

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDUARDO JUSINO,

Defendant-Appellant.

UNPUBLISHED

September 13, 2002

No. 238528

Wayne Circuit Court

LC No. 99-010070

Before: Cooper, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals by leave granted an order sentencing him to three to twenty years' imprisonment for first-degree home invasion, MCL 750.110a(2). We vacate the sentence and remand for resentencing.

Originally, defendant was charged with first-degree home invasion, MCL 750.110a(2), as a second habitual offender, MCL 769.10. However, defendant and the prosecutor entered into a plea bargain under which defendant would plead no contest to the first-degree home invasion charge and, in exchange for the plea, the prosecutor would not seek to enhance the sentence under the habitual offender statutes. Pursuant to a *Cobbs*¹ evaluation, the trial court indicated that it would sentence defendant to fifteen months to twenty years' imprisonment, based on the legislative sentencing guidelines range² of zero to seventeen months, as then scored. On that basis, defendant entered the no-contest plea and the trial court accepted it.

At sentencing, however, the trial court indicated that there had been an error in the scoring of the sentencing guidelines. The corrected scoring of the guidelines resulted in a guidelines evaluation of thirty-six to sixty months. The trial court stated that, given the revised guidelines evaluation, it could not stay within the *Cobbs* evaluation, but that because it gave defendant "an expectation which was not going to be fulfilled, [it] will keep the actual sentence at the low end of the correct guideline. The sentence will be 2 to 20." Although the trial court

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

² The legislative guidelines were used to determine the recommended minimum sentence range in this case because the offense for which defendant was convicted occurred after January 1, 1999. See MCL 769.34.

offered defendant a chance to withdraw his plea because it was not following the *Cobbs* evaluation, defendant chose to proceed with the sentencing. The trial court then sentenced defendant to three to twenty years' imprisonment.

On appeal, defendant argues that he is entitled to resentencing in accordance with the revised *Cobbs* evaluation that the trial court made at the sentencing hearing. Despite defendant's claims to the contrary, specific performance is not warranted because the *Cobbs* agreement is between the prosecutor and the defendant, not the court and the defendant. *People v Williams*, 464 Mich 174, 183, n 5; 626 NW2d 899 (2001) (Kelly, J., dissenting); see *Cobbs, supra*. To the extent that defendant relies on *Santobello v New York*, 404 US 257; 92 S Ct 495, 30 L Ed 2d 427 (1971), in support of his claim for specific performance, we note that in *People v Siebert*, 450 Mich 500; 537 NW2d 891 (1995), the Michigan Supreme Court specifically stated that, "[a]s noted, however, *Santobello* does not propose specific performance by a *trial court* or by any actor not making the promise at issue." *Siebert, supra* at 518 (emphasis supplied). The proper remedy when the plea is based on a *Cobbs* evaluation that is not, or cannot be, upheld is the opportunity for the defendant to withdraw the plea. *Cobbs, supra* at 283; *People v Connor*, 209 Mich App 419, 432; 531 NW2d 734 (1995).

The prosecutor contends that a transcription error must have occurred given the context of the trial court's statements and defendant's lack of objection to the three-year minimum sentence when the trial court announced the sentence.³ The prosecutor requests that the case be remanded for clarification of the record. However, recent authority states that a trial court is not to tell the defendant what the revised sentence will be after a *Cobbs* evaluation is subsequently rejected by the court.⁴ *Williams, supra* at 180. In *Williams*, the Supreme Court stated:

In those circumstances, when the judge makes the determination that the sentence will not be in accord with the earlier assessment, to have the judge then specify a new sentence, which the defendant may accept or not, goes too far in involving the judge in the bargaining process. Instead, when the judge determines that sentencing cannot be in accord with the previous assessment, that puts the previous understanding to an end, and the defendant must choose to allow the plea to stand or not without benefit of any agreement regarding the sentence.

Thus, we hold that in informing a defendant that the sentence will not be in accordance with the *Cobbs* agreement, the trial judge is not to specify the actual sentence that would be imposed if the plea is allowed to stand. [*Id.* at 179-180.]

³ Stated plainly, the thirty-six month low end of the guidelines equals three years; however, the transcript reflects the inconsistency of the trial court stating that it will stay at the low end of the guidelines, but then initially indicating a sentencing of two, rather than three, to twenty years.

⁴ Defendant was sentenced in 1999, so the trial court did not have the benefit of the rule stated in *Williams, supra* at 174. However, judicial decisions generally are to be given complete retroactive effect. *People v Doyle*, 451 Mich 93, 104; 545 NW2d 627 (1996).

Under *Williams*, the trial court was not permitted to tell defendant what the revised sentence would be after it indicated that the sentence would not be in accordance with the *Cobbs* evaluation, and defendant's claim that the trial court revised its *Cobbs* evaluation has no legal basis. Consequently, we believe that remand for clarification is not the appropriate remedy.

On these facts, we find that defendant's sentence must be vacated and the case remanded to the trial court for further proceedings. On remand, defendant shall again be given the opportunity to withdraw his plea or proceed with sentencing in accordance with *Williams, supra*.

The judgment of sentence is vacated and the case is remanded. We do not retain jurisdiction.

/s/ Jessica R. Cooper

/s/ Joel P. Hoekstra

/s/ Jane E. Markey