

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARION MITCHELL,

Defendant-Appellant.

UNPUBLISHED

June 10, 2004

No. 242773

Wayne Circuit Court

LC No. 00-007838

Before: Sawyer, P.J., and Gage and Owens, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from plea-based convictions of assault with intent to do great bodily harm, MCL 750.84, and armed robbery, MCL 750.529, for which he was sentenced to prison terms of 80 months to 10 years and 114 months to 18 years, respectively. We affirm.

Defendant was originally charged with assault with intent to murder, MCL 750.83, and armed robbery, MCL 750.529. Pursuant to a plea bargain/*Cobbs*¹ agreement, defendant pleaded guilty to a lesser assault charge and to armed robbery and the prosecutor dismissed the original assault charge and the habitual offender notice. In addition, the trial court gave a preliminary sentence evaluation of six years, eight months to ten years for the assault and nine and a half to eighteen years for the robbery. It also stated that if defendant testified truthfully against codefendant Herbert Morton at Morton's upcoming trial, it would reduce the robbery sentence to eight to eighteen years.

When defendant appeared for sentencing, the court elected not to sentence in accordance with the preliminary evaluation. It departed from the evaluation not because of any new information in the presentence report but because it believed that defendant had perjured himself while testifying at Morton's trial. Rather than allow defendant to withdraw his plea, the court imposed sentence and sentenced defendant to twelve to twenty years on the robbery conviction. This Court vacated defendant's sentence and remanded for resentencing, ordering that the trial court sentence defendant in accordance with the *Cobbs* agreement or, "if the circuit judge is not

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

willing to sentence defendant pursuant to the *Cobbs* agreement,” to permit defendant to withdraw his plea. *People v Mitchell*, unpublished order of the Court of Appeals, entered July 20, 2001 (Docket No. 234802). On remand, the court elected to sentence defendant in accordance with the *Cobbs* agreement.

Defendant first contends that the trial court erred in denying him the opportunity to withdraw his plea when it determined that it could not sentence defendant in accordance with the sentence evaluation of eight to eighteen years on the robbery conviction. Defendant failed to preserve this issue for appeal because he did not move to withdraw his plea in the trial court on the same ground asserted on appeal. MCR 6.311(C); *People v Nowicki*, 213 Mich App 383, 385; 539 NW2d 590 (1995). Therefore, review is precluded unless defendant shows plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A defendant who pleads guilty in reliance on the court’s preliminary evaluation of the sentence “has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation.” *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). “The question whether defendant’s sentence exceeded the trial court’s preliminary evaluation is one of fact.” *People v Everard*, 225 Mich App 455, 458; 571 NW2d 536 (1997).

The sentence evaluation was nine and a half to eighteen years on the robbery conviction, with the minimum sentence reduced to eight years if defendant testified truthfully against Morton. Defendant never testified against Morton. Rather, he testified on Morton’s behalf and his testimony conflicted with that given at the plea proceeding. Because the condition for the reduction of the robbery sentence was not met, the trial court did not exceed the preliminary evaluation of sentence by imposing a sentence of nine and a half to eighteen years. Defendant has thus failed to show plain error.

Defendant next contends that he is entitled to resentencing because the court neglected to obtain an updated presentence report before resentencing him. Defendant also failed to raise this issue below and thus it has not been preserved for appeal. Therefore, review is limited to plain error affecting defendant’s substantial rights. *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000).

“A presentence report is required upon conviction of a felony where an indeterminate sentence is to be imposed.” *In re Del Rio*, 400 Mich 665, 696; 256 NW2d 727 (1977); MCL 771.14(1); MCR 6.425(A). The defendant cannot waive preparation of the report. *People v Hemphill*, 439 Mich 576, 581; 487 NW2d 152 (1992). When a defendant is resentenced, a completely new report is not necessary; a supplemental report updating the original report is sufficient. *People v Triplett*, 407 Mich 510, 515; 287 NW2d 165 (1980). The defendant may waive preparation of an updated report if the original presentence report is not manifestly outdated. *Hemphill*, *supra* at 582.

Defendant asserts, and the prosecutor agrees, that defendant was resentenced without an updated presentence report. Defendant has thus shown plain error. However, defendant has not shown that his substantial rights were adversely affected. This case was not remanded for determination and imposition of an indeterminate sentence, but for imposition of a

predetermined sentence in accordance with a sentence evaluation. Because the trial court elected to sentence defendant in accordance with that evaluation, new information regarding defendant's circumstances was not relevant. Under the circumstances, it would be pointless "to engage the trial court in the futile exercise of marching up the sentencing hill again, only to hand out the same sentence and march back down again." *People v Ristich*, 169 Mich App 754, 759; 426 NW2d 801 (1988).

Affirmed.

/s/ David H. Sawyer

/s/ Hilda R. Gage

/s/ Donald S. Owens