

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROOSEVELT TOLBERT,

Defendant-Appellant.

UNPUBLISHED

April 1, 1997

No. 187469

Genesee Circuit Court

LC No. 94-050400-FH

Before: D.F. Walsh,* P.J., and R.P. Griffin** and W.P. Cynar,* JJ.

MEMORANDUM.

Defendant pleaded guilty to solicitation to deliver less than fifty grams of heroin, MCL 750.157b(3)(a); MSA 28.354(2)(3)(a) and MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). In exchange for a sentence agreement under *People v Cobbs*, 443 Mich 276, 283; 505 NW2d (1993), defendant agreed that an appropriate sentence would be four years' probation, with a one-year jail term to be held in abeyance and subject to waiver if he successfully complied with the terms of probation. Following a period of delayed sentencing, the trial court sentenced defendant to two to five years' imprisonment and denied defendant's request to withdraw his plea. Defendant appeals as of right. We remand. This case has been decided without oral argument pursuant to MCR 7.214(A).

The order delaying sentence did not modify the prior *Cobbs* agreement. Therefore, this case is distinguishable from *People v Rashid*, 154 Mich App 762, 770; 398 NW2d 525 (1986). A defendant who pleads guilty pursuant to a sentence agreement under *Cobbs*, *supra*, has an absolute right to withdraw the plea if the agreement is not followed. *Cobbs*, *supra* at 283. Although it was proper for the trial court to consider defendant's continued drug use as a basis for refusing to follow the *Cobbs* agreement, the court was still required to provide defendant with an opportunity to withdraw his plea if

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**Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

the *Cobbs* agreement was not followed. Therefore, the trial court erred when it failed to sentence defendant in accordance with the *Cobbs* agreement without affording defendant an opportunity to withdraw his guilty plea. Accordingly, we remand this case so that defendant may be given an opportunity to withdraw his plea. If defendant declines to withdraw his plea, his sentence shall be affirmed.

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Daniel F. Walsh

/s/ Robert P. Griffin

/s/ Walter P. Cynar