important, acts of malicious mischief were committed indicating that the purpose of the burglary was more than simply larcenous. The intruder or intruders threw raw eggs on the floor and furniture, slashed a couch, threw potted plants around, and threw a compact stereo system on the floor.

The police ultimately arrested co-defendant Lee Sturdivant who evidently confessed his involvement in the crime and implicated this defendant on February 3, 1994. On February 10th, 1994, Mr. Thompson, this defendant, was arrested by the police and promptly confessed that, yes, he did commit the breaking an entering at his estranged girlfriend's home with Lee Sturdivant on December 23rd, 1993.

The pattern of the case is consistent with other offenses in Mr. Thompson's past; that is to say, the case involves a distinct stalking element and is consistent with a pattern of behavior between Mr. Thompson and Ms. Brown during their on-again, off-again, relationship.

It appears that he has previously threatened her and engaged in conduct of the sort which has given rise to his arrest and subsequent conviction in this case.

Alibi defense was not properly noticed out. When the alibi witness was first made known to Mr. Tevlin, apparently two or three weeks after the guilty plea, the alleged alibi witness did not testify or would not supply information consistent with the alibi. We still don't know whether he will except that Mr. Thompson says that now he's had a change of heart and will testify differently.

An alibi witness who comes forward only nine months after an offense and, indeed, initially tells an attorney one thing and then purportedly will say something else in court is almost wholly lacking in credibility. The witness was not uncovered or noticed consistent with the Michigan statute and, indeed, Mr. Thompson went to trial in front of Judge Snow without having any such alibi in place.

Significantly, Mr. Thompson is linked to the crime by virtue of his prior course of conduct with the victim, Katherine Brown, and by his own confessional statement given to the police contemporaneous with this arrest. As late as this date, we have no positive averment of innocence and, in fact, in light of the history in the context of the case, such averment would seem to be ludicrous and frivolous if it were made.

A plea which is offered by a defendant mid-trial is to be disturbed much more conservatively and cautiously than a plea which is offered in a pretrial

> context. Here we went to all the trouble to bring a visiting judge out of retirement, impanel a jury and start a case, and Mr. Thompson, on what seem to me to be essentially frivolous grounds, wants to go back to square one and start all over again nine months after the offense.
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> It seems to me that inadequate grounds to do that have been demonstrated here but the motion itself is nearly completely frivolous, and that now that the great liberality standard for withdrawing guilty pleas no longer obtains and guilty pleas are only to be withdrawn in the interest of justice, it seems to me that the interest of justice clearly do [sic] not militate in favor of withdrawing this plea.
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> The prosecutor's office, it seems to me, has suffered prejudice if only because they have geared up once and summoned witnesses and must, if the case is to be retried, start that process all over again and we will have to find either myself or another visiting judge to come in and deal with the matter.
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> Furthermore, motions of this sort when not substantiated by a well-grounded claim of innocence, are to be looked upon with some considerable suspicion in any event.
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> Therefore, I'm satisfied that this motion is simply not well-founded, is not in the interest of justice and should be denied.

Sentencing proceeded. No corrections or additions were offered to the presentence report. Defendant was sentenced within the minimum guidelines range, to 6 to 22 1/2 years imprisonment. This appeal ensued.

I

Defendant first argues the trial court abused its discretion in denying his motion to withdraw his guilty plea. We disagree.

We review determinations regarding the withdrawal of a guilty plea before sentencing for abuse of discretion. *People v Hall,* 195 Mich App 460; 491 NW2d 854 (1992). The court in the interest of justice may permit an accepted plea to be withdrawn before sentence is imposed unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. MCR 6.310(B).

The trial court did not err in denying defendant's motion to withdraw his guilty plea. Defendant failed to meet his initial burden of establishing that it was in the interest of justice to withdraw the plea. *People v Jackson*, 203 Mich App 607; 513 NW2d 206 (1994). Defendant made no allegation that his plea was coerced, involuntary or brought about by promises of leniency. No affidavit from the alleged alibi witness was submitted, and a jury had been impaneled and the prosecution had presented its first witness when defendant accepted the plea bargain. As the trial court noted, defendant had confessed contemporaneously with his arrest, approximately six months before trial began. And while defendant stated that the only reason he pleaded guilty was that the witness was unavailable, he never directly asserted his innocence. Under these circumstances, the trial court did not abuse its discretion in denying defendant's motion to withdraw.

II

Defendant next argues he is entitled to resentencing because the trial court considered an uncounseled 1993 conviction for assault and battery. However, documents provided by defendant subsequent to the filing of his appellate brief state defendant waived counsel for this conviction.

Uncounseled misdemeanor convictions may be used to enhance punishment at a subsequent conviction provided no prison term was imposed. *Nichols v United States*, 511 US ; 128 L Ed 2d 745, 750, 754-755; 114 S Ct 1921 (1994). Defendant bears the initial burden to establish prima facie proof that a prior conviction violated *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963), i.e., was obtained without counsel or without a proper waiver of counsel, or present evidence that the sentencing court either failed to reply to a request or refused to furnish requested copies of records and documents. *People v Haywood,* 209 Mich App 217, 231; 530 NW2d 497 (1995) citing *People v Carpentier*, 446 Mich at 31.

Defendant received ten points under PRV5 for four or more prior misdemeanor convictions. The presentence report indicates defendant was represented regarding two misdemeanors and that no jail time was imposed regarding a third. Further, defendant supplied this court with a copy of a letter from appellate counsel to the 61st District Court inquiring about four convic-tions, and various court documents sent to defense counsel in response. The 61st District Court documents state defendant waived counsel for the June 1993 assault and battery conviction at issue here. Thus, it appears that the court properly scored PRV5. Further, defendant has thus not complied with *Carpentier* as to the allegedly uncounseled assault and battery conviction, in that he failed to provide prima facie proof that it violated *Gideon*. The court document states defendant waived counsel. *Carpentier*, 446 Mich at 31, 35.

Moreover, we note that although the trial court considered defendant's previous assault and battery involving Ms. Brown, it also considered defendant's extensive prior record,[1] the danger he posed to society, and his drug abuse:

> THE COURT: We've already indicated the basic facts here, Mr. Thompson, and my concern is that this was a particularly malicious criminal offense. Although it is technically a breaking and entering because a residence was broken into and property was stolen, it seems to me that it was mostly a harassment-stalking type offense aimed at Katherine brown, your on-again, off-again, girlfriend.
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> I believe the principal purpose of the break-in was not to steal goods for your own use, although apparently that was done, but rather to maliciously injure and destroy property belonging to Ms. Brown as a a means of venting your peak because you were unhappy at the direction your relationship was taking.
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> Furthermore, it appears that you have previously engaged in similar threatening conduct toward Ms. Brown and that the relationship is unwholesome and ultimately potentially dangerous in this particular case.
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> * * *
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> Your history is one that is not encouraging. I note, beginning in 1982 and coming through 1993, you have been convicted of at least the following

> offenses: Entering without breaking, removing property not your own, false information to the police, larceny from a person, disorderly conduct trespassing, possession of cocaine as a third felony offender, escape from prison, conspiracy to commit larceny under $100, assault and battery spouse abuse which I believe also involved Ms. Brown -- that in 1993 -- malicious destruction of property under $100, and disorderly conduct frequenting a place of illegal business or occupation.
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> I am satisfied from this course of conduct and the most unwholesome and stalking-type conduct you have engaged in relative to Ms. Brown, that you are a danger in your present configuration, Mr. Thompson, that you require a fair amount of contemplation time to bring your thoughts aright. It's my hope that if we separate you [sic] society for a period of time you may during that time have a chance to reflect upon your actions, get control of what appears to be a nagging cocaine problem, and generally turn yourself around so that you will be a suitable person for life in free society as a productive and law-abiding member of that society.
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> * * *
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> Based upon all of these factors and balancing them as we've attempted to do this afternoon, Mr. Thompson, it will be the sentence and judgment of the Court that you be ... confined ... for a term of not less than six nor more than 22-1/2 years...
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> The court will also direct that you be placed in appropriate programming while institutionalized and ultimately when paroled to deal with a cocaine or other substance abuse problem and that you be ordered to pay $1,175 as restitution for the damage done to the apartment of Ms. Brown on December 23rd, 1993, when you were on parole and under supervision of the Department of Corrections to provide restitution in that amount.

We further note that the sentencing court's statements regarding defendant's pattern of wrongful conduct against Ms. Brown are supported by the unobjected to PSR, which states in the section entitled "Evaluation and Plan" that defendant was arrested in December 1992 while on parole status and was charged with unarmed robbery in an offense involving defendant attacking Ms. Brown and stealing twenty dollars from her. The PSR further states:

> The defendant subsequently pled guilty to a misdemeanor charge and received a seven month jail sentence. The current conviction should be considered as quite serious as the defendant has continued to harass Katherine Brown, his ex-girlfriend, and the mother of his child. They previously lived together but separated in late 1992. Since then, he has assaulted her and threatened to kill her. Therefore, the instant offense is not an isolated incident, but an ongoing set of occurrences which could result in serious consequences.
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> * * *
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> The defendant can be evaluated as an individual who has harassed his ex-girlfriend for several years. This harassment has involved physical as well as verbal attacks.

> The defendant has not shown an ability to control himself . . . He has had numerous warnings to stay away from Ms. Brown but obviously did not take those warnings seriously.
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> * * *
>
> INVESTIGATOR'S DESCRIPTION OF THE OFFENSE
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> * * *
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> Thompson was subsequently arrested [on the instant matter] on 2-10-94, and interviewed by Detective Edgcombe at the Kent County Jail. Initially he said he didn't know anything about the breaking and entering but later stated that he was a lookout for Sturdivant. Sometime after the interview was completed, Thompson was released from jail by mistake prior to arraignment on this charge. On 2-11-94, Ms. Brown contacted the detective and told him that Thompson had threatened to kill her the previous evening at Noah's Lark, where he had confronted her while she was with her friends. She also advised that her car had been torched while sitting in the driveway the previous evening. On 2-14-94, Ms. Brown again spoke to the detective and told him that Thompson kept calling her and coming to her house. She was very concerned for her safety. At that time, the detective installed a Zebra Panic Alarm in Ms. Brown's home. At approximately eighteen thirty hours, the alarm was set off by Ms. Brown and Thompson was subsequently arrested as he was running in the Franklin and Henry Street Area.

Thus, the trial court's sentence was based on more than the assault and battery conviction, and is well supported by the record.

III

Defendant lastly argues the trial court abused its discretion in ordering payment of restitution, because it was not set in accordance with MCL 780.767(1); MSA 28.1287(767)(1). Defendant argues the court based the amount solely on information in the PSR without taking into account defendant's ability to pay.

The unobjected to PSR recommended that, as a condition of parole, defendant should be ordered to pay restitution of $1,175 to the victim, Katherine Brown. The investigator's description of the offense section of the PSR stated that defendant stole a VCR valued at $200, that estimated damage to Ms. Brown's possessions was over $500 and the value of the couch defendant slashed was $500 when purchased new. The victim's impact statement of the PSR stated that Ms. Brown "advised that restitution in this case should be set at $1,175. This would cover the cost of the damage and the cost of missing several days work." Ms. Brown testified at trial that it cost her approximately $1,000 to repair or replace furniture and household items destroyed or damaged by defendant and that she had no insurance.

As defendant failed to assert an inability to pay restitution or request an evidentiary hearing, the trial court was not required to conduct an evidentiary hearing regarding his ability to pay restitution. *People v Hart*, 211 Mich App 703, 706-707; 536 NW2d 605 (1995); *People v Grant,* 210 Mich App 467, 470; 534 NW2d 149 (1995), *lv grtd* ___ Mich ___ (1996). Nonetheless, MCL 780.767(1); MSA 28.1287(767)(1) provides that a trial court shall consider

a defendant's ability to pay and the defendant's financial needs and those of his family in imposing a restitution order. *Grant*, 210 Mich App at 471. We believe the record supports that the trial court considered these factors. Restitution was ordered as a condition of parole. The PSR stated that defendant was single, was thirty-two years old, had one dependent (the child he had with Ms. Brown and who lived with Ms. Brown), had a GED, and that defendant reported he had employment skills in construction. The PSR further stated that defendant was unemployed at the time of arrest, that over the past several years he had not held any long term, full time employment, and that he suffers headaches, blurred vision, passing out and possible seizures as a result of a head wound inflicted during a robbery in December of 1993. The Basic Information Report stated defendant had no occupation, no health insurance, did not have assets of $1,500 and up, and did not have a monthly income of $75 and up.

We conclude that under the circumstances presented here, the trial court did not abuse its discretion in providing for restitution as a condition of parole in the amount of $1,175. The trial court was entitled to rely on the unobjected to PSR. *Grant*, 210 Mich App at 472. Defendant did not assert an inability to pay and did not request a hearing on the issue, although the recommendation for restitution appeared on the face of the PSR. We are not persuaded by defendant's argument that *Grant* mandates a different conclusion, as the PSR in *Grant* provided only conclusory input regarding the amount of loss incurred, and the defendant had challenged the evidence. 210 Mich App at 468-470. In contrast, in the instant case, Ms. Brown's testimony at trial is in accord with the unobjected to PSR as to the approximate amount of loss she sustained. The court's reliance on this evidence to ascertain the amount of loss sustained by the victim was reasonable. *People v Guajardo*, 213 Mich App 198, 200; 539 NW2d 570 (1995). The PSR also stated defendant was single, that his only dependent was the child who lived with Ms. Brown, and that defendant had construction employment skills and a GED. The trial court had also ascertained at the plea-taking that defendant was thirty-two years old. Under these circumstances, we conclude the trial court did not abuse its discretion in providing for restitution as a condition of parole in the amount of $1,175 and that defendant is not entitled to remand on this issue or to have the restitution portion of the judgment of sentence vacated.

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Richard M. Pajtas

[1] As to the court's consideration of defendant's entire record, the court mentioned eleven prior offenses. There is a legitimate question regarding representation regarding only four of the offenses, all misdemeanors. We are satisfied that the court would have imposed the same sentence even if these four prior offenses had not been considered.