

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STACY LYNN WOLSCHON,

Defendant-Appellant.

UNPUBLISHED

March 30, 2004

No. 245009

Macomb Circuit Court

LC No. 94-001935-FH

Before: Zahra, P.J., and Saad and Schuette, JJ.

PER CURIAM.

Defendant pleaded guilty to possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), for which she was sentenced to lifetime probation. She later pleaded guilty to violating probation and was sentenced to five to twenty years in prison. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court erred in denying her motion to withdraw her guilty plea to violation of probation because the plea was based on an unfulfilled promise of leniency. We review the trial court's ruling for an abuse of discretion. *People v Davidovich*, 238 Mich App 422, 425; 606 NW2d 387 (1999), *aff'd* 463 Mich 446; 618 NW2d 579 (2000).

A defendant is entitled to withdraw a guilty plea induced by an unfulfilled promise of leniency by a judge or prosecutor. *People v Walls*, 3 Mich App 279, 282; 142 NW2d 38 (1966). "Where a defendant's plea of guilty is induced by the prosecutor's promise relating to sentencing, the terms of that agreement must be fulfilled." *People v Swirles*, 206 Mich App 416, 418-419; 522 NW2d 665 (1994). If the court determines that it cannot follow the recommendation, the defendant is entitled to withdraw his guilty plea. *People v Killebrew*, 416 Mich 189, 209-210; 330 NW2d 834 (1982). Similarly, if the parties agree to a specific sentence as part of the plea bargain, the defendant is entitled to withdraw his plea if the court determines that the sentence is inappropriate. *Id.* at 206-207. Likewise, if a defendant pleads guilty in reliance on a judge's preliminary evaluation of sentence, the defendant is entitled to withdraw his plea if the court determines that the sentence must exceed the preliminary evaluation. *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). An unfulfilled promise or misleading statement regarding the sentence by defense counsel can also justify withdrawal of a plea. *People v Schirle*, 105 Mich App 381, 385; 306 NW2d 520 (1981).

Before the violation of probation hearing, the probation department prepared an updated presentence report as required by MCL 771.14. Pursuant to statute, the report contained a specific written recommendation for disposition. MCL 771.14(2)(c). That recommendation was that probation be continued but defendant be sentenced to one year in jail followed by six months on tether. A recommendation is a thing recommended. *Random House Webster's College Dictionary* (1997). To recommend something is to present it as worthy of acceptance or use or to urge or suggest it as appropriate. *Id.* It is simply a suggestion and should not be considered binding on the trial court, which, in this case, was entitled to impose any sentence within the limits set by the Legislature that was proportionate to the circumstances surrounding the offender and the offense. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990) (adopting standard of proportionality); *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972) (minimum sentence cannot exceed two-thirds of maximum); *People v Shipley*, 256 Mich App 367, 378; 662 NW2d 856 (2003) (a sentence is invalid if it exceeds the statutory limits).

At the plea proceeding, defense counsel noted the probation department's recommendation and stated, "We have no objection to that." There is nothing in the record to suggest that the judge or prosecutor agreed to such a sentence or that defense counsel promised defendant that the court would follow the probation department's recommendation. There being nothing in the record to support defendant's claim that her plea was induced by an unfulfilled promise of leniency, the trial court did not abuse its discretion by denying the motion to withdraw the plea.

Defendant next contends that the sentence imposed by the trial court was disproportionate.

This Court's review is limited to determining whether the trial court abused its discretion by violating the principle of proportionality. *People v St John*, 230 Mich App 644, 649; 585 NW2d 849 (1998). An abuse of discretion will be found "where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender." *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998).

A sentence must be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Milbourn, supra*. Because defendant was sentenced for violation of probation, "this Court may not use the guidelines in any manner in determining whether the defendant's sentence is proportionate." *People v Williams*, 223 Mich App 409, 413; 566 NW2d 649 (1997). In determining an appropriate sentence for violation of probation, the trial court may "consider defendant's actions and the seriousness and severity of the facts and circumstances surrounding the probation violation" *People v Peters*, 191 Mich App 159, 167; 477 NW2d 479 (1991).

Defendant repeatedly violated the terms of her probation. She was arrested for subsequent crimes and used cocaine. Sanctions short of a prison sentence such as substance abuse treatment, electronic tether, and jail time apparently had little effect on defendant considering that she stopped reporting to probation within two months after her release from jail and then absconded from probation for twenty-eight months. Despite being given another chance at probation, she again stopped reporting and had further police contact and arrests. Given these circumstances, the trial court did not abuse its discretion in sentencing defendant to five years in prison. *People v Reynolds*, 195 Mich App 182, 184-185; 489 NW2d 128 (1992).

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Bill Schuette