

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE HICKS,

Defendant-Appellant.

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UNPUBLISHED

November 25, 2008

No. 279986

Calhoun Circuit Court

LC No. 2006-002944-FC

Before: Murphy, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals by leave granted after pleading no contest to charges of first-degree home invasion, MCL 750.110a(2), safe breaking, MCL 750.531, and two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as an habitual fourth offender, MCL 769.12, to serve concurrent terms of 2 years each for the felony-firearm charges. These sentences were to precede concurrent prison terms of 15 to 25 years for first-degree home invasion, and 8 to 25 years for safe breaking. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant had entered into a *Cobbs*<sup>1</sup> agreement, which called for him to be sentenced to consecutive prison terms of “10, 8, and 2” years, for a total of 20 years’ imprisonment. Given Michigan’s indeterminate sentencing scheme, we presume that the terms spoken of are proposed minimums. Defendant argues that the trial court should order resentencing and instruct the trial court to comply with the *Cobbs* agreement. However, this argument fails for two reasons. First, as stated in *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993), “The judge’s preliminary evaluation of the case does not bind the judge’s sentencing discretion, since additional facts may emerge during later proceedings, in the presentence report, through the allocution afforded to the prosecutor and the victim, or from other sources.”

Second, according to *Cobbs*, a defendant who pleads guilty or nolo contendere in reliance on a plea agreement has “an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation.” *Id.* at 283. Here, the court concluded that

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

the sentence imposed is “consistent with the plea agreement because it gets [defendant] essentially to the same time.” Defendant argues that the trial court actually exceeded the *Cobbs* agreement because the minimum sentence for first-degree home invasion increased from 10 to 15 years. Under the *Cobbs* agreement, the recommended sentences—10 years for first-degree home invasion, 8 years for the safe breaking, and 2 years each for each count of felony-firearm—were all to be served consecutively, resulting in a minimum total of 20 years. However, while the concurrent felony-firearm sentences actually imposed were consecutive to the sentence for the other two substantive crimes, the 15-year minimum for first-degree home invasion and the 8-year minimum for safe breaking are to run concurrently, resulting in a minimum total of 17 years. Thus, the sentence imposed not only did not exceed the recommended sentence, it was actually less than that agreed to pursuant to *Cobbs*.

Defendant also argues that pursuant to *Santobello v New York*, 404 US 257; 92 S Ct 495; 30 L Ed 2d 427 (1997), the *Cobbs* agreement “constitutes a ‘promise of leniency’ which must be fulfilled and if breached, violates due process of law.” However, the concept of due process and its applicability to promises made in plea negotiations was raised only by Justice Douglas in his *Santobello* concurrence. *Id.* at 267 (Douglas, J., concurring). Moreover, the promise broken in *Santobello* was not an agreed upon sentence, but the prosecutor’s agreement not to make a sentencing recommendation. *Id.* at 258-259. In the case at hand, the prosecutor did not similarly violate such a promise not to act. Finally, as noted above, the sentence imposed was in accordance with the length of the recommended sentence, even though the manner in which each crime was dealt with was altered.

Accordingly, the trial court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ William B. Murphy  
/s/ David H. Sawyer  
/s/ Michael R. Smolenski