

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RALPH GARY,

Defendant-Appellant.

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UNPUBLISHED

October 19, 2004

No. 247952

Muskegon Circuit Court

LC No. 02-047038-FH

Before: Griffin, P.J., and Saad and O’Connell, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his sentence of two to forty years in prison imposed on his plea-based conviction of possession with intent to deliver less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). We remand this matter to the trial court to allow defendant an opportunity to withdraw his plea to that charge. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with possession with intent to deliver less than fifty grams of cocaine and possession of marijuana, MCL 333.7403(2)(d). The parties did not reach a specific plea agreement; however, the trial court evaluated the case pursuant to *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), and agreed to impose a minimum sentence of not more than eighteen months on the cocaine charge. Before sentencing, and upon learning that defendant had failed to submit a DNA sample as required by law, the trial court concluded that it was not required to adhere to the sentence recommendation, and sentenced defendant as a fourth habitual offender to two to forty years in prison for the conviction of possession with intent to deliver less than fifty grams of cocaine, and to six months in jail for the conviction of possession of marijuana.

We review the issue whether a trial court is legally required to adhere to a *Cobbs* agreement de novo. *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999).

A trial court may evaluate a case and state on the record the length of sentence that, on the basis of the information available at the time, appears to be appropriate. However, a defendant who pleads guilty or nolo contendere in reliance on a court’s preliminary evaluation has the “absolute right” to withdraw a plea if the court determines that the actual sentence must exceed the preliminary evaluation. *Cobbs, supra* at 283.

We remand this matter to the trial court to allow defendant the opportunity to withdraw his plea to the charge of possession with intent to deliver less than fifty grams of cocaine.<sup>1</sup> A defendant has an “absolute right” to withdraw a plea if the trial court determines that it cannot adhere to a preliminary sentence evaluation. *Id.* The trial court’s reliance on *People v Kean*, 204 Mich App 533; 516 NW2d 128 (1994), as support for its conclusion that it was not required to adhere to the *Cobbs* agreement, is misplaced. In *Kean, supra*, another panel of this Court held that a defendant is not entitled to the benefit of a plea bargain/sentence recommendation, and a trial court is not required to allow the defendant to withdraw a plea if the defendant violated a specific condition of the plea agreement. *Id.* at 535-536. Here, the requirement that defendant submit a DNA sample was not made a specific condition of the *Cobbs* evaluation. In light of our Supreme Court’s pronouncement that a defendant has an “absolute right” to withdraw a plea if the trial court determines that it cannot adhere to a sentence evaluation, coupled with the fact that *Kean, supra*, is distinguishable on its facts, the trial court erred in concluding that it was not required to adhere to the sentence evaluation. On remand, defendant shall be afforded an opportunity to withdraw his plea to the charge of possession with intent to deliver less than fifty grams of cocaine. If defendant declines to withdraw his plea to that charge, the sentence shall be affirmed.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Richard Allen Griffin  
/s/ Henry William Saad  
/s/ Peter D. O’Connell

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<sup>1</sup> Defendant is not entitled to specific performance of the sentence evaluation. *People v Siebert*, 450 Mich 500, 516-518; 537 NW2d 891 (1995).