

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY JOHN BRUCE,

Defendant-Appellant.

UNPUBLISHED

October 8, 1996

No. 181712

LC No. 94-050240-FH

Before: J.H. Gillis, P.J., and G.S. Allen and J.B. Sullivan, JJ.*

MEMORANDUM.

Defendant pleaded nolo contendere to operating a motor vehicle while under the influence of intoxicating liquor, causing death, MCL 257.625(4); MSA 9.2325(4), in exchange for the dismissal of an additional charge of vehicular manslaughter and a recommendation by the prosecutor that he be sentenced within the sentencing guidelines' recommended range. The plea was tendered under the mistaken belief that the guidelines were applicable to the crime of OUIL causing death. Defendant was subsequently sentenced to six to fifteen years' imprisonment. He appeals as of right. We remand. This case has been decided without oral argument pursuant to MCR 7.214(A).

Although defendant's six- to fifteen-year sentence is proportionate to the seriousness of the circumstances surrounding the fatal automobile accident and defendant's background, *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), we remand this case to the trial court to afford defendant an opportunity to withdraw his nolo contendere plea.

There is no question that defense counsel made a mistake when he negotiated a sentence recommendation calling for defendant to be sentenced within the sentencing guidelines for an offense not covered by the guidelines. The closer question is whether, as the trial court found, defendant made a knowing and intelligent decision to proceed with sentencing after becoming aware that the sentence recommendation aspect of the plea bargain was incapable of being fulfilled. See *People v Pickens*,

*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.

446 Mich 298, 303, 314; 521 NW2d 797 (1994); *People v Thew*, 201 Mich App 78, 89-90; 506 NW2d 547(1993).

We find that the trial court clearly erred in finding that defendant made a knowing and intelligent decision to proceed with sentencing. Neither the sentencing transcript nor the record of the evidentiary hearing establish that defendant was competently advised of his options relative to sentencing after becoming aware that the sentence recommendation aspect of the plea agreement was incapable of being fulfilled. On the contrary, defense counsel repeatedly testified at the evidentiary hearing that he could not recall what discussions he had with defendant relative to this issue. More significantly, the sentencing transcript reflects that, at the time of sentencing, defense counsel discussed on the record the fact that the sentence recommendation aspect of the plea agreement was incapable of being fulfilled and, regarding this situation, stated, “I don’t know what effect that has.” This statement negates any suggestion that defendant made a knowing and intelligent decision to proceed with sentencing. Indeed, if defense counsel was unaware of the effect of not being able to comply with the sentence recommendation aspect of the plea agreement, as he indicated at the time of sentencing, then he could not have competently advised defendant on this matter.

Furthermore, once it became apparent that the sentence recommendation aspect of the plea agreement was incapable of being fulfilled, the trial court should have told defendant that the recommendation could not be accepted by the court and should have informed him of the appropriate disposition. Defendant should have then been given an opportunity to either affirm or withdraw his plea. *People v Killebrew*, 416 Mich 189, 209-210; 330 NW2d 834 (1982). The purpose of this procedure is to ensure that the defendant is “fully aware of all the consequences of his guilty plea.” *Id.* In this case, the trial court failed to comply with the procedure announced in *Killebrew* and did not make any other effort to ensure that defendant was aware of the consequences of his plea.

Under the circumstances, we hold that defendant should be given an opportunity to withdraw his nolo contendere plea. Accordingly, this case is remanded to afford defendant this opportunity. If defendant elects to withdraw his plea, the case may proceed to trial in accordance with MCR 6.312. However, if defendant elects to affirm his plea, his conviction and sentence shall be affirmed.

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

/s/ John H. Gillis

/s/ Glenn S. Allen, Jr.

/s/ Joseph B. Sullivan