

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEVIN P. MCELROY,

Defendant-Appellant.

UNPUBLISHED

April 21, 2000

No. 217800

Kent Circuit Court

LC No. 94-001346-FC

Before: Gribbs, P.J., and Doctoroff and T.L. Ludington*, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying his motion for relief from judgment. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant pleaded guilty to armed robbery, MCL 750.529; MSA 28.797, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), before a district court judge acting as a circuit court judge. Defendant was sentenced to consecutive terms of ten to twenty-five years and two years. He was not sentenced by the circuit court judge to whom the case was assigned, as was his co-defendant. Defendant claimed an appeal, arguing that the trial court abused its discretion by denying his motion to withdraw his plea, that he was denied the effective assistance of counsel, that he was denied due process by the trial court's failure to adequately respond to alleged inaccuracies in the sentencing report, that the guidelines were improperly scored, and that his sentence was disproportionate. In *People v McElroy*, unpublished opinion per curiam of the Court of Appeals, issued July 11, 1995 (Docket No. 177633), another panel of this Court rejected defendant's arguments and affirmed his convictions and sentences.

Defendant moved for relief from judgment in the trial court, arguing that had he been sentenced by the circuit judge to whom the case was originally assigned, the sentencing guidelines would have been scored differently, and his sentence for armed robbery would have been proportionate. The trial court denied the motion, finding that defendant failed to establish the required good cause and actual prejudice. MCR 6.508(D)(2)(3)(b).

* Circuit judge, sitting on the Court of Appeals by assignment.

A defendant must establish that he is entitled to the relief requested in a motion for relief from judgment. MCR 6.508(D). If an argument raised by the defendant has been raised and rejected in a prior appeal or proceeding under subchapter 6.500, he is not entitled to relief unless a retroactive change in the law has undermined the prior decision. MCR 6.508(D)(2). If an issue was not but could have been raised in a prior appeal, the defendant must show good cause for the failure to raise the issue and actual prejudice from the alleged error. In the case of a challenge to the sentence, actual prejudice means that the sentence is invalid. MCR 6.508(D)(3)(a)(b)(iv).

On appeal, defendant argues that he was entitled to be sentenced by the same judge who sentenced his co-defendant, MCR 8.111(D)(1), and that because he was not, his sentences are invalid. Defendant asserts that his belated discovery that his co-defendant's sentencing judge had scored the guidelines differently than did his sentencing judge, or, in the alternative, ineffective assistance rendered by appellate counsel, constituted good cause for the failure to raise this issue in his initial appeal. MCR 6.508(D)(3)(a). Moreover, defendant claims that the disproportionate sentence he received as a result of his sentencing judge scoring the guidelines as he did constituted actual prejudice. MCR 6.508(D)(3)(b)(iv).

We affirm. Defendant's sentencing by a circuit court judge other than the judge who sentenced his co-defendant violated MCR 8.111(D)(1). This issue could have been but was not raised in defendant's appeal of right. Defendant has failed to demonstrate either good cause for the failure to raise the issue in his appeal of right, or actual prejudice. Appellate counsel's failure to raise every conceivable issue on appeal does not automatically constitute ineffective assistance. *People v Reed*, 449 Mich 375, 387-388; 535 NW2d 496 (1995). The assignment of co-defendant's case to another circuit court judge was disclosed during defendant's plea-taking and sentencing hearings. Defendant did not object to being sentenced by another judge. Moreover, the imposition of defendant's sentences by another judge did not result in actual prejudice. While as a general rule a defendant is entitled to be sentenced by the judge who accepted his plea, resentencing is not required if the sentencing judge was able to impose an individualized sentence. *People v Pierce*, 158 Mich App 113, 115-116; 404 NW2d 230 (1987). In the instant case, the record indicates that the sentencing judge thoroughly familiarized himself with defendant's case, and was able to impose an individualized sentence. Defendant's argument that the sentencing guidelines would have been scored differently and he would have received a more lenient sentence had he been sentenced by the same judge who sentenced his co-defendant is based entirely on speculation. Furthermore, if a sentence is proportionate, an error in the calculation of the guidelines provides no basis for relief. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998). In *McElroy, supra*, another panel of this Court specifically held that defendant's ten-year minimum term for the conviction of armed robbery was proportionate. Defendant is not entitled to resentencing.

Affirmed.

/s/ Roman S. Gibbs
/s/ Martin M. Doctoroff
/s/ Thomas L. Ludington