

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 21, 2012

v

JOSEPH ALEXANDER FRANKLIN,

Defendant-Appellant.

No. 292469
Wayne Circuit Court
LC No. 08-014196-FH

ON REMAND

Before: MURRAY, P.J., and K. F. KELLY and DONOFRIO, JJ.

PER CURIAM.

This is the second time this case is before us. Initially, we vacated defendant's convictions on the basis that the trial court committed plain error in failing to allow defendant to affirm his plea to second-degree home invasion, a lesser charge than what he was ultimately convicted of (amongst other crimes) after a bench trial. *People v Franklin*, unpublished opinion per curiam of the Court of Appeals, issued November 16, 2010 (Docket No. 292469). The prosecution appealed, and in an order the Supreme Court reversed our opinion and remanded for consideration of defendant's remaining issues on appeal. *People v Franklin*, 491 Mich 916; 813 NW2d 285 (2012). We now affirm.

I. BACKGROUND

In October 2008, William Crumpton, the victim, returned to his home and discovered that it had been broken into. Subsequently, the Detroit Police Department arrested defendant and he was charged with first-degree home invasion, MCL 750.110a(2), larceny in a building, MCL 750.360, larceny of a firearm, MCL 750.357b, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b.

On December 16, 2008, defendant accepted a plea agreement on the record before the trial court. According to the terms of the deal, defendant would be convicted of second-degree home invasion, MCL 750.110a(3), with possible consideration under the Holmes Youthful Training Act, MCL 762.11 *et seq.*, and the remaining counts would be dismissed. But in January 2009, at the sentencing hearing and after speaking with the victim, the trial court *sua sponte* set aside the plea agreement and set a trial date.

In April 2009, on the first day of trial, defendant waived his right to a jury trial and a bench trial ensued. The trial court ultimately found defendant guilty of first-degree home invasion, larceny of a building, and larceny of a firearm, but acquitted defendant of the felony-firearm charge. Defendant was sentenced to 4 to 20 years' imprisonment for the first-degree home invasion conviction, and to time served for the remaining convictions.

Defendant appealed as of right to this Court, arguing, among other things, that the trial court abused its discretion in setting aside the plea agreement. This Court determined that the trial court's decision to set aside the entire plea agreement constituted plain error requiring reversal:

Because the trial court failed to (1) inform defendant what sentence it intended to impose in place of the sentence agreement, and (2) allow defendant the option of withdrawing or affirming his plea after being informed by the court that it was not going to adhere to the sentence agreement reached by the parties, it committed a plain error. MCR 6.310 required such action (as defendant was required to be informed at the plea taking stage under MCR 6.302(C)(3)), and so we are compelled to vacate defendant's conviction and sentence, and remand to allow defendant the opportunity to withdraw his plea to second[-]degree home invasion, and if he does not do so, for resentencing in the court's discretion. [*Franklin*, unpub op at 3.]

After granting the prosecution's application for leave to appeal, the Supreme Court reversed this Court, holding that although the trial court had to provide defendant the opportunity to affirm or withdraw his plea, the failure to do so did not constitute plain error:

Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we reverse the November 16, 2010, judgment of the Court of Appeals. Although the Court of Appeals correctly held that MCR 6.310(B)(2) requires the trial court to "provide the defendant the opportunity to affirm or withdraw the plea," the Court of Appeals erroneously held that the failure to provide such an opportunity resulted in plain error requiring reversal. First, given this Court's holding in *People v Grove*, 455 Mich 439[; 566 NW2d 547] (1997), that the trial court could reject the entire plea agreement and subject the defendant to a trial on the original charges over the defendant's objection, the trial court's error in this case was not "plain, i.e., clear or obvious." *People v Carines*, 460 Mich 750, 763[; 597 NW2d 130] (1999). However, in the future, such an error will be "plain" because we take this opportunity to clarify that, as both parties agree, *Grove* has been superseded by MCR 6.310(B). Furthermore, even if the error here was plain and resulted in outcome determinative prejudice, this Court still "must exercise its discretion in deciding whether to reverse." *Carines*, 460 Mich at 763. Under these circumstances, where the defendant did not just fail to object at sentencing, but also failed to object during the subsequent trial and waived his right to a jury trial, this Court is exercising its discretion in favor of not reversing the defendant's convictions. "Any other conclusion would be contrary to the rule that defendants cannot 'harbor error as an appellate parachute.'" *People v Pipes*, 475 Mich 267,

278 n 39[; 715 NW2d 290] (2006) (citation omitted). We remand this case to the Court of Appeals for consideration of the defendant's remaining appellate issues. The Court of Appeals is specifically directed to consider the applicability of *Lafler v Cooper*, 566 US __; 132 S Ct 1376; 182 L Ed 2d 398 (2012), to defendant's ineffective assistance of counsel claim. [*Franklin*, 491 Mich at 916 (footnote omitted).]

Pursuant to the Supreme Court's order, we now turn to defendant's remaining issues on appeal.

II. ANALYSIS

At the outset, we note that defendant requests that this Court revisit and reverse the Supreme Court's holding that the trial court's setting aside of the plea agreement was not a plain error, or, in the alternative, hold that such a conclusion is a miscarriage of justice. It is elementary law, however, that we cannot alter the dictates of a Supreme Court opinion or order. *People v Gioglio (On Remand)*, 296 Mich App 12, 18; 815 NW2d 589 (2012).

A. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant asserts two grounds of ineffective assistance of counsel. "A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008) (citations omitted). Although defendant filed a motion for an evidentiary hearing, the trial court never ruled on this motion. Because an evidentiary hearing was not held, review is limited to errors apparent on the record. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

To establish ineffective assistance of counsel, the defendant must show that defense counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for defense counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 691-692; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). The defendant must overcome the strong presumption that counsel's performance constituted sound trial strategy. *People v Marcus Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

1. FAILURE TO OBJECT

Defendant argues that counsel was ineffective for failing to object at the time the trial court set aside the plea agreement, or at anytime thereafter. As noted in the Supreme Court's order and our prior opinion, the trial court erred in setting aside the entire plea agreement without providing defendant the opportunity to affirm or withdraw his plea pursuant to MCR 6.310(B)(2)(b). However, this error was not plain because the trial court had the authority under *People v Grove*, 455 Mich 439; 566 NW2d 547 (1997), to reject the plea agreement and require

defendant to face trial on the original charges.¹ Consequently, because the trial court made the decision to set aside the plea agreement without a request from either party, and it had the authority to actually set the plea agreement aside, any objection by defense counsel would have been futile, *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005), or could have been a result of trial strategy, *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008) (declining to raise an objection can be considered part of sound trial strategy).

Moreover, “[w]e will not substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel’s competence.” *Unger*, 278 Mich App at 242-243. Given that the trial court had the authority to set aside the plea, and it exercised its discretion by setting aside the plea, defense counsel could have had several reasons for declining to object before the trial commenced, including an understanding that such an objection would be futile. While in hindsight an objection may have been appropriate as a mode to allow the trial court to reconsider its decision, we cannot second-guess defense counsel’s decision. Consequently, defendant has failed to show that counsel’s actions constituted deficient performance. Defendant was not denied the effective assistance of counsel.²

Additionally, the Supreme Court requested that we consider the applicability of *Lafler v Cooper*, 566 US ___ ; 132 S Ct 1376; 182 L Ed 2d 398 (2012). For two reasons we do not find *Lafler* applicable. First, *Lafler* involved the defendant’s rejection of a plea offer because of legal advice by defense counsel that the parties conceded was deficient. *Lafler*, 566 US at ___ (slip op at 4, 15). Consequently, *Lafler* contains no analysis of the standards for determining whether counsel’s tactics or advice were objectively unreasonable, as the Court focused exclusively on the prejudice aspect of the *Strickland* test. *Id.* Because defendant failed to establish the first *Strickland* prong – i.e., that defense counsel’s actions were objectively unreasonable³ – there is no reason to address whether he suffered prejudice. *Strickland*, 466 US at 687.

¹ But, as noted in the Supreme Court’s order, *Grove* has been superseded by MCR 6.310(B), and therefore similar action in the future would be plain error.

² We note that defendant also asserts that the prosecution had a duty to inform the trial court of its error when it violated MCR 6.310(B)(2)(b), and that the prosecution’s failure to act also forms a basis for reversal. While it is true that the prosecution has a duty to seek justice and not merely convict a defendant, see *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003), defendant does not provide any citation to a decision establishing an affirmative duty on the prosecution to object to a trial court’s setting aside a plea agreement. Consequently, we decline to address this issue. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) (we will not discover and rationalize a party’s claims, or unravel and elaborate his argument).

³ Additionally, *Lafler* makes the point that “[i]n the context of pleas a defendant must show the outcome of the plea process would have been different with *competent advice*.” *Lafler*, 566 US at ___ (slip op at 4). (Emphasis added.) There is no suggestion that defense counsel rendered incompetent advice to defendant during plea negotiations, as it was the trial court’s own independent decision that led to the issues of which defendant now complains.

Second, even if we did consider the prejudice prong under *Strickland, Lafler* still affords defendant no relief. Indeed, the *Lafler* Court specifically noted that the prejudice issue it was deciding does not arise if “a plea deal is accepted by the defendant but rejected by the judge” *Lafler*, 566 US at __ (slip op at 9). And that is likely because when a judge decides an issue – particularly here, when it was done *sua sponte* – defense counsel’s action or inaction has done nothing to cause the alleged injury and resulting prejudice. There is nothing in the record to show that if defense counsel had alerted the trial court to defendant’s rights under the applicable court rule, the trial court would have changed its decision. Consequently, defendant has not established that he received the ineffective assistance of counsel.⁴

2. JURY TRIAL WAIVER

Defendant next argues that counsel was ineffective for electing to waive defendant’s jury trial because his decision to waive the jury trial was a bad one given defendant’s previous admission of guilt to the trial court and the court’s harsh demeanor. However, a review of the record reveals that defendant personally made the choice to give up his right to a jury trial on the first day of trial and that he freely and voluntarily made this choice after the trial court apprised him of his constitutional rights. Even if defense counsel and defendant discussed whether defendant should waive his right to a jury trial, the record is clear that defendant made the ultimate decision. Defendant was aware that he had previously admitted to committing second-degree home invasion in front of the trial court, and defendant was also aware of the trial court’s demeanor at the first sentencing hearing. Consequently, because defendant has failed to establish the factual predicate of his argument – i.e., that counsel waived defendant’s right to a jury trial – it must fail. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Moreover, even if defendant had proven deficient performance, he has also failed to demonstrate any resulting prejudice. While defendant’s argument implies that the trial court’s commentary suggested a bias towards defendant, and that this alleged biased deprived defendant of a fair trial, defendant does not provide any analysis regarding how this alleged judicial bias could have affected the outcome of the proceedings. Although inadequately briefed issues are generally considered abandoned on appeal, *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006), we note that “[c]omments critical of or hostile to counsel or the parties are ordinarily not supportive of finding bias or partiality[.]” *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Consequently, defendant has not demonstrated that the result of the proceedings would have been different. Defendant was not denied the effective assistance of counsel.

B. SENTENCING ERRORS

Defendant has also raised several arguments regarding sentencing. Where a defendant has failed to object at sentencing, in a motion to remand, or in a motion for resentencing, we

⁴ And, as noted, the legal issue that defendant argues his counsel should have raised *was raised* in the proceedings on appeal before our Court and the Supreme Court, i.e., through the proper legal avenues.

review the alleged sentencing errors for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). Here, although defendant filed a motion for resentencing, the register of actions shows that the trial court cancelled the hearing after defense counsel sent a letter to the trial court indicating that the motion should be removed from the docket. Accordingly, we review these issues for plain error. To establish a plain error, the defendant must establish that an error occurred, it was obvious, and the error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

1. INVALID SENTENCE

Defendant argues that the trial court improperly sentenced him on his first-degree home invasion conviction and that he should have been sentenced according to the terms of the plea agreement. However, as previously discussed, the Supreme Court has determined that the trial court's setting aside of the plea agreement was not a plain error requiring reversal. Consequently, because defendant was convicted of first-degree home invasion, the trial court acted appropriately when it sentenced defendant for first-degree home invasion.

2. DISPROPORTIONATE/EXCESSIVE SENTENCE

Although defendant acknowledges that his sentence is within the minimum sentencing guidelines range, he nonetheless asserts that his sentence is disproportionate to him, considering his age, his bi-polar condition, and his tendency to be a "follower." If the minimum sentence is within the appropriate sentencing guidelines range, this Court must affirm and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied upon in determining the sentence. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003).

Michigan's sentencing guidelines generally require a sentencing court to impose a minimum sentence within the appropriate sentencing range as determined by the offense variable and the prior record variable points assigned to the defendant. MCL 769.34(2); *People v McCuller*, 479 Mich 672, 684-685; 739 NW2d 563 (2007). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993) remanded 447 Mich 984 (1994). "Scoring decisions for which there is any evidence in support will be upheld." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002) (quotations and citation omitted). Moreover, the age of the defendant is not a factor that the trial court must consider. *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997). The trial court did not err in sentencing defendant within his minimum sentencing guidelines range. It was aware of defendant's age, and heard testimony from defendant's mother regarding defendant's bi-polar condition and "follower" tendencies, and thus, the trial court had all available factors before it when it calculated defendant's sentence.

Furthermore, a minimum sentence that is within the sentencing guideline range is presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

Because defendant's minimum sentence of four years is within the appropriate sentencing guidelines range, and no other facts have been presented that reveal the sentence was disproportionate, defendant's sentence is proportionate. *Id.* Defendant has failed to establish plain error in his sentencing.

3. *BLAKELY*⁵ VIOLATION

Finally, defendant argues that the trial court engaged in impermissible fact-finding by basing his sentence on facts that were not proven beyond a reasonable doubt to a jury, relying upon *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has clearly and consistently held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *McCuller*, 479 Mich at 683; *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). Despite defendant's argument that this line of cases was wrongly decided, this Court is bound to follow the decisions of our Supreme Court. *People v Tierney*, 266 Mich App 687, 713; 703 NW2d 204 (2005). Thus, defendant's argument fails.

Affirmed.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio

⁵ *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).