

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS FREDERICK MCGINN, II,

Defendant-Appellant.

UNPUBLISHED

January 24, 2006

No. 256407

Calhoun Circuit Court

LC No. 01-004223-FC

Before: Donofrio, P.J. and Zahra and Kelly, JJ.

KELLY, J. (*dissenting*).

I respectfully dissent. The trial court did not abuse its discretion in denying defendant's motion to withdraw his plea. A trial court abuses its discretion when an unprejudiced person, considering the facts on which the trial court acted, would conclude there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

There is no absolute right to withdraw a plea after a trial court has accepted it. *People v Kennebrew*, 220 Mich App 601, 605; 560 NW2d 354 (1996). MCR 6.310(B) provides the process for withdrawing a plea:

On the defendant's motion or with the defendant's consent, the court in the interest of justice may permit an accepted plea to be withdrawn before sentence is imposed unless withdrawal of the plea would substantially prejudice the prosecutor because of reliance on the plea. If the defendant's motion is based on an error in the plea proceeding, the court must permit the defendant to withdraw the plea if it would be required by MCR 6.311(B).

Because defendant did not allege any error in the plea-taking procedure, he relied on the trial court's discretionary power to permit withdrawal of the plea before sentencing. *People v Wilhite*, 240 Mich App 587, 594; 618 NW2d 386 (2000); MCR 6.310(B). Therefore, defendant bore the burden of showing that withdrawal of the plea would have been "in the interest of justice," meaning that he had to articulate "a fair and just reason" for withdrawing the plea. *Wilhite, supra* at 594.

Defendant moved to withdraw his plea before sentencing, claiming that he was unaware of the potential ramifications of the plea. Specifically, defendant argued that his counsel failed to tell him that he would be eligible for parole in fifteen years instead of ten years. However,

even if defendant's assertion were true, incorrect advice rendered by trial counsel, by itself, is not a sufficient basis for withdrawal of a defendant's plea. *Wilhite, supra* at 596-597; *People v Gomer*, 206 Mich App 55, 58; 520 NW2d 360 (1994). As this Court stated in *People v Zuniga*, 56 Mich App 231, 237; 223 NW2d 652 (1974):

While bad advice or inaccurate representations by accused's own counsel as to the consequences of a plea of guilty under the particular circumstances are not sufficient to vitiate a plea of guilty as involuntary, in the absence of proof that the judge or the prosecuting attorney, or other state officer participated in the alleged misrepresentation, it is otherwise if the statements of the attorney amount to an unqualified factual representation that the state or a responsible officer thereof, such as a judge of competent authority or a district attorney, has entered into a bargain purporting to commit the state to give accused a reward, in the form of immunity or lesser punishment, in exchange for a plea of guilty, where such representation is apparently substantially corroborated by acts or statements of a responsible state officer, relied on by accused, and operating to preclude his exercise of free will. [Punctuation and citation omitted.]

Even if defense counsel's alleged bad advice was a sufficient basis for plea withdrawal, the record in this case is absolutely void of any indication that defense counsel did not explain the full ramifications of the plea.¹ Nor is there any indication in the record that either the prosecutor or the judge misled defendant as to the consequences of his plea. With nothing in the record to support his argument, defendant's claim is premised on nothing more than remorse following a plea. But defendant's subjective dissatisfaction with his sentence is not a proper ground for withdrawing his no contest plea. *Wilhite, supra* at 597. Indeed, requests to withdraw pleas are to be regarded as frivolous where the circumstances indicate that the defendant's true motive in making the motion is a concern regarding sentencing. *People v Holmes*, 181 Mich App 488, 492; 449 NW2d 917 (1989).

The record indicates that the trial judge, defense counsel, and the prosecutor repeatedly informed defendant that he was eligible for review in ten years. Defendant acknowledged this on the record. Defendant also acknowledged that he could choose a life sentence or a term of years. In sum, the record indicates that defendant was well aware of the potential ramifications of his no contest plea. Because defendant did not establish "a fair and just reason for withdrawal" of the plea, *Wilhite, supra* at 597, the trial court did not abuse its discretion in denying defendant's motion to withdraw his no contest plea before sentencing.

In his second motion to withdraw his plea, or in the alternative for resentencing, defendant argued that his plea should be set aside because it was not voluntary and knowingly made when he actually entered into an agreement allowing him to be eligible for parole after ten

¹Although this Court held in *People v Sledge (On Rehearing)*, 200 Mich App 326; 503 NW2d 672 (1993), that defense counsel's promise of leniency may provide grounds for withdrawal of a guilty plea, that opinion was later divested of any precedential force or effect by the Supreme Court, 444 Mich 863 (1993).

years. Again, however, defendant's argument was premised solely on facts that are not in the record. Defendant asserted that not only he, but also defense counsel, the prosecutor, and the trial court erroneously believed that he would be eligible for parole in ten years. Defendant also asserted that the trial court acknowledged that the sentencing agreement was that he would be eligible for parole in ten years. However, the record does not substantiate any of these factual assertions. On the contrary, the record reveals that the prosecutor stated, at the plea entry hearing and in defendant's presence, that defendant would be subject to review in ten years. Defense counsel too stated that defendant would be subject to review in ten years. These were and are accurate statements of the law. MCL 791.234. Both defense counsel and defendant stated on the record that they understood and agreed to this. It was never stated on the record that defendant would be eligible for parole in ten years. Nor is there anything in the record to support this Court's conclusion that defendant misunderstood the terms of the agreement when they were discussed extensively and precisely on the record and when defendant explicitly asserted that he understood. "Defendant's subjective expectations regarding the possible length of his sentence do not render involuntary an otherwise valid plea." *In re Oakland County Prosecutor*, 191 Mich App 113, 122-125; 477 NW2d 455 (1991).

The actual plea agreement called for dismissal of a number of other charges and defendant had the option of choosing a life sentence with the possibility of parole or a sentence for a term of years. Defendant first chose a life sentence, then changed his mind and chose a term of years. The other charges were dismissed. All terms of the plea bargain were complied with and defendant should not be now heard to complain.

The trial court did not abuse its discretion in denying defendant's motion to withdraw his plea. I would affirm.

/s/ Kirsten Frank Kelly