

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

August 16, 1996

Plaintiff-Appellee,

v

No. 182844

LC Nos. 93-013319;

93-013321

DELETON WARREN, a/k/a DELETON ALPADRO
WARREN,

Defendant-Appellant.

Before: Kavanagh, T.G.,* P.J., and R.B. Burns** and G.S. Allen,** JJ.

MEMORANDUM.

Defendant pleaded guilty to armed robbery, MCL 750.529; MSA 28.797, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). For those respective convictions, he was sentenced to six to twenty-five years' imprisonment, one to ten years' imprisonment, and two years' consecutive imprisonment. He appeals as of right. We remand. This case has been decided without oral argument pursuant to MCR 7.214(E)(1)(b).

Defendant did not preserve a challenge to the factual basis of the conviction for assault with intent to do great bodily harm less than murder. MCR 6.311(C); *People v Beasley*, 198 Mich App 40, 43; 497 NW2d 200 (1993). However, with regard to the basis of the motion to withdraw the plea that was presented to the trial court, we agree with defendant's claim that the trial court should not have decided the motion without granting an evidentiary hearing.

*Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.

**Former Court of Appeals Judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.

Unfulfilled promises of leniency can form the basis for withdrawal of a plea although, where a defendant states on the record that no such promises were made, he will normally be held to his record denial. *People v Weir*, 111 Mich App 360; 314 NW2d 621 (1981). In light of the trial court's failure to ask defendant at the plea hearing if anyone promised him anything beyond what was in the plea agreement and the affidavit filed by defendant in support of his motion to withdraw the plea, we conclude that the case must be remanded to the trial court for an evidentiary hearing on the motion. See *People v Jackson*, 203 Mich App 607; 513 NW2d 206 (1994); *People v Thew*, 201 Mich App 78; 506 NW2d 547 (1993). See also MCR 6.302(C)(4)(a). On remand, defendant shall have an opportunity to file a renewed motion to withdraw the plea. Further, the trial court shall make specific findings on defendant's motion, and then exercise its discretion in deciding whether defendant should be permitted to withdraw the plea under the miscarriage of justice standard applicable to motions to withdraw a plea made after a sentence is imposed. *People v Effinger*, 212 Mich App 67; 536 NW2d 809 (1995); *People v Jones*, 190 Mich App 509; 476 NW2d 646 (1991).

We find no basis for remanding the case for further proceedings on the motion for resentencing inasmuch as the record shows that the guidelines' minimum sentence range was scored based on the plea agreement. A party cannot request that the court take a certain action and then argue on appeal that the action was error. *People v McCray*, 210 Mich App 1, 9; 532 NW2d 885 (1995). In any event, we are satisfied from the record as a whole that any error in scoring the offense variables was harmless because it did not affect the trial court's sentencing decision. See *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993); *People v Daniels*, 192 Mich App 658, 675-676; 482 NW2d 176 (1992).

Remanded for further proceedings consistent with this opinion. No further jurisdiction.

/s/ Thomas G. Kavanagh

/s/ Robert B. Burns

/s/ Glenn S. Allen, Jr.