STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM LEE MARTIN,

Defendant-Appellant.

UNPUBLISHED
August 2, 1996

No. 174169
LC Nos. 92-025093-FH;
94-025902-FH

Before: Neff, P.J., and Jansen and G.C. Steeh III,* JJ.

PER CURIAM.

Defendant pleaded nolo contendere to felonious assault, MCL 750.82; MSA 28.277, in lower court no. 92-025093-FH. He also pleaded nolo contendere to assault with intent to do great bodily harm, MCL 750.84; MSA 28.279, in lower court no. 94-025902-FH. He was thereafter sentenced to concurrent terms of 2-1/2 to 4 years' imprisonment and three to ten years' imprisonment respectively. Defendant appeals as of right. We reverse the order of restitution and affirm in all other respects.

Defendant raises two issues on appeal, both of which relate only to his conviction of assault with intent to do great bodily harm. He contends that the prosecutor breached the terms of the plea bargain and that he is, therefore, entitled to resentencing. He also claims that the order of restitution must be vacated because restitution was not included as part of the prosecutor's sentence recommendation. Defendant raises no issues with respect to his conviction of felonious assault. The conviction and sentence for felonious assault (lower court no. 92-025093-FH) is therefore affirmed.

In the first case, defendant agreed to plead nolo contendere, as charged, to one count of felonious assault. In the second case, defendant agreed to plead nolo contendere to one count of assault with intent to do great bodily harm in exchange for dismissal of a charge of unarmed robbery. The prosecutor also agreed that the minimum sentence for the charge of assault with intent to do great bodily harm would be no greater than three years. At the end of the plea hearing, the trial court stated

* Circuit judge, sitting on the Court of Appeals by assignment.

that it accepted defendant's pleas, but that it had not agreed on the sentences that defendant would receive.

At the sentencing hearing, the trial court sentenced defendant in accordance with the sentence recommendation of three years for the conviction of assault with intent to do great bodily harm. The trial court also ordered that defendant pay restitution as a condition of parole in the amount of $20,619.60 with respect to the conviction of assault with intent to do great bodily harm.

Defendant first argues that the prosecutor breached the terms of the plea agreement when he did not make an oral recommendation at sentencing. We find no reversible error here. At the sentencing hearing, defense counsel stated that the prosecutor had agreed to recommend that the minimum sentence be no greater than three years with regard to the conviction of assault with intent to do great bodily harm. The trial court sentenced defendant to three to ten years, in accordance with the plea bargain. MCR 6.302(C)(3)(b). The trial court also noted that the sentencing guidelines range was twelve to thirty-six months and that, but for the plea bargain, defendant's sentence probably would have been more severe. The fact that the prosecutor did not state the sentence recommendation is not dispositive. The trial court was well aware of the sentence recommendation and followed it. Accordingly, defendant is not entitled to resentencing on this basis because the prosecutor did not breach the terms of the plea bargain.

Defendant also argues that the order of restitution must be vacated where restitution was not included as part of the prosecutor's sentence recommendation. We agree that defendant is entitled to relief on this issue.

We find the decision in *People v Schluter*, 204 Mich App 60; 514 NW2d 489 (1994) to be determinative. Although *Schluter* involved a sentence agreement rather than a sentence recommendation, we do not find this difference to be dispositive in this case as the prosecutor argues. Here, the restitution order resulted in a substantial increase in the penalty and was not part of the sentence recommendation. See *People v Siebert*, 450 Mich 500, 508-509, n 4; 537 NW2d 891 (1995) and MCR 6.302(C)(3). In *Schluter, supra*, p 66, this Court held that a trial court does not have the authority to order restitution under MCL 780.766(2); MSA 28.1287(766)(2) if it accepts a plea entered pursuant to a sentencing agreement that does not address restitution. In *Schluter*, this Court's remedy was to grant the defendant's request for specific performance. Generally, where a trial court fails to fulfill a plea agreement, a reviewing court has the discretion to choose between vacating the plea or ordering specific performance, with the defendant's choice accorded considerable deference. *People v Nixten*, 183 Mich App 95, 97; 454 NW2d 160 (1990).

In the present case, as is *Schluter*, the sentencing recommendation was silent with regard to the issue of restitution. Therefore, this Court can assume that the parties rejected the possibility of restitution as part of the penalty when they entered into the sentence recommendation. *Schluter, supra*, p 65. The trial court had no authority to order restitution in this case. Because defendant requests that the order of restitution be vacated, we conclude that defendant is requesting specific performance of the

sentence recommendation rather than vacation of the entire plea agreement. Accordingly, we reverse the order of restitution and remand for the limited purpose of eliminating restitution from the sentence.

The conviction and sentence for felonious assault is affirmed. The conviction for assault with intent to do great bodily harm is affirmed. We affirm defendant's minimum term of three years for assault with intent to do great bodily harm, reverse the order of restitution, and remand for the trial court to vacate restitution from the sentence. No further jurisdiction is retained.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ George C. Steeh III