

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS ALEXANDER,

Defendant-Appellant.

UNPUBLISHED

March 12, 2009

No. 280990

Wayne Circuit Court

LC No. 07-006069-01

Before: Cavanagh, P.J., and Jansen and Meter, JJ.

PER CURIAM.

Defendant appeals by leave granted from his plea-based convictions of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to prison terms of two years for felony-firearm and 18 months to five years for felon in possession of a firearm, to be served consecutively.¹ We affirm but remand for reconsideration of the order requiring defendant to pay attorney fees. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with carrying a concealed weapon, felony-firearm, and felon in possession of a firearm; a fourth-offense habitual offender enhancement was also filed. The prosecutor offered to dismiss the concealed weapon charge and habitual offender enhancement if defendant pleaded guilty to felony-firearm and felon in possession of a firearm. Defendant received a *Cobbs*² preliminary evaluation of two years in prison for felony-firearm and no additional prison time for felon in possession. Defendant agreed with this evaluation, and defense counsel asked for reinstatement of the bond, stating that he had informed defendant that his sentence could be harsher if defendant did not appear for sentencing. The trial court reinstated the bond, but admonished defendant that, if he did not appear, the court would consider what he had done in the meantime in sentencing him. Defendant did not appear for the

¹ The trial court set forth a sentence of “18 months to two years” on the record, but this was clearly a misstatement because the felon-in-possession statute indicates that the offense is a five-year felony. MCL 750.224f(3). The judgment of sentence indicates a sentence of 18 months to five years.

² *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

original sentencing date, and other people presented a false death certificate in defendant's name and other false documents to the trial court. When defendant was apprehended and sentenced, the trial court sentenced defendant to 18 months to five years' imprisonment for the felon in possession plea-based conviction; there was no discussion of defendant withdrawing his plea.

Defendant argues that the trial court plainly erred by failing to inform him of his right to withdraw the plea when the trial court did not follow the *Cobbs* agreement. In *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993), the Michigan Supreme Court created the framework by which a trial court judge could, upon request, give a defendant a preliminary evaluation of the sentence in his case. The Court also established a framework by which a judge could change this evaluation:

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.* at 283.]

In this case, the trial court believed that defendant was involved in an attempted fraud upon the court, where false documents were presented to the court indicating that defendant had died. The court thus sentenced defendant to a prison term for the felon-in-possession conviction.

We reject defendant's argument that he was entitled to withdraw his plea because the judge violated the sentencing agreement. Indeed, a reading of the transcript makes clear that defendant agreed that additional prison time would potentially be imposed if he did not appear for sentencing. At the plea hearing, defense counsel stated:

As I have explained to him at length, I think for the court, even though he has to go to do the time, if he were to not reappear, if he were not to do what this court tells him as far as continuing his original bond, he would be in a position where this court would not have to abide by it's [sic] *Cobbs* agreement.

It could give him a one to five under the guidelines of five to 23, plus two years, which has serious sentencing ramifications within the department of corrections, when time would be stacked or consecutive.

The prosecutor stated:

Your Honor, I would ask the court to keep bond where it's at. He does have a lot of risk if he does not come back. But as the court is well aware, people have not come back when they have plead[ed] guilty to felony firearm.

So even though he does have a large ramification if he does not come back, he still has ramifications by not wanting to spend two years in prison. So I would ask the court to keep the bond where it's at.

Defense counsel replied:

Just to follow up, I respect what [the prosecutor] is saying. But many times in those cases what we are really looking at with a risk seems to be the highest where the plea has only been to felony firearm. So that sentence is going to be the same, regardless.

However, we have a different situation here, because this court has a great deal of flexibility on [the] felon in possession charge. It could sentence consecutive to prison time, were he not to abide.

The court then questioned defendant about his residence, and the following colloquy ensued:

THE COURT. I'm going to set a twenty thousand personal bond until sentencing. However, if you do not appear, you have already taken a plea.

DEFENDANT. Yes.

THE COURT. And I have said, although I said no additional prison time, you could have a penalty that it's going to be considered what you have done in the mean time [sic], and the authorities will find you. I'll give you the chance.

DEFENDANT. Yes. Thank you.

Under the circumstances, it is clear that defendant agreed to the plea of guilty with the understanding that if he did not appear for sentencing, the court might impose an additional penalty. Accordingly, we conclude that he is not entitled to withdraw his plea. See, e.g., *People v Kean*, 204 Mich App 533, 535-536; 516 NW2d 128 (1994).

Next, defendant argues that the trial court erred by ordering defendant to pay court costs and attorney fees without analyzing his ability to pay. We agree, with respect to the attorney fees. See *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004). Because *Dunbar* explicitly addresses only attorney fees, *id.* at 255-256, and because defendant cites no binding authority indicating that the same rationale applies concerning court costs, we decline to remand with respect to court costs.

Affirmed in part but remanded for reconsideration of the order directing defendant to pay attorney fees. We do not retain jurisdiction.

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter

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JANSEN, J. (*dissenting*).

I conclude that the trial court plainly erred by failing to inform defendant of the right to withdraw his guilty pleas. Therefore, I respectfully dissent.

Defendant was charged with several firearm-related offenses, and the prosecution filed a notice of intent to seek enhancement of defendant's sentences under the habitual offender statutes. See MCL 769.13. Thereafter, the prosecution offered to dismiss one of the criminal charges and the habitual-offender notice if defendant would plead guilty to possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and possession of a firearm by a felon (felon-in-possession), MCL 750.224f. Defendant received a *Cobbs*¹ preliminary evaluation of two years in prison for the felony-firearm conviction, with no additional prison time for the felon-in-possession conviction. Following defendant's pleas, defense counsel asked for reinstatement of the bond, stating that he had informed defendant that his sentence could be harsher if defendant did not appear for sentencing. The trial court reinstated the bond, but admonished defendant that if he did not appear, the court would consider what he had done in the meantime at the time of sentencing.

Defendant did not appear for the original sentencing date. Instead, other people presented a false death certificate bearing defendant's name and other false documents to the trial court. When defendant was ultimately apprehended and sentenced, the trial court sentenced him to 1½ to 5 years in prison for the felon-in-possession conviction. The court did not inform defendant of the right to withdraw his guilty pleas.

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

The trial court apparently believed that defendant was involved in a fraud upon the court by having false documents presented at the time of sentencing. Under these circumstances, I agree that the court was not bound by the *Cobbs* preliminary evaluation. However, because the trial court did not intend to follow the *Cobbs* evaluation, it was required to inform defendant that he had the absolute right to withdraw his pleas. *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). I conclude that the trial court plainly erred by failing to explain this right to defendant and by failing to give him the opportunity to withdraw his pleas. See *People v Killebrew*, 416 Mich 189, 209-210; 330 NW2d 834 (1982). Defendant should have been given the opportunity to withdraw his guilty pleas and to proceed to trial on the charges against him. Accordingly, I would reverse.

/s/ Kathleen Jansen