

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JODY J. CALVIN,

Defendant-Appellant.

UNPUBLISHED

December 10, 1999

No. 208787

Recorder's Court

LC No. 96-008402

Before: Gribbs, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of three counts of forgery, MCL 750.249a; MSA 28.446(1). Defendant originally received concurrent sentences of five years' probation, boot camp, and electronic monitoring after boot camp. However, the trial court later resentenced defendant to two to four years in prison.¹ We affirm defendant's conviction of one count of forgery, and pursuant to the prosecutor's confession of error², we reverse and vacate defendant's convictions for two additional counts of forgery. In regard to defendant's sentence, we reverse and vacate the present sentence and reinstate the original sentence.

I

Defendant's first argument on appeal is that the trial court lacked authority to resentence him. We agree. The trial court initially sentenced defendant to concurrent sentences of five years' probation, boot camp, and electronic monitoring after boot camp. However, the trial judge subsequently concluded that defendant was not eligible for boot camp and resentenced defendant in the amended judgment of sentence to two to four years in prison. Pursuant to MCR 6.429(A), a court may correct an invalid sentence but lacks the authority to modify a valid sentence after it has been imposed. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997); *People v Wybrecht*, 222 Mich App 160; 564 NW2d 903 (1997).

MCL 771.3b; MSA 28.1133(2) provides that certain conditions must be met before a defendant can be eligible for a special alternative incarceration program: Subsection 2(a) states that a person is not eligible for a special alternative incarceration program if the person has served a sentence

of imprisonment in a state correctional facility. Furthermore, the statute mandates that if a person is sentenced to an alternative program and then does not meet the requirements of subsection (2), the probation order must be rescinded and the defendant shall be resentenced. MCL 771.3b(5); MSA 28.1133(2)(5).

As noted by the trial court, defendant had a case pending against him in Oakland County at the time of the original sentencing. Because of the pending charge, the trial court resentenced defendant under the mistaken assumption that he was not eligible for probation and boot camp. However, MCL 771.3b; MSA 28.1133(2) does not preclude boot camp if a case is pending against defendant. Defendant had not served a previous sentence. Therefore, at the time he was originally sentenced, defendant was eligible for boot camp. Accordingly, we conclude that because defendant's original sentence was valid, the trial court lacked authority to resentence defendant. Defendant's present sentence is reversed and vacated and defendant's original sentence is reinstated. *Wybrecht, supra*.

II

Defendant's second argument on appeal is that there was insufficient evidence to support his convictions of three counts of forgery. We agree in part. We affirm defendant's conviction and sentence of one count of forgery but reverse his convictions for two additional counts of forgery.

In reviewing the sufficiency of the evidence following a bench trial, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995), citing *People v Petrella*, 424 Mich 221, 268; 380 NW2d 11 (1985). However, this Court should not interfere with the trial court's role of determining the weight of evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692, 698 (1996).

Here, the prosecutor concedes that there was not sufficient evidence to prove that defendant committed three counts of forgery. Instead, the prosecution argues that there was sufficient evidence to convict defendant of only one count of forgery, because the proofs established only one instance of possession of tools by defendant to make fraudulent transaction devices. We agree.

MCL 750.249a; MSA 28.446(1) provides:

A person who casts, stamps, engraves, makes, or mends, or knowingly has in his or her possession a mold, pattern, die, puncheon, engine, press, or other tool or instrument adapted and designed for making a false, forged, altered, or counterfeit financial transaction device, as defined in section 157m, with the intent to use or employ or cause or permit the same to be used or employed in making a counterfeit financial transaction device is guilty of a felony.

In this case, Charlotte Noel was charged with presenting a counterfeit check at a store. She identified defendant as providing her with the counterfeit check. After Investigator Parker obtained a search warrant and searched defendant's home, several items were found that could lead a trier of fact to reasonably conclude that defendant had committed forgery.

According to Investigator Parker, defendant indicated that his bedroom was in the basement and that the things in the basement belonged to him. An accordion-type file was found in the bedroom. It contained a file labeled "good ones," which contained a number of credit cards, financial transaction devices, and other items with several individuals' names on them. Also in the files were drivers' licenses and American Express cards in several individuals' names, other than defendant's name. Several drivers' licenses and credit cards were reported stolen. Three individuals all testified that items seized from the green folder belonged to them and were previously stolen. Investigator Parker also discovered a laminating machine, a paper cutter, and a list of persons with their social security numbers.

It is reasonable to conclude that the paper cutter and laminating machine could be used to create credit cards and identification cards. Defendant kept other forms of identification in the folder, in addition to credit cards, that could be used to perpetuate the use of a stolen credit card. Furthermore, even though there was evidence that other people had access to the basement bedroom, defendant told Investigator Parker that his bedroom was located in the basement. Viewed in the light most favorable to the prosecution, there was sufficient evidence to convict defendant of a single count of forgery.

Moreover, contrary to defendant's contention, the verdict was not against the great weight of the evidence. Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds by *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). The test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). This issue usually involves matters of credibility or circumstantial evidence, *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765 (1989), but if there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder, *Lemmon*, *supra* at 642-643.

In addition to the above evidence presented by the prosecution, conflicting testimony was also presented that several people other than defendant had access to the basement. Defendant testified that when he slept at his parents' home, he slept in an upstairs bedroom or various other locations. Defendant also denied ever seeing the green accordion-type folder and denied knowing about any of the items found in the folder. As mentioned above, if there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *Lemmon*, *supra*. It cannot be said that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Gadomski*, *supra*.

III

Defendant's final argument on appeal is that his sentence of two to four years in prison is not proportionate. In view of our disposition of defendant's first issue, we conclude that this question is moot.

Defendant's conviction of one count of forgery is affirmed; defendant's convictions of two additional counts of forgery are reversed and vacated. Defendant's sentence is reversed and vacated, and the original sentence reinstated.³

/s/ Roman S. Gibbs

/s/ William B. Murphy

/s/ Richard Allen Griffin

¹ On resentencing, the trial court imposed a sentence of four to ten years. However, without explanation or a hearing, the judgment of sentence was "amended" on October 28, 1997, to change the sentence to two to four years.

² The prosecutor concedes error in his brief, although a formal confession of error has not been filed in accordance with MCR 7.211(C)(7).

³ Because defendant has served a two-year prison sentence, the only portion of the original sentence that remains is the order for probation.