

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSIE LEE WILSON,

Defendant-Appellant.

UNPUBLISHED

March 21, 2006

No. 258801

Wayne Circuit Court

LC No. 02-004672-01

Before: Neff, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Our Supreme Court has remanded the case to this Court for consideration as on leave granted. *People v Wilson*, 471 Mich 909; 688 NW2d 288 (2004). Defendant pleaded nolo contendere to two counts of operating a motor vehicle while license suspended causing death, MCL 257.904(4), and failure to stop at the scene of a serious injury accident, MCL 257.617. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent sentences of eight to 30 years in prison for each suspended license conviction, and seven to 30 years for the failure to stop conviction. We remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

In contemplation of defendant's plea, the prosecutor agreed to dismiss two additional charges of manslaughter with a motor vehicle, MCL 750.321. Defendant sought a preliminary sentence evaluation pursuant to *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). The trial court noted that the sentencing guidelines range as preliminarily calculated was 43 to 86 months, or 43 to 129 months with the habitual offender enhancement. The trial court then stated that it would "give [defendant] the low end of the guidelines." The court further told defendant that he had a right to withdraw his plea if the court had to change its preliminary evaluation at sentencing, and asked defendant whether he understood. Defendant replied affirmatively.

During sentencing, the guidelines were recalculated to 50 to 150 months. The trial court sentenced defendant to eight to 30 years in prison. Defense counsel objected and stated that the sentence was not appropriate under the *Cobbs* agreement, and that the guidelines had been scored at "43 months, 15 years." The trial court agreed that the previous guidelines had been scored at 43 to 86 months for the minimum, but stated that the presentencing report was not accurate and that the guidelines had changed. The trial court noted that the presentencing agreement also had recorded the settlement offer incorrectly in that it did not reflect the fact that

defendant did not plead to dismiss the habitual offender notice. The trial court then stated that the sentence was within its understanding of the *Cobbs* agreement:

It should reflect, that is the pre-sentencing report should reflect, that he had plead to Counts 3, 4, and 5 and notice of enhancement 3rd offense, which carries a maximum penalty of 30 years in prison. And this plea agreement that they have listed is incorrect. It is not dismiss Count 1, 2 and habitual. It should reflect dismiss Counts 1 and 2, not the habitual. This Court is going to strike the habitual from the plea agreement on the face sheet of the pre-sentencing report and they are accurate with respect to the *Cobbs* evaluation which was a sentence within the guidelines. And the guidelines have already been scored by this Court and the Court- or by the parties and this Court. And just so the record is accurate, those guidelines are 50 to 150 months at the low end, which with the guidelines—the sentence the Court already gave is clearly at the low end of the guideline.

The trial court did not give defendant an opportunity to withdraw the plea, despite counsel's repeated objection that the sentence did not reflect the agreement. Defendant now argues that he has a right to withdraw his plea for that reason.

We agree. 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. We disagree with the trial court's holding that the sentence imposed comported with the sentence agreement. The trial court's statement that it would “give [defendant] the low end of the guidelines” transmitted to defendant the understanding that his sentence would be at or near the actual low end of the guidelines.¹ The trial court may have thought that it promised only to sentence defendant to a minimum sentence within the lower half of the guidelines, as it stated at sentencing. However this is not the agreement that the court conveyed to defendant. A sentence at the upper end of the lower half of the guidelines is not one at “the low end” of the guidelines. Moreover, the sentence actually imposed was not even within the lower half of the initially scored guidelines, which are reflected in the written pretrial settlement offer signed by the parties and the trial court.

Our examination of the proceedings leads us to conclude that defense counsel pursued a continued, albeit perhaps inartful, objection to the sentence on the ground that it did not comport with the agreement. In *People v Carter*, 462 Mich 206; 612 NW2d 144 (2000), our Supreme Court discussed the concept of waiver and its effect on an issue raised on appeal. It defined waiver as “the intentional relinquishment or abandonment of a known right.” *Id.* at 214-219. In the instant case, defendant did not affirmatively waive his right to withdraw his plea once he

¹ In contrast, the trial court could have used the phrases, “the lower half” of the guidelines, or even “within the low end” of the guidelines, had it not wished to be as constrained. Either phrase might be reasonably interpreted to include a range of possible sentences, and to possibly include the sentence imposed. However, the phrase used is more limiting. We do not contend that the trial court was prevented from imposing any sentence but the actual low end of the guidelines while remaining within the agreement. However, we find that defendant's sentence did not comport with the agreement.

learned of the changed sentencing guidelines.² It is also clear from the transcript that the trial court would not have allowed defendant to withdraw his plea on the ground that the sentence did not comport with the agreement, because the trial court thought that the sentence did, in fact, comport with the agreement.

The sentence given did not comport with the agreement to “give [defendant] the low end of the guidelines.” 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/ Janet T. Neff
/s/ Henry William Saad
/s/ Richard A. Bandstra

² We note that the plea was taken a number of months prior to the sentencing. It is somewhat unreasonable to expect defendant to remember that he could seek to withdraw his plea without a reiteration of that right by the trial court.