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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAPHEAL RYAN BRADLEY,

Defendant-Appellant.

UNPUBLISHED
January 14, 2021

No. 351956
Oakland Circuit Court
LC No. 2019-270214-FH

Before: LETICA, P.J., and GLEICHER and O'BRIEN, JJ.

PER CURIAM.

Defendant pleaded no-contest to charges of possession with intent to deliver methamphetamine, MCL 333.7401(2)(b)(*i*); possession with intent to deliver less than 50 grams of a mixture containing heroin, MCL 333.7401(2)(a)(*iv*); possession with intent to deliver less than 50 grams of a mixture containing cocaine, MCL 333.7401(2)(a)(*iv*); possession of a firearm by a felon (felon-in-possession), MCL 750.224f; and four counts of possession of a firearm during the commission of a felony (felony-firearm), third or subsequent offense, MCL 750.227b. He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 78 months' to 50 years' imprisonment for his possession with intent to deliver methamphetamine conviction, 19 months' to 20 years' imprisonment for his possession with intent to deliver less than 50 grams of a mixture containing heroin conviction, 19 months' to 20 years' imprisonment for his possession with intent to deliver less than 50 grams of a mixture containing cocaine conviction, 9 months' to 20 years' imprisonment for his felon-in-possession conviction, and 10 years' imprisonment for each of his felony-firearm convictions. Defendant's controlled-substance and felon-in-possession convictions were to be served concurrently with each other, but consecutively to his felony-firearm sentences. We granted defendant's delayed application for leave to appeal[1] and now affirm.

[1] *People v Bradley*, unpublished order of the Court of Appeals, entered February 4, 2020 (Docket No. 351956).

I. BACKGROUND

In July 2018, defendant was arrested after a police investigation into gang- and drug-related activity. Before trial, defendant requested a *Walker*[2] hearing to determine the admissibility of his admissions to police officers on the day of his arrest. On the day scheduled for trial, the trial court held the hearing and determined that defendant's statements would be admissible at trial. At this point, defendant decided to explore a plea with the trial court. Thereafter, defendant and the trial court reached a *Cobbs*[3] agreement. The trial court provided defendant a thorough explanation of the anticipated sentences and stated that defendant would be responsible for "certain costs and fees." Defendant indicated that he understood and pleaded no-contest to the charges. Before sentencing defendant in accordance with the *Cobbs* agreement, the trial court again explained defendant's sentences and defendant's responsibility for expenses related to his prosecution.

This appeal followed.

II. INVOLUNTARY PLEA

Defendant raises two challenges to the voluntariness of his no-contest plea. First, defendant contends his plea failed to comply with MCR 6.301(A) because he never offered to plead. Second, defendant contends that his plea was involuntary because the trial court failed to comply with MCR 6.302(C)(3).

"For an issue to be preserved for appellate review, it must be raised, addressed, and decided by the lower court." *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). The parties agree that this issue was not addressed in the trial court. And, although defendant posits that plain-error review is appropriate, the prosecution contends that review is barred under MCR 6.310(D). We agree with the prosecution that the court rule bars our review.

Guilty and no-contest pleas are governed by MCR 6.302. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012). Under MCR 6.302(A), a "court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate." Thus, before accepting a plea, the court must place the defendant "under oath and personally carry out [MCR 6.302(B) through (E)]." MCR 6.302(A). A defendant's ability to challenge the voluntariness of his plea, compliance with MCR 6.301(A), and compliance with MCR 6.302(C)(3) on appeal is controlled by MCR 6.310(D), which reads:

> 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 [6.300 *et seq.*], 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.

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[2] *People v Walker*, 374 Mich 331, 338; 132 NW2d 87 (1965).

[3] *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

As it is undisputed here that defendant never moved in the trial court to withdraw his plea, and because the basis of his claims rests on either the voluntariness of his plea or the trial court's failure to comply with MCR 6.301(A) and MCR 6.302(C)(3), MCR 6.310(D) prohibits us from reviewing the merits of these particular arguments. See *People v Armisted*, 295 Mich App 32, 48; 811 NW2d 47 (2011) ("Because defendant failed to file a motion to withdraw his plea in the circuit court, appellate review of this issue is precluded."). Consequently, we decline to consider the merits of defendant's challenges.

Even if our review was not barred, after thorough review of the record, we would conclude that the trial court did not err in accepting defendant's no-contest plea. In relevant part, MCR 6.301(A) provides:

> Subject to the rules in this subchapter, a defendant may plead not guilty, guilty, nolo contendere, guilty but mentally ill, or not guilty by reason of insanity. If the defendant refuses to plead or stands mute, the court, pursuant to the rules, refuses to accept the defendant's plea, the court must enter a not guilty plea on the record . . . .

On the day set for jury trial in this case, the trial court ruled that defendant's admissions to police were admissible and defense counsel indicated that he was ready for the jury. The proceedings halted, however, after defense counsel asked to approach the bench. Following a seven-minute conference, the trial court indicated its willingness to impose a minimum sentence under *Cobbs* upon defendant's guilty plea. Under *Cobbs*, "[a]t 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[s]." 443 Mich at 383. Defense counsel responded to the trial court's remarks that it would impose the *Cobbs* sentence on acceptance of defendant's guilty plea, stating: "[W]e're respectfully asking that this be a no contest plea." The trial court then placed defendant under oath and asked if he understood that he was pleading no contest and that such a plea had the same legal effect as a guilty plea. Defendant responded: "Yes[.]" And, when further asked if it was his "own choice to plead no contest," defendant likewise responded affirmatively. The following day, a form, signed by defendant and his attorney, was filed with the court. That form also reflected that defendant offered to plead guilty to the charges and further reflected that it was defendant's "own choice to plead[.]"

Defendant contends that his plea fails because MCR 6.301(A), either explicitly or implicitly, requires an accused to actually offer a plea before the trial court may accept it. We disagree with defendant's reading, but, even if we accepted his underlying premise, he would not

be entitled to relief under the plain-error standard because the record reflects no error.[4] The *Cobbs* agreement between defendant and the trial court resulted from defense counsel's request after an unsuccessful attempt to exclude defendant's admissions to police on the day scheduled for jury trial. Pursuant to the Michigan Rules of Professional Conduct 1.2(a), a defense attorney must "abide by the client's decision, after consultation with the lawyer, with respect to a plea to be entered . . . ." We have no reason to conclude that defense counsel failed to follow his ethical obligation in requesting the court's preliminary sentence evaluation under *Cobbs*. Moreover, defense counsel asked the trial court, on behalf of his client, to approve a no-contest plea rather than the guilty plea referred to by the trial court. An under-oath defendant affirmed his desire to plead no-contest to all of the charges. And, finally, a form evincing defendant's intent to plead to the charges was filed with the court. Accordingly, even if we reviewed this issue, defendant has not established any error, let alone plain error, in the trial court's acceptance of his plea.

Defendant's argument under MCR 6.302(C)(3)[5] also fails. Defendant did not have a plea agreement with the prosecution, but a *Cobbs* agreement with the trial court. This Court recognizes

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[4] The plain-error review standard requires a defendant to demonstrate "1) [an] error . . . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error has affected a defendant's substantial rights when there is "a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*. Moreover, "once a defendant satisfies these three requirements, . . . [r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. at 763-764 (quotation marks and citation omitted; second alteration in original). A defendant bears the burden of persuasion with respect to prejudice. *Id*. at 763.

[5] MCR 6.302(C) states:

> (3) If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a sentence to a specified term or within a specified range or a prosecutorial sentence recommendation, the court may
>
> > (a) reject the agreement; or
> >
> > (b) accept the agreement after having considered the presentence report, in which event it must sentence the defendant to a specified term or within a specified range as agreed to; or
> >
> > (c) accept the agreement without having considered the presentence report; or
> >
> > (d) take the plea agreement under advisement.
>
> If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow an agreement to a sentence for a specified term or within a specified range or a recommendation agreed to by the prosecutor, and that if the court chooses not to follow an agreement to a sentence for a specified term or

that "MCR 6.302 is silent on *Cobbs* agreements." *People v Brinkey*, 327 Mich App 94, 99; 932 NW2d 232 (2019). After reviewing the presentence investigation report and hearing from the victim, a court that opts not to follow its preliminary sentence evaluation under *Cobbs* must afford the defendant the opportunity to withdraw his plea. See MCR 6.310(B); *Cobbs*, 443 Mich at 283. In this case, the trial court followed the sentencing agreement and defendant cannot demonstrate either plain error or prejudice.

III. *COBBS* AGREEMENT

Defendant argues that the sentencing court erred in imposing court costs,[6] a crime-victims' assessment,[7] and attorney fees[8] because they were "not included in the *Cobbs* sentencing agreement . . . ." Defendant further asserts that by imposing these expenses, the trial court exceeded the terms of the *Cobbs* agreement, requiring it to inform him of his right to withdraw his no-contest plea. We disagree.

To the extent that defendant claims he is entitled to withdraw his plea, MCR 6.310(D) bars our review. And, even if we reviewed the issue, we again conclude defendant is not entitled to relief because he has not shown any error. Review of the record reveals that defendant waived this issue. A waiver is the "the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotations marks and citation omitted). "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *Id*. (quotation marks and citation omitted). During the plea-taking proceeding, the following exchange occurred:

> *The Court*: You understand by pleading no-contest, you'll be ordered to pay certain costs and fees?
>
> [*The Defendant*]: Yes, sir.

> within a specified range, the defendant will be allowed to withdraw from the plea agreement. A judge's decision not to follow the sentence recommendation does not entitle the defendant to withdraw the defendant's plea.

[6] MCL 769.1k(1)(b).

[7] MCL 780.905(1)(a).

[8] MCL 769.1(1)(b)(*iv*).

As defendant was informed that costs and fees would be imposed as part of his sentence, and agreed that the court could impose them, he waived this claim.[9] *Id*.

Affirmed.

/s/ Anica Letica
/s/ Elizabeth L. Gleicher
/s/ Colleen A. O'Brien

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[9] Defendant also suggests that the order to remit exceeds what his amended of judgment authorized, namely, court costs of $544 and a crime victim rights assessment of $130. But the amended judgment of sentence also included any court-appointed attorneys fees as part of defendant's sentence. Defendant twice requested court-appointed counsel. Each time, defendant signed a form, stating: "I understand that I may be required to contribute to the cost of an attorney." The court determined that the attorneys' fees were $165 for defendant's initial court-appointed attorney and $1,815 for his second court-appointed attorney.