

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH GILDERSLEEVE,

Defendant-Appellant.

UNPUBLISHED
October 10, 1997

No. 193735
Oakland Circuit Court
LC No. 95-140336 FH

Before: Doctoroff, P.J., and Cavanagh and Saad, J.J.

MEMORANDUM.

Defendant appeals by right his jury conviction of third offense OUIL, enhanced by fourth offender status and for which a sentence of 5 to 20 years' imprisonment was imposed, raising no issue with respect to his ancillary plea-based conviction of driving while license suspended. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Prior to his jury trial, defendant pleaded guilty as charged under an agreement, pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), whereby the trial court would sentence him only to county jail time, thus, to no more than one year of incarceration, with a proviso that defendant would not have to be credited with time served (this Court does not pass on the propriety of an agreement to waive sentence credits which are mandated by statute). When it came time for sentencing, the court noted that having reviewed defendant's criminal record as established by the presentence report, it could not possibly agree to impose only a jail sentence. It set the plea aside sua sponte, its action being immediately approved by defense counsel. Defendant in this Court, however, contends that it was his choice whether to stand by his plea or withdraw it. He is correct. However, appellate relief on this issue would be pointless. Either defendant wished to stand by his plea, in which case he would have been sentenced on exactly the same basis he was sentenced after trial, or he would have withdrawn his plea, and in either event the present status would be exactly the same. This issue is therefore without merit as a basis for appellate relief.

Defendant contends that the trial court erred in admitting into evidence, on redirect examination of the arresting officer, a preliminary chemical breath test analysis. The trial court did not abuse its

discretion in admitting this evidence, where on cross-examination of the arresting officer defendant laid the groundwork for suggesting that, when defendant submitted to breath testing by an evidential breathalyzer, his blood alcohol level was rising. The preliminary breath test result established the contrary, that defendant's blood alcohol level was falling. This evidence was admissible under MCL 257.625a(2)(b)(3); MSA 9.2325(1)(2)(b)(iii). The assertion that a proper foundation for admission of the evidence, as required by *People v Krulikowski*, 60 Mich App 28; 230 NW2d 290 (1975), was not laid, is not preserved, and such evidentiary objections when made for the first time on appeal will not be reviewed, *People v Stimage*, 202 Mich App 28; 507 NW2d 778 (1993), particularly as the evidence was cumulative, three evidential breathalyzer results being previously admitted.

In light of defendant's prior criminal record, consisting of 7 felonies including the present one, 17 misdemeanor convictions, of which 12 are for drinking and driving offenses, a juvenile record, and the fact that this offense was committed while defendant was on parole and while his license was suspended, the enhanced 5 to 20 year sentence imposed on defendant as a fourth offender is not disproportionate to the offense and the offender nor does it represent an abuse of the trial court's sentencing discretion. *People v Hansford* (After Remand), 454 Mich 320; 562 NW2d 460 (1997).

Defendant's claim that he was deprived of the effective assistance of trial counsel is without merit. His claim that counsel was unprepared and failed to investigate the case is not supported by the record, and his claim of a dereliction in counsel's performance below that expected of minimally competent criminal defense practitioners with regard to cross-examining the arresting officer so as to make the preliminary breath test result admissible is likewise without merit. Even assuming arguendo that such a defense tactic, given the lack of viable defenses available, *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995), falls below that standard, the error was harmless, since the preliminary breath test result was cumulative to the three evidential breathalyzer results previously admitted, all of which establish that defendant had an unlawful blood alcohol level above that establishing a presumption of intoxication. Accordingly, defendant has failed to show how any deficiencies in counsel's performance prejudiced him in a cognizable way. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Affirmed.

/s/ Martin M. Doctoroff

/s/ Mark J. Cavanagh

/s/ Henry W. Saad