

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK MCCALLUM,

Defendant-Appellant.

UNPUBLISHED

February 25, 1997

No. 182643

Kent Circuit Court

LC No. 93-064176-FH

Before: Sawyer, P.J., and Neff and A.L. Garbrecht,* JJ.

PER CURIAM.

Defendant pleaded guilty of breaking and entering a building, MCL 750.110; MSA 28.305, and habitual offender-fourth, MCL 769.12; MSA 28.1084. He was sentenced to eight to twenty years' imprisonment, and now appeals as of right. We affirm.

I

Defendant first argues that his conviction should be set aside because he was not represented by counsel at his plea hearing and did not waive the right to counsel on the record before entering a plea. Defendant, however, failed to raise this issue before the trial court. In general, this Court considers waived those issues which are raised for the first time on appeal. *People v Jacques*, 215 Mich App 699, 702; 547 NW2d 349 (1996).

Defendant's argument appears to be premised upon a claim that the trial court failed to comply with MCR 6.005(E) because the record shows that he waived his right to counsel at another hearing before the plea hearing. Although the right to counsel is associated with the application of MCR 6.005(E), any error involving the waiver of the right to counsel under this court rule is treated as any other trial error. Thus, as plain, unreserved error, this Court will address the issue only if it affected substantial rights of defendant. *People v Lane*, 453 Mich 132, 139-140; 551 NW2d 382 (1996).

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

We are not persuaded that defendant's substantial rights would be affected by waiving review of the issue. Defendant entered his plea just before trial was set to begin. The trial court conducted an evidentiary hearing one day before trial was set to commence at which defendant stated that he wanted to conduct his own case but have his counsel remain to assist him. While the record does not show that the trial court followed the specific requirements of MCR 6.005(D) at that time, there was substantial compliance by the court. *Lane, supra*, 140-141; *People v Adkins*, 452 Mich 702, 726-727; 551 NW2d 108 (1996); *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976).

Moreover, defendant has failed to establish that he was prejudiced by the trial court's failure to comply with MCR 6.005(E) at the plea hearing. Defendant's counsel was present at the plea hearing to discuss the plea with defendant although defendant negotiated his own plea agreement with the prosecutor without his counsel's assistance. Defendant was advised of the penalties he faced as a result of his plea prior to his plea being accepted. Defendant was also represented by counsel at sentencing. Defendant has not shown that his substantial rights were affected.

II

Defendant next argues that the trial court erred when it refused to allow him to withdraw his plea on the ground that the bargain was illusory. The trial court did not err in denying defendant's motion.

There is no absolute right to withdraw a guilty plea once it has been accepted by the trial court. This Court reviews a trial court's decision to deny a motion to withdraw a plea after sentencing for a clear abuse of discretion, resulting in a miscarriage of justice. *People v Jones*, 190 Mich App 509, 512; 476 NW2d 646 (1991).

Defendant asserts that he agreed to plead guilty in exchange for a promise of a recent photograph of his son. Defendant argues that the agreement was illusory because the trial court never enforced that agreement, i.e., defendant did not receive a recent photograph and the court did not force his former wife to provide one. Defendant also argues that there was no legal consideration for the bargain.

We agree with the trial court that the plea agreement in this matter did not involve an illusory legal bargain. *People v Gonzalez*, 197 Mich App 385, 391; 496 NW2d 312 (1992). When defendant offered to plead guilty, he expressly acknowledged that there were no deals made with the prosecution. However, he requested that the prosecutor buy him a meal from Burger King and provide a recent photograph of his son. The prosecutor refused to provide the food, but agreed to try to get a photograph from defendant's former wife. Defendant was not satisfied with the photograph he received because it was not a recent one.

Despite the fact that defendant requested the photograph of his son when he offered to plead guilty, the trial court did not believe this was a legal agreement which constituted a plea bargain. At most, it was a personal agreement made with defendant. On these facts, we agree with the trial court that there was no illusory bargain given that defendant was well aware of the legal terms of his offer to plead guilty, including pleading guilty as charged. *People v Gonzalez, supra*, 391; MCR 6.302. Because defendant was aware of the fact that there were no deals made in relation to his guilty plea, he

was not misled on the value of a bargain. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to withdraw his plea.

III

Related to his argument in Issue II, *supra*, defendant argues that the trial court erred in not allowing him to withdraw his plea because the prosecution did not comply with the plea agreement by providing defendant with a recent photograph of his son, but only a picture of his son as a baby.

As discussed above, the receipt of a photograph was not a part of the plea agreement that the trial court would legally recognize. If this was not a part of the plea agreement, it was also not a term that the trial court was required to abide by. *People v Arriaga*, 199 Mich App 166, 168; 501 NW2d 200 (1993). At most it was only a personal agreement with the prosecutor. Because the prosecutor made good faith efforts to obtain the photograph for defendant and this was not a part of a valid plea bargain, the trial court did not abuse its discretion in refusing to allow defendant to withdraw his plea for this reason. *Jones, supra*, 512.

IV

Defendant challenges the trial court's scoring of Offense Variables 8 and 17. Because defendant was sentenced as an habitual offender, the guidelines did not apply to him. Therefore, defendant's arguments on this issue are moot. *People v Dixon*, 217 Mich App 400, 411; 552 NW2d 663 (1996). However, because the trial court calculated the guidelines, we will briefly address the merits of defendant's argument.

Offense Variable 8 is scored where there is evidence that the defendant was involved in a continuing pattern of criminal behavior. Ten points result if the "offense is a part of a pattern of criminal activities over a period of time from which the offender derives a substantial portion of his or her income and/or the offense is directly related to membership in an organized criminal group." *People v Ayers*, 213 Mich App 708, 724-725; 540 NW2d 791 (1995). Defendant argued below that OV 8 should not have been scored at ten points because there was no evidence that his criminal activities comprised a substantial portion of his income. We disagree.

Although defendant claimed he was a self-employed roofer, there was no evidence offered on how much annual income he earned from legitimate work. In contrast, there was evidence included in the presentence report that defendant stole expensive equipment and materials worth well over \$10,000 to build a home. Moreover, defendant admitted that he was trained to steal as a child and considered stealing a job. On these facts, the trial court could properly infer that defendant was substantially supporting himself through his criminal activities. *People v Haacke*, 217 Mich App 434, 435-436; 553 NW2d 15 (1996).

Defendant also argues that OV 8 discriminates against poor defendants since there is no threshold income level for deciding whether criminal activities comprise a substantial portion of one's income. We decline to address the merits of this issue because it is raised for the first time on appeal

and because there was no evidence presented in the trial court regarding defendant's income as a roofer to decide whether he would even meet such a threshold. *Jacques, supra*, 702.

Next, defendant argues that the trial court erred in scoring OV 17 at five points based on the value of the kitchen cabinets being at least \$1,000. At the time of sentencing, defendant's counsel conceded that OV 17 was properly scored and that the cabinets were worth at least \$1,000. However, in his motion for resentencing, defendant argued that there was no evidence on the value of the cabinets. Nonetheless, the trial court considered the facts of the offense and found that the cabinets were worth more than \$1,000 even if there was no direct evidence of their value.

Because defendant conceded that OV 17 was properly scored at the time of the original sentencing hearing, he could not later assert in his motion for resentencing that OV 17 was improperly scored. *People v Barclay*, 208 Mich App 670, 672-673; 528 NW2d 842 (1995). However, there were facts in the record to support the trial court's scoring decision on the value of the cabinets. The cabinets were new cabinets taken from a home under construction and the cabinets filled the bed of defendant's truck. On these facts, it was reasonable for the court to infer that the cabinets, in total, were worth at least \$1,000.

V

Finally, defendant argues that the trial court erred in not striking his three prior misdemeanor convictions from the presentence investigation report. Defendant argued at his motion for resentencing that all three of the convictions were obtained without counsel or without a valid waiver thereof. The trial court ruled that it did not take defendant's prior misdemeanor record into account in its sentencing decision. Therefore, resentencing was not required. Defendant now argues that he was entitled to have the three convictions stricken from the presentence investigation report. We disagree.

Although the trial court ruled that resentencing was not required because it did not consider defendant's misdemeanor record at sentencing, it also ruled that defendant failed to meet his burden of establishing that the prior misdemeanor convictions were invalid. Defendant's appellate counsel wrote to circuit courts only to request verification of defendant's records. As the trial court properly held, this did not satisfy defendant's initial burden. *People v Zinn*, 217 Mich App 340, 342; 551 NW2d 704 (1996). Defendant should have written to district courts, not circuit courts. Therefore, the trial court also found there was no merit to defendant's challenge to the constitutional validity of his prior convictions in light of his failure to meet his initial burden on this issue. Accordingly, defendant is not entitled to have these convictions deleted from the presentence investigation report where the trial court addressed the merits of his challenge to the constitutional validity of the misdemeanor conviction and found that he had not met his burden. *People v Newcomb*, 190 Mich App 424, 427; 476 NW2d 749 (1991).

Affirmed.

/s/ David H. Sawyer

/s/ Janet T. Neff

/s/ Allen L. Garbrecht

