

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

LARRY TERRELL ROOSEVELT,
Defendant-Appellant.

UNPUBLISHED
November 17, 2015

No. 323667
Oakland Circuit Court
LC No. 2013-244660-FC

Before: STEPHENS, P.J., and CAVANAGH and MURRAY, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his convictions following a guilty plea to three counts of armed robbery, MCL 750.529. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 30 to 60 years' imprisonment. We affirm.

The convictions in this case arose from defendant entering a beauty salon on August 15, 2012, in the city of Oak Park and robbing multiple victims of their money and jewelry at gunpoint.

Defendant first argues on appeal that the trial court relied on information regarding his sentence for a similar offense in Macomb County that was later lowered when sentencing the defendant. He asserts that since due process requires that he be sentenced based on accurate information, his sentence is invalid and he is entitled to be resentenced. We disagree.

Both parties agree that the issue whether defendant's sentence was based on inaccurate information presents a constitutional issue. This Court reviews constitutional issues de novo. *People v Jones*, 260 Mich App 424, 427; 678 NW2d 627 (2004).

In *People v Francisco*, 474 Mich 82, 88-89; 711 NW2d 44 (2006), the Michigan Supreme Court reviewed the relevant law on the requirement of accurate information in sentencing.

A defendant is entitled to be sentenced by a trial court on the basis of accurate information. MCL 769.34(10) states, "[i]f a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing *absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the*

defendant's sentence.” In other words, if a minimum sentence falls within the appropriate guidelines range, a defendant is not entitled to be resentenced unless there has been a scoring error or inaccurate information has been relied upon. As we explained in *People v Kimble*, 470 Mich 305, 310–311; 684 NW2d 669 (2004), “if the sentence is within the appropriate guidelines sentence range, it is only appealable if there was a scoring error or inaccurate information was relied upon in determining the sentence and the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand.”

MCL 769.34(10) makes clear that the Legislature intended to have defendants sentenced according to accurately scored guidelines and in reliance on accurate information (although this Court might have presumed the same even absent such express language). Moreover, we have held that “a sentence is invalid if it is based on inaccurate information.” *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). [Footnotes omitted.]

We are not persuaded by defendant’s arguments that the court’s sentence was based on inaccurate information. At defendant’s sentencing, the court indicated that it duly reviewed the presentence investigation report, and that its sentence was based on the information in that report, not the sentence defendant received in Macomb County. The court reiterated that its sentence was not based upon the original Macomb sentence at a post-conviction motion to withdraw the plea. To the extent that the court inquired about defendant’s sentence in Macomb County by asking defendant about that matter, the record is clear that it did so with the intention of maintaining the terms of the *Cobbs*¹ agreement, that defendant’s sentence in Oakland County run concurrently with his sentence in Macomb County. Accordingly, defendant’s assertions that his sentence was based on inaccurate information are not supported by the record and therefore without merit.

Defendant next argues that the trial court improperly scored Offense Variable (“OV”) 12 in the present case where there is no record evidence of additional contemporaneous acts separate from and in addition to the sentencing offense that would warrant scoring under MCL 777.42(1)(a). We disagree.

The applicable statute, MCL 777.42, provides in pertinent part as follows:

(1) Offense variable 12 is contemporaneous felonious criminal acts. Score offense variable 12 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Three or more contemporaneous felonious criminal acts involving crimes against a person were committed25 points

* * *

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

(2) All of the following apply to scoring offense variable 12:

(a) A felonious criminal act is contemporaneous if both of the following circumstances exist:

(i) The act occurred within 24 hours of the sentencing offense.

(ii) The act has not and will not result in a separate conviction.

In this case, there were seven women present in the beauty salon when defendant entered armed with a gun. Defendant pointed his firearm at the seven women and told them to “stick up,” remove their jewelry, and hand over their cash. Despite there clearly being seven victims, defendant was only charged with three counts of armed robbery. The remaining uncharged counts were properly considered when scoring OV 12. On this record, the trial court’s factual findings are supported by a preponderance of the evidence and not clearly erroneous. Consequently, we find no error in the scoring that would require resentencing.

Finally, defendant argues that although he pleaded guilty to three charges of armed robbery, his plea was not knowing and voluntary because he did not understand the consequences of his plea. We disagree.

Defendant’s sentence was in accordance with a *Cobbs* agreement.² That agreement provided that defendant be sentenced to the “bottom half” of the sentencing guidelines. Defendant now claims that he did not actually know what the “bottom half” of the sentencing guidelines meant in terms of his actual sentence. Defendant also states he reasonably believed that he would receive a sentence in Oakland County congruent with his sentence in Macomb County.

In *People v Eloby (After Remand)*, 215 Mich App 472, 474-475; 547 NW2d 48 (1996), this Court set forth the appropriate standard of review when evaluating a defendant’s motion to withdraw his guilty plea.

[A]fter a plea has been accepted by the trial court, there is no absolute right to withdraw the plea. *People v Effinger*, 212 Mich App 67, 69, 536 NW2d 809 (1995). When a motion to withdraw a plea is made after sentencing, the decision whether to grant it rests within the sound discretion of the trial court. *Id.* That decision will not be disturbed on appeal unless there is a clear abuse of discretion resulting in a miscarriage of justice. *Id.*

² *People v Fonville*, 291 Mich App 363, 369 n 3; 804 NW2d 878 (2011) quoting *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993) (indicating that a Cobbs agreement is one in which a defendant agrees to plead guilty or no contest in reliance on the trial court's preliminary evaluation of the sentence; however, the defendant is allowed to withdraw the plea in the event that the trial court determines that it must exceed the preliminary evaluation).

As an initial matter, our review of the February 13, 2013 plea transcript in this case confirms that the trial court complied with MCR 6.302 to determine that defendant's plea was accurate, voluntary and understanding. Defendant was questioned under oath as to his ability to read, write and understand the English language, and whether he understood both the court and his defense counsel and that defendant was satisfied with defense counsel's advice. Defendant acknowledged that he was pleading guilty to three counts of armed robbery as a fourth habitual offender and that his *Cobbs* sentence would be concurrent to his sentence in Macomb County. Neither the word "equal" nor "congruent" were ever uttered. Defendant established a factual predicate for his guilty plea to three armed robberies and habitual offender status, and was advised of his trial rights. Defendant signed a document under oath attesting to the same information. Based on this record, we are not convinced that there were any errors in the plea-taking process that would warrant setting aside defendant's guilty plea.

We also conclude that the court honored defendant's *Cobbs* agreement. In *Cobbs*, the Michigan Supreme Court noted that under certain circumstances, a defendant may have the right to withdraw his plea if the sentencing judge, after the plea is offered pursuant to *Cobbs*, determines that the sentence given will exceed the "preliminary evaluation" that the defendant agreed to. *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

In addition to the procedures approved in [*People v*] *Killebrew*, 416 Mich [189,] 206-212; 330 NW2d 834 [1982], we today recognize an additional manner in which a judge may participate in sentence discussions. At the request of a party, and not on the judge's own initiative, a judge may state on the record the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense.

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. However, a defendant who pleads guilty or nolo contendere in reliance upon a judge's preliminary evaluation with regard to an appropriate sentence has an absolute right to withdraw the plea if the judge later determines that the sentence must exceed the preliminary evaluation. [Id. (Footnote omitted; emphasis supplied).]

At the plea hearing, the court informed defendant that his sentence would be within the "bottom half" of the recommended sentencing guidelines range but, the court also cautioned defendant that the guidelines range had not yet been scored. Knowing that information, defendant still elected to move forward and plead guilty. Indeed, defendant answered twice in the affirmative that he wished to continue with entering his guilty plea. If defendant did not understand what "bottom half of the guidelines" meant, the plea hearing was defendant's first opportunity to object, but he did not.

Defendant's guidelines range was properly calculated as 225 to 750 months. The middle of the guidelines was 375 months. The trial court adhered to and honored the *Cobbs* agreement, sentencing defendant to 360 to 720 months. Defendant did not raise any objection at the

sentencing hearing concerning these guidelines. We are satisfied that the trial court did not abuse its discretion in refusing to allow defendant to withdraw his guilty plea.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Mark J. Cavanagh

/s/ Christopher M. Murray