

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL MARTIN HOLLOWAY,

Defendant-Appellant.

UNPUBLISHED

October 18, 2016

No. 328562

Wayne Circuit Court

LC No. 13-010339-FH

Before: GADOLA, P.J., and BORRELLO and STEPHENS, JJ.

PER CURIAM.

Defendant pleaded no contest to two counts of obtaining or possessing personal identifying information of another with intent to commit identity theft, MCL 445.67, one count of breaking and entering a motor vehicle, MCL 750.356a(3), and one count of larceny from a motor vehicle, MCL 750.356a(1). Pursuant to a *Cobbs*¹ agreement, the trial court originally sentenced defendant to serve 10 months' jail time followed by two years' probation. After determining that defendant violated the terms of his probation, the trial court sentenced defendant to concurrent prison terms of two to five years for each of his four plea-based convictions. Defendant appeals by leave granted.² We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

In 2013, defendant pleaded no contest to the four counts described above pursuant to a *Cobbs* agreement. At his plea hearing, the trial court explained the following regarding the *Cobbs* agreement:

The Court. I've provided a [*Cobbs*] evaluation of ten months [in] Wayne County Jail, followed by two years['] probation under terms set by the Court, with the proviso that *if you pick up a new case* while you are on probation it's going to be an automatic 18 months to five years on the violation of probation on this case.

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

² *People v Holloway*, unpublished order of the Court of Appeals, entered August 25, 2015 (Docket No. 328562).

Is that everybody's understanding regarding the plea agreement, the Court's [*Cobbs*] evaluation?

Defense Counsel. Yes, Your Honor.

The Prosecutor. Yes, Your Honor. [Emphasis added.]

Defendant then signed a notice of acceptance of the plea offer, which included a proviso stating, "Any new case = 18 mos to 5 years MDOC [Michigan Department of Corrections]." At defendant's subsequent sentencing hearing, the trial court stated that it was in the "best interest of justice" to follow the *Cobbs* agreement, but reiterated to defendant that "if you get *picked up on another case* . . . I'm going to give you the 18 months to five years in the Department of Corrections." (Emphasis added.) The court then entered an order of probation, which stated that any "NEW CASE RESULTS IN 18 MONS TO 5 YRS." The probation order also required defendant to comply with several general conditions of probation, including that he not "violate any criminal law of any unit of government."

Roughly one year later, defendant was arraigned on a bench warrant for violating the terms of his probation after he was accused of threatening a man with a knife. The man's fiancée contacted defendant's supervising probation agent to inform him of the incident. The agent testified that the Detroit Police Department took a statement from the victim and forwarded the report "for further investigation," but there is no evidence in the record that defendant was ever arrested in connection with the incident or that criminal charges were ever filed. Following a probation violation hearing, the trial court concluded that defendant violated a condition of his probation because he "violate[d] a[] criminal law of any unit of government."

At defendant's probation violation sentencing hearing, defendant's attorney noted that the proviso of the *Cobbs* agreement did not apply because defendant "has not actually picked up a new case." He then explained the following:

No charges have been filed against [defendant] . . . for the allegations that were brought out on this hearing. Therefore, he has not violated the terms and conditions of his probation Therefore, the condition precedent to the actual—to trigger the 18 months to five years pursuant to the *Cobbs* [agreement] has not been fulfilled.

In response, the trial court noted that another condition of defendant's probation required that he not "violate any criminal laws of any unit of government," and following the probation violation hearing, the court found that sufficient evidence existed to find defendant guilty of violating a criminal law. The court then sentenced defendant to concurrent terms of two to five years' imprisonment for each of his plea-based convictions. Protesting, defendant asked whether the *Cobbs* agreement was invalid, noting that the minimum sentence imposed by the court was "more than what I would have got had I caught a new case on [the] *Cobbs* agreement" The court then again explained to defendant that it "d[id] not find that you violated your probation for having picked up a new case," but rather "f[ound] that you violated your probation by violating the criminal law."

II. ANALYSIS

On appeal, defendant argues that he is entitled to specific performance of the *Cobbs* agreement, and therefore should have been sentenced to a minimum prison term of 18 months, rather than two years, for violating his probation. In *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993), our Supreme Court held that, at the request of a party, a trial judge may participate in the plea negotiation process by indicating the length of sentence that appears to be appropriate for the charged offenses on the basis of a preliminary evaluation of the case. In this case, the trial court explained to defendant that the *Cobbs* agreement provided for 10 months in the Wayne County Jail followed by two years of probation, “with the proviso that if you *pick up a new case* while you are on probation it’s going to be an automatic 18 months to five years on the violation of probation on this case.” (Emphasis added.) In the context of judicial proceedings, a new criminal case begins with the filing of criminal charges. Defendant was never criminally charged related to the incident in which he assaulted a man with a knife, and thus never “picked up a new case” for purposes of the proviso that formed part of his *Cobbs* agreement.

Defendant’s attorney showed that he understood that the proviso only applied if defendant was subject to new criminal charges when he stated at sentencing, “[Defendant] has not actually picked up a new case. No charges have been filed Therefore, the condition precedent to . . . trigger the 18 months to five years pursuant to the *Cobbs* [agreement] has not been fulfilled.” What is more, defendant himself demonstrated that he understood that the proviso only applied if he was subject to new criminal charges when, after the court imposed his amended sentence, he commented, “Your Honor, that’s more than what I would have got had I caught a new case on a *Cobbs* agreement” Under the circumstances, the trial court did not err by concluding that it was not required to sentence defendant to 18 months to 5 years’ imprisonment in accordance with the proviso of the *Cobbs* agreement, because the agreement did not apply by its own terms.³

Affirmed.

/s/ Michael F. Gadola
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens

³ Likewise, although a defendant who enters a plea in reliance on a trial court’s preliminary evaluation regarding an appropriate sentence has an absolute right to withdraw the plea if the court later determines that the sentence must exceed the preliminary evaluation, *Cobbs*, 443 Mich at 283, in this case, the court was not required to allow defendant to withdraw his plea because the sentence imposed did not violate the *Cobbs* agreement.