

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID R. STRICKLIN,

Defendant-Appellant.

UNPUBLISHED
October 11, 1996

No. 178055
LC No. 91-045471-FC

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

PER CURIAM.

Defendant pleaded guilty of assault with intent to rob while armed, MCL 750.89; MSA 28.284, felonious assault, MCL 750.82; MSA 28.277, and habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to enhanced terms of twenty to forty years' imprisonment for the assault with intent to rob conviction and four to six years' imprisonment for the felonious assault conviction. The sentences are to be served concurrently to each other but consecutively to another sentence defendant was then serving. Defendant appeals as of right. We affirm in part and remand in part. This case has been decided without oral argument pursuant to MCR 7.214(A).

The trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty pleas on the ground that his trial counsel made promises of leniency to him. *People v Jones*, 190 Mich App 509, 512; 476 NW2d 646 (1991). At the plea hearing, defendant denied that any non-record promises were made to him and assured the court that he was voluntarily pleading guilty. Defendant's affidavit could not be used to contradict those earlier statements. *People v Roy*, 131 Mich App 611, 612-613; 345 NW2d 702 (1983); *People v Serr*, 73 Mich App 19, 30-31; 250 NW2d 535 (1976). Defendant did not produce any corroborating evidence to support his motion or the statements contained in his affidavit. Nor did he make an offer of proof. On these facts, the trial court did not err in denying the motion or denying defendant's request to conduct an evidentiary hearing.

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

The trial court had the authority to correct its sentencing decision pursuant to MCR 6.429(A) to change defendant's minimum sentence for assault with intent to rob while armed from eighteen years to twenty years. The court made this modification at the time of sentencing before a judgment of sentence was entered or before defendant had been remanded to jail to await execution of his sentence. Accordingly, the court had not already imposed a sentence at the time it orally modified defendant's sentence, MCR 6.429(A). *People v Barfield*, 411 Mich 700, 702-703; 311 NW2d 724 (1981); *People v Bingaman*, 144 Mich App 152, 157-159; 375 NW2d 370 (1984).

We, however, agree with defendant that the factual basis for his plea to felonious assault was insufficient for the court to accept defendant's guilty plea. This issue was properly preserved by defendant when he made a motion in the trial court to withdraw his plea for that reason. *People v Kaczorowski*, 190 Mich App 165, 172-173; 475 NW2d 861 (1991). The trial court reserved its ruling on this part of defendant's motion, but it apparently never made a supplemental ruling on the matter. Because the crime of felonious assault requires the use of a dangerous weapon, the factual basis for defendant's plea was inadequate. *People v John Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). Defendant only admitted to using a toy gun. This was not sufficient to allow the trial court to infer that defendant used a dangerous weapon to commit this crime. *Jones, supra*, 190 Mich App 511-512; *People v Malkowski*, 198 Mich App 610, 614; 499 NW2d 450 (1993).

We therefore remand this matter to the trial court to give the prosecution an opportunity to provide evidence that a real gun was used in this crime. If the prosecution is able to produce such evidence and there is no contrary evidence, defendant's conviction shall stand. If contrary evidence is produced, the trial court should resolve the factual issue as if defendant moved to withdraw his guilty plea and decide whether, in the exercise of its discretion, to grant the motion. If the prosecution cannot produce evidence of a dangerous weapon, then defendant's plea and sentence for felonious assault must be set aside. *People v Mitchell*, 431 Mich 744, 750; 432 NW2d 715 (1988).

Defendant next argues that his sentence of twenty to forty years' imprisonment for assault with intent to rob while armed violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). While defendant's sentence was consistent with the plea agreement made with the prosecution, defendant moved in the trial court to set aside his plea regarding his sentence. Therefore, this issue is not waived on appeal. Compare *People v Cobbs*, 443 Mich 276, 285 n 11; 505 NW2d 208 (1993); *People v Blount*, 197 Mich App 174, 175-176; 494 NW2d 829 (1992).

Defendant was sentenced as an habitual offender. The sentencing guidelines do not apply to habitual offenders. *People v Cervantes*, 448 Mich 620, 627, 630, 637; 532 NW2d 831 (1995); *People v Gatewood (On Remand)*, 216 Mich App 559; 550 NW2d 265 (1996). Nevertheless, in light of defendant's prior record, limited work history and substance abuse (including at the time this offense was committed), the sentence is not disproportionate. *Milbourn, supra*, 636. Further, because the sentence satisfies the principle of proportionality, it does not constitute cruel or unusual punishment. *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993).

Affirmed in part and remanded in part 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