

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN L. STOKES,

Defendant-Appellant.

UNPUBLISHED

June 25, 2002

No. 235519

Wayne Circuit Court

LC No. 00-003999

Before: Zahra, P.J., and Cavanagh and White, JJ.

PER CURIAM.

Defendant pleaded guilty to a charge of third-degree fleeing and eluding a police officer, MCL 257.602a(3)(a), and was sentenced to forty to sixty months in prison. Defendant appeals by leave granted. We reverse and remand.

Defendant was charged, as a fourth habitual offender, MCL 769.12, with third-degree fleeing and eluding a police officer. Defendant pleaded guilty to the principle charge in exchange for the prosecution's agreement to dismiss the fourth habitual offender charge. At the plea hearing, the trial court stated: "The Court has indicated to your attorney that you will get a guideline sentence, and I don't know what that is. But you'll get a guideline sentence."

The Presentence Investigation Report (PSIR) filed in this case indicated a sentencing guidelines range minimum of ten to twenty-three months in prison, but recommended that defendant be sentenced to two years' probation. The trial court declined to follow the PSIR recommendation and sentenced defendant to forty to sixty months in prison. In sentencing defendant, the court stated: "You got your deal when they dropped the Habitual, because I would have put that on you and doubled the sentence."

On appeal, defendant argues that he had a right to withdraw his guilty plea before the trial court imposed a sentence in excess of the original sentence evaluation. The prosecution has filed a confession of error with this Court, concurring that the trial court's failure to impose a guidelines sentence under these circumstances warrants a remand.

"If the prosecutor is offering to reduce the charge in exchange for a plea of guilty or nolo contendere, the judge . . . may state on the record the sentence that appears to be appropriate for the reduced charge." *People v Cobbs*, 443 Mich 276, 283 n 5; 505 NW2d 208 (1993). "[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.” *Id.* at 283.

In the instant case, the trial court told defendant before he pleaded guilty that he would “get a guideline sentence.” According to the Sentencing Information Report and PSIR, the guidelines range was ten to twenty-three months’ imprisonment. At sentencing, defendant challenged the trial court’s scoring of one of the offense variables, but the court never resolved whether the scoring was proper. The court did not state what the legislative guidelines range was for defendant’s minimum sentence. The court then sentenced defendant to forty to sixty months in prison.

Defendant’s sentence exceeded the guidelines range. Regardless of whether the trial court accepted defendant’s argument regarding the scoring of the offense variable, defendant’s minimum sentence was substantially higher than the guidelines range.¹ The court did not give defendant the opportunity to withdraw his plea before imposing his sentence. Because the parties entered a *Cobbs* agreement and the trial court imposed a sentence in excess of its preliminary sentence evaluation, defendant had an absolute right to withdraw his plea. *Cobbs*, *supra* at 283; *People v Everard*, 225 Mich App 455, 458; 571 NW2d 536 (1997). Therefore, this case must be remanded to the trial court.

On remand, the trial court should first decide if it intends to abide by the preliminary sentencing evaluation. In doing so, the court should resolve defendant’s challenge to offense variable 19.² If the court determines that the original *Cobbs* evaluation should be followed, then defendant should be resentenced within the guidelines range consistent with that evaluation. See *People v Chappell*, 223 Mich App 337, 342-343; 566 NW2d 42 (1997). If, on the other hand, the court decides that it will no longer abide by the preliminary sentence evaluation because defendant’s sentence should depart from the guidelines, then defendant must be given the opportunity to withdraw his plea. See *id.* at 343.³

¹ The Sentencing Information Report calculated a guidelines range of ten to twenty-three months in prison. If the trial court accepted defendant’s argument that offense variable 19 was improperly scored, the guidelines range would have been seven to twenty-three months in prison. MCL 777.66. The absolute maximum guidelines range for a “Class E” offense, such as third-degree fleeing and eluding a police officer, is a minimum of twenty-two to thirty-eight months in prison. MCL 777.66.

² A trial court must resolve a defendant’s challenge to the scoring of the guidelines and must determine whether defendant’s allegations of inaccuracies are correct. *People v Boucher*, 165 Mich App 361, 363; 418 NW2d 464 (1987).

³ We note that the judgment of sentence states that defendant was convicted under MCL 257.602a(3)(a). That subsection applies to circumstances where a defendant’s failure to stop his vehicle “results in a collision or accident.” *Id.* The limited record established below suggests that MCL 257.602a(3)(b) is the applicable subsection. That subsection applies where “[a] portion of the violation occurred in an area where the speed limit is 35 miles an hour or less,” *Id.* Any necessary correction in this regard should be made on remand.

Reversed and remanded. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Mark J. Cavanagh

/s/ Helene N. White