

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD GEORGE HORAN,

Defendant-Appellant.

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UNPUBLISHED

January 9, 1998

No. 199067

Oakland Circuit Court

LC No. 94-134661 FH &

94-134662 FH

Before: MacKenzie, P.J., and Hood and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions, on plea of nolo contendere, in each case of embezzlement over \$100, MCL 750.174; MSA 28.371, and from his plea of guilty to habitual offender, third offense, MCL 769.11; MSA 28.1083. Defendant claims that his pleas were the result of a sentence bargain with the court pursuant to *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993), and that although the agreement was not honored, defendant was not offered the opportunity to withdraw his pleas. We affirm.

*Cobbs* contemplates a situation in which, at 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." In that situation, "a defendant who pleads guilty or nolo contendere in reliance upon a judge's preliminary evaluation with regard to an appropriate sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation."

Here, the only mention of a *Cobbs* bargain occurred at the commencement of the plea proceeding, in which defense counsel asked the court "to consider a plea in this particular matter under *People v Cobb[s]*, in which the court would consider a delayed sentence with restitution. And with that understanding I would tender Mr. Horan to the court for voir dire."

The trial court did not say anything about this arrangement nor did it inquire of defendant as to his understanding. Here, as in *Guilty Plea Cases*, 395 Mich 96, 126-127; 235 NW2d 132 (1975), it is implicit on the record that a bargain was made, but there was a failure to comply with the court rule

requirement that the agreement be stated on the record and affirmatively acknowledged by the defendant and his lawyer (the prosecutor's agreement is not required for a sentence bargain under *Cobbs*). MCR 6.302(C)(2) and (E).

At the conclusion of the plea proceedings, sentencing was scheduled for June 18, 1996. No transcripts of proceedings on that date or any other date before sentencing on October 17, 1996, have been furnished to this Court, but this does make clear that to some extent defendant's sentence was indeed delayed. At the actual sentencing on October 17, 1996, the court reflected that defendant had had ample opportunity to make restitution, and had paid only \$10,000 towards his \$125,000 restitutionary obligation. The court accordingly decided that the time had come to impose sentence.

Delayed sentencing is not a sentence within the contemplation of *People v Cobbs, supra*, because delayed sentencing is simply an opportunity for the defendant to establish by his behavior during the period of delay that probation would be an appropriate punishment. MCL 771.1(2); MSA 28.1131(2); *People v Saylor*, 88 Mich App 270; 276 NW2d 885 (1979). By its nature, delayed sentencing does not involve a particular "length of sentence" as contemplated by *People v Cobbs, supra*. In any event, accepting arguendo that defendant bargained for delayed sentencing status, there was a significant delay between his plea and imposition of sentence of approximately five months, and before sentence was imposed nearly two years had elapsed since the charges arose, with defendant making little progress towards restitution, the obvious quid pro quo for delayed sentencing. As defendant was given a delay in sentencing, and no contention is made that a particular length of delay was agreed upon, the trial court had jurisdiction to sentence defendant once satisfied that the purpose of delay -- accomplishing full restitution as a means of demonstrating that defendant deserved a probationary sentence -- was no longer a relevant consideration. *People v Coleman*, 130 Mich App 639; 344 NW2d 30 (1983). Delayed sentencing status may be revoked at any time and no hearing is required. *People v Paulus*, 121 Mich App 445; 328 NW2d 659 (1982), remanded on other grounds 417 Mich 1100.15 (1983).

Affirmed.

/s/ Barbara B. MacKenzie

/s/ Harold Hood

/s/ Joel P. Hoekstra