

EXAMINER'S ANALYSIS OF QUESTION NO. 12

Defendant Don filed a timely motion in the trial court to withdraw his plea. MCR 6.310(C)(1) (motion may be filed within six months of sentencing). Don asserts his plea was not an understandingly, voluntarily and accurate plea. MCR 6.302; *People v Pointer-Bey*, 321 Mich App 609, 616 (2017).

Guilty pleas are controlled by MCR 6.302; *People v Cole*, 491 Mich 324, 330 (2012), *Pointer-Bey*, 321 Mich App at 616. The requirements contained in MCR 6.302 do not state all possible due process requirements. *Cole*, 491 Mich at 332.

A guilty plea involves the waiver of certain constitutional rights. *People v Jaworski*, 387 Mich 21, 28-29 (1972). MCR 6.302(B)(3). An effective waiver of rights requires a voluntary and knowing plea. *Cole*, 491 Mich at 333. When a defendant pleads guilty "he or she is making a bargain, giving up trial rights in exchange for some perceived benefit..." *Id.* at 337. A court cannot accept a guilty plea unless it is convinced the plea was understanding, voluntary and accurate. *Id.* at 330-331; MCR 6.302. A voluntary plea is one which is made by a defendant "fully aware of the direct consequences of the plea." *Id.* at 333.

1. Plea agreement

The prosecutor's offer to Don to plead guilty of one count RCSP is not a plea agreement between the defendant and prosecutor. MCR 6.302(C)(1), (2).

The prosecutor's promise to Don that if he pled guilty it would not file a habitual enhancement is an agreement between the prosecutor and defendant. Don's plea of guilty was made in exchange for the prosecutor not filing the habitual enhancement.

Don should argue the defect in his plea process under *Brown* was that his plea bargain was illusory. "Illusory" means the defendant did not receive any benefit from the bargain. "[A] defendant may be entitled to withdraw a guilty plea if the bargain on which the plea was based was illusory, meaning that the defendant received no benefit from the agreement." *People v Harris*, 224 Mich App 130, 132 (1997); *Pointer-Bey*, 321 Mich App at 621. "Illusory" can also mean a defendant is led to believe the "plea bargain has one value when, in fact, it has another lesser value." *People v Williams*, 153 Mich App 346, 351 (1986).

When Don did not plead as charged, the prosecutor induced Don to plea by the promise it would not file the habitual enhancement charge. That promise was illusory because the prosecutor's promise was made 30 days after the arraignment on the information. The bright line filing deadline is 21-days from the arraignment. The prosecutor was legally prohibited from filing the habitual enhancement after that 21-day deadline. MCL 769.13(1); *People v Bollinger*, 224 Mich App 491, 492-493 (1997). Don did not receive any value for not filing the habitual enhancement and the promise was illusory. *People v Johnson*, 86 Mich App 77, 79 (1978). Don will prevail on this ground.

2. Sentence agreement

Don further contends he had a sentence agreement for a six-month sentence. *People v Brown*, 492 Mich 684, 688 (2012). MCR 6.302(C)(1) allows for plea and sentence agreements: "... a plea agreement, which may include an agreement to a sentence to a specific term..., the agreement must be stated on the record or reduced to writing and signed by the parties." "A sentencing agreement is an agreement between the parties concerning a specific sentence." *People v McKay*, 474 Mich 967, 970 (2005) (Markman, J., dissenting). Don did not have a sentence agreement with the prosecutor. MCR 6.302. Neither Don's question to the prosecutor about his sentence, nor the prosecutor's answer constitutes an agreement concerning a specific sentence. Moreover, it was not in writing or on the record. MCR 6.302(C)(1). The prosecutor's remark was only a vague prediction of the likely sentence.

Moreover, Don said there were no promises made to him in exchange for his plea and he did not say he was promised a 6-month sentence. His argument is waived. Don's plea was not premised on a specific sentence as there was no sentence agreement. MCR 6.302 (B)(4). Don will not prevail on this ground.

3. Dissatisfaction with sentence

MCR 2.613(A) provides that a court may modify a judgment due to an error where the refusal to take action would be inconsistent with "substantial justice." Dissatisfaction with a given sentence is not a valid basis or ground upon which a defendant can be resentenced. See *People v Fonville*, 291 Mich App 363, 378 (2011). Don's motion on this ground will be denied.