

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID L. IRVINE,

Defendant-Appellant.

UNPUBLISHED

November 30, 1999

No. 211604

Oakland Circuit Court

LC No. 96-147304 FC

Before: Talbot, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant pleaded nolo contendere to second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and was sentenced, as a second habitual offender, MCL 769.10; MSA 28.1082, in accordance with a *Cobbs*¹ sentencing agreement to six to fifteen years' imprisonment. He appeals by delayed leave granted. We affirm.

Defendant claims that he is entitled to withdraw his plea because his sentence does not comport with the terms of the *Cobbs* sentencing agreement. We disagree.

Generally, a trial court's decision to grant or deny a motion to withdraw a guilty plea after sentencing will not be reversed absent a clear abuse of discretion resulting in a miscarriage of justice. *People v Hall*, 195 Mich App 460, 461; 491 NW2d 854 (1992). However, a defendant who pleads 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 determines that the sentence must exceed the preliminary evaluation. *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). The question whether a defendant's sentence exceeded the trial court's preliminary evaluation is one of fact that is reviewed for clear error. *People v Everard*, 225 Mich App 455, 458; 571 NW2d 536 (1997). A finding of fact is clearly erroneous, if, after a review of the entire record, this Court is left with a definite and firm conviction that a mistake has been made. *Id.*

Here, it is apparent from the record that the trial court misspoke at the plea proceeding when it seemingly referred to the *Cobbs* sentence evaluation as being six to ten years' imprisonment. Although the statement was ambiguous, the trial court properly resolved that ambiguity through references to

other statements in the record. *People v Swirles (After Remand)*, 218 Mich App 133, 135-136; 553 NW2d 357 (1996). At the hearing on defendant's motion to withdraw his plea, the trial court found that the statement was made in reference to the recomputed guidelines range, not to the maximum sentence (i.e., the court did not mean to say that defendant would receive a six-year minimum to ten-year maximum sentence, but rather that the guidelines called for a minimum sentence of between six and ten years). Indeed, as plaintiff points out, the trial court had no authority to alter the maximum sentence established by law. *In re Pardee*, 327 Mich 13, 16-17; 41 NW2d 466 (1950). The indeterminate sentencing statutes provide that when a defendant is convicted of a felony for the first time, "the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence."² MCL 769.8(1); MSA 28.1080(1). The statutory maximum term for CSC-2 is fifteen years. MCL 750.520c(2); MSA 28.788(3)(2). The trial court did not have the authority to set the maximum sentence at anything less than fifteen years.

The trial court determined at the motion hearing that the parties' clear understanding was that defendant would receive a legal sentence. Stated differently, defendant had no reason to believe that the trial court would violate the law by setting a maximum term of only ten years. Moreover, the written plea form signed by defendant reflects his acknowledgment that the *Cobbs* agreement called for a sentence of six to fifteen years. Thus, after a review of the entire record, we are not left with a definite and firm conviction that the trial court erred in finding that defendant's sentence comported with the *Cobbs* evaluation. *Everard, supra* at 458. Because the trial court did not clearly err in concluding that defendant's sentence comported with the *Cobbs* evaluation, it did not abuse its discretion when it denied defendant's motion to withdraw his plea.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Henry William Saad

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

² Part of the parties' plea agreement was that plaintiff would not seek sentence enhancement under the habitual offender statute. See MCL 769.10(1)(a); MSA 18.1082(1)(a).