

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
March 14, 2013

v

ROBERT PAUL GUNNELLS,

Defendant-Appellant.

No. 309766
Jackson Circuit Court
LC No. 11-004245-FH

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Defendant Robert Gunnells appeals as on leave granted his conviction of unlawfully driving away a motor vehicle¹ after the trial court denied his motion to withdraw his guilty plea. The trial court sentenced Gunnells as a third-offense habitual offender² to serve 30 to 120 months' imprisonment. We affirm.

I. FACTS

At his plea hearing on March 27, 2011, Gunnells testified that he understood that his maximum sentence would be ten years' imprisonment as a third-offense habitual offender, and that he was pleading guilty because the prosecution agreed not to seek further sentencing enhancements. He testified that it was his voluntary choice to plead guilty. Gunnells stated that he understood that the trial court was not making any promises about his sentence. Both Gunnells' trial counsel and the prosecutor affirmed that they did not make any other promises, threats, or inducements other than the plea agreement.

Gunnells then pleaded guilty to unlawfully driving away a motor vehicle. On the basis of Gunnells' statements at the hearing, the trial court found that his plea was knowingly, intelligently, and voluntarily made. Gunnells signed a plea form that stated that there were no sentencing agreements other than those stated on the record.

¹ MCL 750.413.

² MCL 769.12.

On July 21, 2011, the trial court sentenced Gunnells to serve 30 to 120 months' imprisonment. On January 19, 2012, Gunnells moved the trial court to allow him to withdraw his guilty plea and to amend his pre-sentence investigation report (PSIR). He argued that his plea was not voluntary because his counsel told him that he could expect a sentence of 12 to 18 months' imprisonment. He also argued that the probation officer impermissibly stated in his PSIR that "reform at this time is remote[.]"

At an evidentiary hearing on March 30, 2012, Gunnells testified that trial counsel told him that if he pleaded guilty, he would serve between one year in jail and 16 months' imprisonment. Gunnells introduced a letter from his trial counsel that he alleged contained a written promise that he would serve no more than 16 months' imprisonment. He testified that he felt coerced by the letter and, if he had known his sentence could be 30 to 120 months' imprisonment, he would not have pleaded guilty. Gunnells acknowledged that the trial court did not make any agreements concerning his sentence at the plea hearing and that his plea form did not mention any other sentencing agreement.

Gunnells' trial counsel testified that he did not tell Gunnells that he would receive a small amount of prison time, that he had been unaware of the extent of Gunnells' prior convictions when he wrote the letter, and that the letter indicated that his scoring was tentative.

The trial court found that counsel did not communicate inaccurate information to Gunnells about the sentence. It denied Gunnells' motions to withdraw his guilty plea and amend his PSIR. Gunnells applied to this Court for leave to appeal on two issues: (1) his plea was coerced and involuntary, and (2) his PSIR contained an impermissible statement of opinion. This Court granted his application.³

II. INVOLUNTARY GUILTY PLEAS

A. STANDARD OF REVIEW

When reviewing the trial court's decision on a defendant's motion to withdraw his guilty plea, this Court reviews for clear error the trial court's factual findings and reviews for an abuse of discretion the trial court's ultimate decision.⁴ The trial court's factual findings are clearly erroneous if, after reviewing the record, we are definitely and firmly convinced that the trial court made a mistake.⁵ The trial court abuses its discretion when its outcome falls outside the range of principled outcomes.⁶

³ *People v Gunnells*, unpublished order of the Court of Appeals, entered July 25, 2012 (Docket No. 309766).

⁴ *People v Cole*, 491 Mich 325, 329; 817 NW2d 497 (2012); *People v Everard*, 225 Mich App 455, 458; 571 NW2d 536 (1997).

⁵ *Id.*

⁶ *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

B. LEGAL STANDARDS

A defendant does not have an absolute right to withdraw his or her guilty plea after the trial court has accepted it.⁷ The defendant must establish a fair or just reason to withdraw the plea.⁸ To effectively waive a defendant's constitutional rights to a jury trial, to confrontation, and against compelled self-incrimination, the defendant's guilty plea must be voluntary and knowing.⁹

A defendant's guilty plea may have been involuntary if he or she pleaded guilty because of unfulfilled promises or misleading statements by defense counsel.¹⁰ Thus, a defendant who pleads guilty in reliance on unfulfilled promises of sentencing lenience may withdraw his or her guilty plea if the sentence later exceeds those promises.¹¹

C. APPLYING THE STANDARDS

Gunnells contends that the trial court violated MCR 6.302(E) because it failed to ask him on the record whether agreements other than the plea existed. When challenging a guilty plea, the defendant may not raise an issue on appeal that he or she did not raise during his or her motion to withdraw the plea.¹² If the defendant did not challenge the plea on the same basis below, MCR 6.310(D) precludes us from reviewing the issue.¹³ Gunnells did not raise the issue of the trial court's compliance with MCR 6.302(E) below. We may not review this issue.

Gunnells also contends that his plea was involuntary because he pleaded guilty in reliance on counsel's misleading promises of lenience, both oral and written. We disagree.

Here, the trial court considered counsel's letter and found that the letter was not misleading. The letter states in pertinent part:

As a result of our discussion, I preliminarily scored your case (this is tentative and can vary slightly depending on facts and prior convictions)

⁷ *People v Gomer*, 206 Mich App 55, 56; 520 NW2d 360 (1994).

⁸ *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997).

⁹ *Cole*, 491 Mich at 332-333.

¹⁰ *People v Johnson*, 386 Mich 305, 314-315; 482 (1971); *In re Valle*, 364 Mich 471, 477-478; 110 NW2d 673 (1961).

¹¹ See *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

¹² MCR 6.310(D).

¹³ *People v Armisted*, 295 Mich App 32, 48; 811 NW2d 47 (2011); see *People v Kaczorowski*, 190 Mich App 165, 172-173; 475 NW2d 861 (1991).

It appears that if you take the deal as offered, plead as a supp 3rd, you will be an intermediate sanction, scored with a minimum of 0 to 16 months, with a maximum up to 5 years. What this means is that the court could jail you or send you to prison. I should note that . . . the best we can do is try to guess what [the trial judge] will do given your score.

Given the context of the statement that Gunnells challenges, we are not convinced that the trial court made a mistake.

The trial court also considered whether counsel made any misleading oral promises to Gunnells. Gunnells testified that counsel promised that he would serve only a small amount of jail or prison time; counsel testified that he did not do so. The trial court found that counsel did not communicate inaccurate information about Gunnells prison sentence. Conflicting witness testimony creates an issue of credibility, which is for the trier of fact to determine.¹⁴ This Court does not resolve questions of credibility on appeal.¹⁵ The trial court's finding that counsel did not orally mislead Gunnells was a credibility issue because of the conflicting testimony, and we will not second-guess the trial court's finding on appeal. We conclude that the trial court's findings of fact were not clearly erroneous.

Further, the record of the plea hearing also supports the trial court's ultimate decision. At the hearing, counsel affirmed that he did not make any other promises, threats, or inducements other than the plea agreement. Gunnells stated that he understood both that (1) his maximum sentence under the guilty plea would be ten years' imprisonment, and (2) the trial court was not making any promises about his sentence. Gunnells signed a plea form that stated that there were no sentencing agreements other than those stated on the record. On the basis of all these facts, we conclude that the trial court's decision to deny Gunnells' motion to withdraw his guilty plea was within the range of principled outcomes.

III. ACCURACY OF SENTENCING INFORMATION

A. STANDARD OF REVIEW

"This Court reviews a trial court's response to a defendant's challenge to the accuracy of a PSIR for an abuse of discretion."¹⁶ The trial court abuses its discretion when its outcome falls outside the range of principled outcomes.¹⁷

¹⁴ See *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998).

¹⁵ *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

¹⁶ *People v Uphaus (On Remand)*, 278 Mich App 174, 181; 748 NW2d 899 (2008).

¹⁷ *Id.*; *Babcock*, 469 Mich at 269.

B. ANALYSIS

Gunnells contends that the trial court abused its discretion when it denied his motion to amend his PSIR, in which a probation officer stated that Gunnells' likelihood of "reform at this time is remote[.]" He argues that because the officer did not support the statement with any reports or studies, it is a statement of pure opinion that has no place in a PSIR. We disagree.

Because the sentencing court relies on the PSIR, it is important for it to contain accurate information.¹⁸ Among other things, the Legislature has mandated that a probation officer must include "[a]n evaluation of and a prognosis for the person's adjustment in the community based on factual information contained in the report" in the PSIR.¹⁹ Gunnells neither addresses this statute nor provides any other basis to support his argument. A party "may not merely announce his position and leave it to this Court to discover and rationalize the basis for their claims[.]"²⁰ A party who fails to address the merits of his or her issue on appeal has abandoned it.²¹ We conclude that Gunnells has abandoned this issue, and we decline to address it.

We affirm.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ William C. Whitbeck

¹⁸ *Uphaus*, 278 Mich App at 182.

¹⁹ MCL 771.14(2)(a)

²⁰ *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004) (alteration in original).

²¹ *Id.*