

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK FUNDERBERG,

Defendant-Appellant.

UNPUBLISHED

December 18, 1998

No. 191841

Recorder's Court

LC No. 95-001011 FC

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

Defendant pleaded nolo contendere to armed robbery, MCL 750.529; MSA 28.797, in exchange for the dismissal of additional charges and an agreement that he would receive a sentence of no more than five years minimum and ten years maximum. He was sentenced to a term of four to twenty years' imprisonment. He appeals as of right.¹ We remand.

Defendant contends that he is entitled to have his maximum sentence reduced to the maximum agreed upon as part of the plea agreement, i.e., ten years. However, we conclude that specific performance is not an appropriate remedy in this case because the trial court was not required to follow the plea-based sentence agreement, *People v Killebrew*, 416 Mich 189, 209-210; 330 NW2d 834 (1982), and it is not clear from the record that defendant's plea was accepted by the trial court with the understanding that he would receive a maximum sentence of no more than ten years, cf. *People v Jennings*, 178 Mich App 334, 336; 443 NW2d 793 (1989). Nonetheless, defendant had an "absolute right" to withdraw his plea if the sentence imposed was not in accord with that promised. *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993); *Killebrew, supra*. Contrary to the prosecutor's argument, the record does not indicate that defendant was ever offered an opportunity to withdraw his plea at sentencing.

Under the circumstances of this case, because the intent of the trial court is unclear from the record, we remand for further proceedings to determine the trial court's intent in imposing sentence. If the trial court intended to impose a ten-year maximum sentence, but simply misspoke when it announced a maximum sentence of twenty years, it may correct its error by resentencing defendant to a

ten-year maximum sentence in conformity with the sentence agreement. *People v Henderson*, 144 Mich App 801, 803; 377 NW2d 319 (1985). Alternatively, if it was the trial court's intent to impose a maximum sentence of twenty years, it shall afford defendant an opportunity to withdraw his nolo contendere plea. *Cobbs, supra; Killebrew, supra*.

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

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Richard A. Bandstra

¹ Defendant has an appeal as of right because his crime was committed before December 27, 1994. See MCL 770.3; MSA 28.1100 and MCL 600.308; MSA 27A.308, as amended by 1994 PA 374 and 1994 PA 375, respectively.