

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RYAN LEE HERRERA,

Defendant-Appellant.

UNPUBLISHED

March 19, 2019

No. 343850

Mason Circuit Court

LC Nos. 17-003295-FH;

17-003298-FC

Before: SAWYER, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant, Ryan Lee Herrera, appeals by delayed leave granted¹ the trial court's judgments of sentence. We affirm.

Defendant was offered and accepted a plea agreement in each case before the trial court. In case number 17-003295-FH, defendant pleaded guilty to accosting a minor for immoral purposes, MCL 750.145a, as a second-offense habitual offender, MCL 769.10. In case number 17-003298-FC, defendant pleaded guilty to two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) and MCL 750.520b(1)(c), as a second offender, MCL 750.520f, and one count of accosting a minor for immoral purposes as a second offense habitual offender. In this case, the prosecutor and defendant agreed to a minimum sentence of 22 years' imprisonment.

After accepting the plea agreements but before sentencing, defendant began writing letters to one of his minor victims. Defendant was barred from contacting any minors as a condition of his pretrial release, so he turned the letters over to other inmates who were being released from jail in the hopes that they would forward the letters to the victim. In these letters,

¹ *People v Herrera*, unpublished order of the Court of Appeals, entered July 12, 2018 (Docket No. 343850).

defendant asked the victim to attend his sentencing hearing and request that defendant receive only a 15-year sentence, rather than the 22-year sentence he had agreed to. Defendant indicated that he would pay the victim \$200 immediately and \$1,000 once he arrived in prison, and promised that he would send the victim money annually. None of the letters reached the victim. Instead, the released inmates turned the letters over to law enforcement.

At sentencing, the prosecutor argued that the letters defendant sent to the victim constituted “misconduct such that the sentence agreement contained in the plea agreement would be voided.” The prosecutor requested that the trial court abandon the sentencing agreement in case number 17-003298-FC and sentence defendant to the top of the guidelines minimum sentencing range, or 29 years and 8 months’ imprisonment, and requested a maximum sentence of 70 years. The prosecutor asked the court to use its discretion to sentence defendant in case number 17-003295-FH.

The trial court reviewed defendant’s guidelines minimum sentencing range on each count and noted that at all relevant times, defendant had been a registered sex offender. The trial court stated that after defendant had entered a plea, he “engaged in a course of conduct trying to get this child to come into court and ask for [him] to receive a lesser sentence. That is clearly misconduct on [defendant’s] part.” In case number 17-003295-FH, the trial court sentenced defendant to a minimum sentence of two years and four months with credit for 278 days served. In case number 17-003298-FC, the trial court sentenced defendant to 356 months’ imprisonment (29 years and 8 months) for each count of CSC-I and to two years and four months for the count of accosting a minor for immoral purposes, with credit for 278 days served. All four sentences were to run concurrently.

We granted defendant’s delayed application for leave to appeal

so that this Court can review whether the additional language added into the plea agreement by the prosecution is violative of defendant’s due process rights under *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), as it limited defendant’s right to withdraw his plea. MCR 7.205(E)(4). Based on the trial court’s indication that it intended to exceed its preliminary sentencing evaluation, defendant had an “absolute right” to withdraw his plea, but could not because of the language in the agreement. *Cobbs*, 443 Mich at 283. Further, this Court should review whether the term “misconduct,” as used in the plea agreement, provides defendant with sufficient information to know what he can do, or not do, in order to have the benefit of his bargain.^[2]

On appeal, defendant first argues that the trial court did not comply with the *Cobbs* agreement placed on the record at the plea hearing. We disagree because there was no *Cobbs* agreement.

² *Herrera*, unpub order.

Generally, issues must be raised before and considered by the trial court to be preserved for appellate review. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). Further, “[a] defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter, or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal.” MCR 6.310(D). Defendant did not object to his sentence or move to withdraw his plea. Therefore, the issue is unpreserved.

We review unpreserved claims of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Plain error affects substantial rights when it alters the outcome of the trial court proceedings. *Id.* Reversal is appropriate when an error is so serious it results in the conviction of an innocent defendant or when it affects the fairness, integrity, or public reputation of the judicial proceedings, independent of the defendant’s innocence. *Id.* at 763-764.

A *Cobbs* plea agreement is a plea that is entered into by a defendant after the trial court has made an initial assessment of the case and shared with the parties what the sentence is likely to be. *Cobbs*, 443 Mich at 283. “At the request of a party, and not on the judge’s own initiative, a judge may state on the record the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense.” *Id.* This preliminary evaluation does not “bind the judge’s sentencing discretion,” but “a defendant who pleads guilty or nolo contendere in reliance upon a judge’s preliminary evaluation with regard to an appropriate sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation.” *Id.*

This stands in contrast to a standard plea agreement under *People v Killebrew*, 416 Mich 189; 330 NW2d 834 (1982), which does not involve the trial court. If the prosecution and a defendant agree to a specific sentence without evaluation by the trial court, the trial court is required to offer defendant an opportunity to affirm or withdraw his plea before the trial court deviates from that agreed-upon sentence. *Id.* at 213.

However, the right to withdraw any plea agreement after acceptance but before sentencing remains subject to MCR 6.310(B). *People v White*, 307 Mich App 425, 434; 862 NW2d 1 (2014); *People v Martinez*, 307 Mich App 641, 648; 861 NW2d 905 (2014). If a defendant commits misconduct after accepting the plea but before sentencing, the defendant may not withdraw his plea. MCR 6.310(B)(3).

In this case, the trial court never assessed defendant’s potential sentence. The trial court reviewed the maximum penalties that each charge carried, but it was never asked to make an evaluation of defendant’s sentence, and it did not make such an evaluation on the record. Therefore, there was no *Cobbs* agreement. See *Cobbs*, 443 Mich at 283. Rather, defendant entered into a standard plea and sentence agreement.

Defendant argues that his due-process rights under *Cobbs* were violated when plaintiff inserted language into the plea agreement regarding “full disclosure” and “no further charges.” At sentencing, plaintiff stated that “[i]n exchange for full disclosure for any other offenses

involving the victim as to case no. 17-3298, upon full disclosure from the defendant, there would be no additional charges.” The trial court handwrote and initialed the words “full disclosure/no additional charges” on the plea agreement. Defendant alleges that plaintiff used the handwritten “no further charges” language to prohibit defendant from engaging in misconduct after entering into the plea agreement, and that in turn, the added language was used to improperly increase defendant’s sentence.

This argument fails for two reasons. First, as discussed above, there was no *Cobbs* agreement, so defendant did not have any unique rights under *Cobbs*. See *id.* Therefore, the language added to defendant’s plea agreement did not violate his absolute right to withdraw under *Cobbs* because that right simply did not exist.

Second, the added language was irrelevant to defendant’s sentencing. At no time during sentencing did plaintiff refer to the “no further charges” language, nor is it mentioned in plaintiff’s sentencing memorandum. Rather, plaintiff relies exclusively on the “misconduct” language contained in defendant’s plea agreement. The trial court also relied on the “misconduct” language, not the “no further charges” language, when it chose to deviate from the plea agreement. The record simply does not support the contention that the prosecution or the trial court improperly relied on the handwritten language.

Defendant did not have a *Cobbs* agreement, so the trial court did not violate any of defendant’s rights under *Cobbs*. Further, the added language was irrelevant to the trial court’s consideration, and therefore, it did not violate any of defendant’s rights.

Defendant next argues that the conditions of his plea agreement “were not plainly stated or made clear at the time of the plea hearing or acknowledged by defense counsel or [defendant].” We disagree.

Defendant appears to refer to the “misconduct” language, which allowed the trial court to deviate from the agreed-upon sentence. Defendant does not argue that his letters were not misconduct; rather, defendant argues that he was not made aware that such misconduct would erase his right to withdraw his plea. This failure to explain the misconduct clause to defendant, he argues, was a violation of his due-process rights.

Defendant’s plea agreement states, as part of the SCAO form language and in relevant part, that “[i]f the defendant commits misconduct after the plea is accepted but before sentencing, the defendant is not entitled to withdraw the plea unless allowed by the court for good cause.”

The trial court does not need to orally place each condition of a plea agreement on the record if the terms in the written plea agreement are incorporated into the record at the plea hearing and the requirements of MCR 6.302(C) are satisfied.

It is true that the trial court did not read the misconduct condition into the record. However, the trial court did confirm that defendant had read, signed, and had an opportunity to read and understand the rights contained in both plea agreements. This satisfies the requirement that a plea agreement “must be stated on the record or reduced to writing and signed by the parties.” MCR 6.302(C)(1). Further, the trial court repeatedly referred to the plea agreements, incorporating them into the record. Therefore, the written terms of the plea agreement were

incorporated into the record, and as such, defendant had sufficient notice of the terms. Contrary to his assertion on appeal, defendant was made aware of the conditions of his plea agreement, including the condition that he would lose his right to withdraw his pleas if he engaged in misconduct between entering into the plea agreement and sentencing.

Therefore, we can presume that defendant was aware of the misconduct clause. We granted leave in part to review whether the clause itself satisfies due-process requirements: specifically, to “review whether the term ‘misconduct,’ as used in the plea agreement, provides defendant with sufficient information to know what he can do, or not do, in order to have the benefit of his bargain.” *Herrera*, unpub order.

Defendant’s plea agreement provides: “[i]f the defendant commits misconduct after the plea is accepted but before sentencing, the defendant is not entitled to withdraw the plea unless allowed by the court for good cause.” This is nearly identical to the language in MCR 6.310(B)(3), which provides:

Except as allowed by the trial court for good cause, a defendant is not entitled to withdraw a plea under subsection (2)(a) or (2)(b) if the defendant commits misconduct after the plea is accepted but before sentencing. For purposes of this rule, misconduct is defined to include, but is not limited to: absconding or failing to appear for sentencing, violating terms of conditions on bond or the terms of any sentencing or plea agreement, or otherwise failing to comply with an order of the court pending sentencing.

The interpretation and application of MCR 6.310, which governs withdrawal or vacation of a plea, is reviewed de novo. *Martinez*, 307 Mich App at 646, quoting *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

Statutes are presumed to be constitutional. *People v Parker*, 319 Mich App 664, 669; 903 NW2d 405 (2017). Court rules are interpreted using the same principles that govern statutory interpretation. *People v Buie*, 491 Mich 294, 304; 852 NW2d 524 (2012); *Martinez*, 307 Mich App at 647. Therefore, court rules are also presumed to be constitutional. To overcome this presumption of constitutionality and show that a statute is void for vagueness, a defendant must show that the statute “either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application” *People v Herron*, 68 Mich App 381, 382; 242 NW2d 584 (1976), quoting *Lanzetta v New Jersey*, 306 US 451, 453; 59 S Ct 618; 83 L Ed 888 (1939).

Defendant has not shown that the language contained on the SCAO plea agreement form or the corresponding language in MCR 6.310(B)(3) should be found void for vagueness. Defendant argues that the term “misconduct” was not plainly stated or made clear at the time of the plea hearing. Therefore, it appears that defendant is arguing that he could not know that violating a no-contact order and bribing his victim to testify in a certain way would be misconduct. These actions constitute an attempt at felonious witness tampering in violation of MCL 750.122 and a violation of the conditions of defendant’s pretrial release. While the plea agreement does not list examples of what may constitute misconduct, and the trial court did not place any such examples on the record for defendant, a man of common intelligence could

deduce that violating a court order and attempting to break the law would constitute misconduct. Therefore, as applied to defendant, the language of MCR 6.310(B)(3) is not so vague that it requires guessing nor has its application resulted in varied outcomes. It follows that the statute is not void for vagueness. See *Herron*, 68 Mich App at 382. The language on the SCAO plea agreement form, drawn from MCR 6.310(B)(3), is also not void for vagueness.

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly