

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL PATRICK BROWN,

Defendant-Appellant.

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UNPUBLISHED

April 24 2001

No. 221455

Bay Circuit Court

LC No. 99-001111-FH

Before: Cavanagh, P.J., and Markey and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of delivery of cocaine, less than fifty grams, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). The trial court sentenced defendant to 120 to 240 months' imprisonment and later amended that sentence to clarify that the sentence was to be served consecutively to an existing sentence for which defendant was on parole. Defendant appeals by right. We affirm.

Defendant first challenges several references to the areas where he was arrested as "The Hood," and the introduction of evidence that he was present at a previous undercover drug buy and that his cousin was a drug dealer. Defendant argues that this information was irrelevant, prejudicial, and to the extent that it involved prior bad acts, violated MRE 404(b). We disagree.

Generally, the role and responsibility of a prosecutor differs from that of other attorneys because the prosecutor's duty is to seek justice and not merely to convict. *People v O'Quinn*, 185 Mich App 40, 43; 460 NW2d 264 (1990). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *Id.* A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999).

A review of the record indicates that the challenged references to "The Hood" were simply colloquialisms describing the area known to law enforcement officers as "Sector 20," and that both parties used the terms interchangeably. Moreover, the reference was permissible because it related to the prosecutor's theory that the transaction took place in a high crime area. The reference was not an improper attempt designed to appeal to the fears and prejudices of the jurors. *People v Bahoda*, 448 Mich 261, 284-285; 531 NW2d 659 (1995). Likewise, any

impropriety could have been cured by a timely cautionary instruction. *People v Cooper*, 236 Mich App 643, 652; 601 NW2d 409 (1999).

Defendant also assigns as error several questions posed by the prosecutor that he contends were irrelevant, were highly prejudicial, and denied him a fair trial. Alternatively, defendant argues that this testimony could be considered proof of prior bad acts, and its admission violated the procedures established in *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). The disputed questions arose as a result of a tape recording – admitted into evidence – of the drug transaction for which defendant was convicted.

A review of the record indicates that the tape was direct evidence of the circumstances of the crime and was material to the question of defendant's ultimate guilt. Because it was generally inaudible and included colloquiums, the prosecutor had to explore the language and contents of the tape. Defendant's denial of knowledge of the contents of the tape put its reliability and content in issue, and the prosecutor had to rehabilitate its reliability by exploring the wider circumstances surrounding the undercover buy. Defendant cannot complain about this matter because the tape's content was made relevant by defendant's denial of the tape's contents and the commission of the crime. See *People v Knapp*, 244 Mich App 361, 377-378; NW2d \_\_\_\_ (2001) (a defendant cannot complain about the introduction of evidence if the evidence was made relevant by the defendant raising the issue at trial); see, also, *People v Starr*, 457 Mich 490, 501; 577 NW2d 673 (1998) (a defendant's general denial of the crime places all elements of the charged offense at issue).

With regard to defendant's assertion that certain testimony introduced at trial violated the procedures established in *VanderVliet*, *supra*, we find this claim to be meritless. First, Officer Potts' testimony that he saw defendant seated at a bar during an earlier "undercover buy" did not prejudice defendant because there was no allegation that defendant participated in or was associated with that drug transaction. It can reasonably be inferred that this testimony was offered to establish defendant's identity as the person who went with the informant in the present case. In any event, even if this testimony and the other complained-of testimony was admitted in error, no reversal is required. In light of the testimony of the informant, the corroborating evidence of the tape recording, and the police officers' testimony regarding their observations while trailing defendant and the informant, the error was not outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant next argues that a formal resentencing was required before the trial court could amend the judgment of sentence to make the present sentence consecutive to that imposed for his parole violation. This, defendant contends, was in violation of the double jeopardy protections against multiple punishments. We disagree.

Whether the court could amend defendant's sentence without a hearing is a question of law that we review de novo. *People v Thenghkam*, 240 Mich App 29, 69; 610 NW2d 571 (2000). Authority to modify a sentence is vested in the provisions of MCR 6.429(A), which allows the court to correct an invalid sentence after sentencing; however, the court may not modify a valid sentence after it has been imposed except as provided by law. MCR 6.429(A);

*People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997); *People v Gerry Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994). The *Miles* Court defined invalid sentences:

A sentence is invalid when it is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of law, or when it conforms to local sentencing policy rather than individualized facts. This Court has also repeatedly held that a sentence is invalid if it is based on inaccurate information. [*Miles, supra* (citations omitted).]

Here, defendant's original judgment of sentence was silent regarding its relationship to the sentence imposed for his parole violation. Generally, consecutive sentences can only be imposed if specifically authorized by statute. *People v Lee*, 233 Mich App 403, 405; 592 NW2d 779 (1999). Consecutive sentencing is mandatory where, as here, a defendant is convicted of a crime while on parole. MCL 768.7a(2); MSA 28.1030(1)(2); *People v Chavies*, 234 Mich App 274, 280; 593 NW2d 655 (1999). When setting an indeterminate sentence, the trial court need not consider the length of an associated or underlying consecutive or concurrent sentence. *Miles, supra* at 95.

In the present case, the trial court was mandated by MCL 768.7a(2); MSA 28.1030(1)(2) to impose a consecutive sentence on defendant, and failure to so indicate on the judgment of sentence resulted in its invalidation based on a misconception of law. *Miles, supra* at 96. Consequently, it was within the powers of the trial court to resentence defendant without impacting defendant's constitutional protections against double jeopardy. *Thenghkam, supra* at 69-70.

Our Supreme Court has consistently and summarily disposed of decisions of this Court affirming changes in invalid sentences by concluding that it was "improper to change concurrent sentences to consecutive ones without a resentencing hearing." *People v Williams*, 462 Mich 909; 613 NW2d 725 (2000); see, also, *People v Burton*, 459 Mich 876; 585 NW2d 303 (1998). However, the present case is factually distinguishable from those authorities that mandate remand and falls within the exception allowed by *People v Kaczorowski*, 190 Mich App 165; 475 NW2d 861 (1991).

In *Miles, supra* at 98-99, our Supreme Court explained that modification of invalid sentences is sometimes ministerial in nature and does not require a resentencing hearing, while at other times, these modifications do require the due process protections afforded by a resentencing hearing. The Court in *Miles, supra* at 100, concluded that an inaccuracy pertaining to the defendant's mandatory enhancement for felony-firearm was not purely ministerial because the accompanying armed robbery conviction was based on inaccurate information in the presentence report and thus, it was error to resentence without a hearing.

Importantly, the Court noted in its conclusion that because the sentencing court was bound by the mandatory nature of the enhancement provisions of the felony-firearm statute,

it is unnecessary to resentence the defendant for the felony-firearm sentence conviction on remand. All challenges to the felony-firearm sentence are moot,

and the court's failure to afford defendant a resentencing hearing when it amended the sentence was harmless error. [*Miles, supra* at 101.]

Essentially, the Court implicitly held that if the sentencing change was mandatory, any change was ministerial and did not require a resentencing hearing because due process is required only where there is a non-ministerial modification of an invalid sentence. *Id.* at 98-99.

In *People v Roberto Thomas*, 223 Mich App 9, 11; 566 NW2d 13 (1997), this Court was faced with the similar issue of whether an erroneously imposed concurrent sentence could be corrected by issuing an amended judgment of sentence and held that concurrent sentences could not be changed to consecutive sentences without first conducting a resentencing. The Court reasoned that resentencing was required because defendant's sentence as originally imposed was being drastically increased through the imposition of consecutive terms. *Id.* at 15. Moreover, given the significant effect of this conversion, the Court maintained that the parties should have the opportunity to inform the court of their positions on sentencing in light of the changed circumstances. *Id.* at 16.

In *Thomas, supra* at 13 n 1 the Court questioned, but did not overrule *Kaczorowski, supra*. In *Kaczorowski, supra* at 174, the defendant argued that he was entitled to resentencing because the concurrent sentences imposed were invalid due to the requirement that by law they were to run consecutive to a prior sentence for a conviction for which the defendant was on parole. The trial court modified the sentences to run consecutive to the prior conviction and articulated a finding that "even if it had been aware that consecutive sentencing was required, this consideration would not have affected the length of the sentences in the present case." *Id.* This Court affirmed the modification, reasoning that because it was clear that the court would not have sentenced defendant any differently had it known that his sentences were to run consecutively, resentencing was unnecessary and would have merely wasted the court's time and resources. *Id.* This Court in *Thomas* recognized the difficulties presented by the *Kaczorowski* trial court's after-the-fact statement that the sentence imposed would not be different, and its potential infringement on a defendant's due process rights due to the largely unreconciled position that the pre- and post-amendment sentences were effectively different. *Id.* at 13-14 n 1.

In *People v Mapp*, 224 Mich App 431, 432; 569 NW2d 523 (1997), this Court was again presented with the question whether a formal resentencing was required by the trial court to convert concurrent sentences into consecutive ones. The *Mapp* Court found the case indistinguishable from *Thomas*, and felt constrained by Administrative Order No. 1996-4<sup>1</sup> to affirm the sentence. *Id.* at 432-433. Notwithstanding, the Court in dicta maintained that the only invalid portion of the defendant's sentence was that it ordered concurrent rather than consecutive

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<sup>1</sup> The provisions of Administrative Order No. 1996-4 dealing with conflict resolution were incorporated into the court rules as MCR 7.215(H) and require a panel that follows a prior published decision only because it was required to do so by subrule MCR 7.215(H)(1) to indicate so in the text of its opinion, cite to the rule, and explain its disagreement with the prior decision. MCR 7.215(H)(2). Publication of the opinion is mandatory. MCR 7.215(H)(2).

sentences and stated its belief that the *Thomas* Court erred in resolving the case because of its mistaken belief that consecutive sentences would effectively increase the minimum sentence that defendant Thomas would have to serve. *Id.* at 434. The *Mapp* Court reasoned that the rule developed in *Miles* was that a sentencing court need not consider the length of a consecutive or concurrent mandatory sentence when setting an indeterminate sentence and that each sentence involves a separate determination. *Mapp, supra*. The Court also noted that under *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996), the principle of proportionality does not consider the cumulative effect of consecutive sentences. *Mapp, supra*.

The *Mapp* Court also considered as error the *Thomas* Court's finding that "resentencing was the 'long established remedy'" in these circumstances and noted that various panels have split on the issue whether resentencing is required where a trial court erroneously imposes a concurrent sentence. *Id.* at 435, citing *People v Cuppari (After Remand)*, 214 Mich App 633, 638; 543 NW2d 68 (1995) (remanding for modification of the judgment of sentence); *People v Jones*, 207 Mich App 253, 260; 523 NW2d 888 (1994) (remanding for resentencing); *Kaczorowski, supra* at 174 (no resentencing necessary, harmless error); *People v McKee*, 167 Mich App 258, 262; 421 NW2d 655 (1988) (remanding for resentencing); *People v Doss*, 122 Mich App 571, 581; 332 NW2d 541 (1983) (remanding for resentencing).

The *Mapp* Court concluded its articulation of reasons for disagreeing with *Thomas* by saying that based on the reasons outlined, it would (if not prohibited by Administrative Order No. 1996-4) affirm the trial court's decision because the trial court's original judgment of sentence was not based on incorrect information, and because the length of defendant's sentence was not invalid. *Mapp, supra* at 436.

Defendant cites as authority several cases that are factually distinguishable from those presented here. The sentences overturned in those cases were all valid and not subject to amendment by the court. MCR 6.429(A); *Thomas, supra* at 393; *Miles, supra* at 96. Moreover, defendant premises his argument on the erroneous assumption that his sentence was increased by the requirement that it run consecutively to the sentence imposed for his parole violation and that this violates the double jeopardy provisions of our federal and state constitutions. While the aggregate time incarcerated will undoubtedly increase, a "second sentence" was not imposed because under *Miles, supra* at 95, sentencing courts are not required to consider the effect of a mandatory sentence when setting a consecutive indeterminate sentence. Rather, each sentence involves a separate determination. *Id.* at 101. Here, if the trial court had convened a resentencing hearing before ordering that the sentence run consecutively, defendant would be unable to mount a double jeopardy constitutional challenge to his new sentencing scheme. Consequently, this case is distinguishable from *Thomas, supra*, and is more analogous to *Miles* because it presents the question of mandatory consecutive sentencing.

The trial court was aware that defendant was on parole at the time he committed the felony for which he was being sentenced. Defendant's presentence investigation report also conveyed to the trial court that he was on parole at the time of the offense. However, the report also states that "[n]o letter was received from the Prosecuting Attorney's Office regarding possible consecutive sentencing." This would have provided some notice to the court that defendant's sentence was subject to consecutive sentencing. The order amending judgment of

conviction indicates that the trial court was aware and intended that the sentences be served consecutively and that failure to so state was simply an administrative oversight.

Because the record supports the position that the trial court knew that the sentence was to run consecutively and the order implicitly indicated that the sentence would remain the same on remand, this case is factually analogous to the circumstances presented in both *Miles, supra*, and *Kaczorowski, supra*. Accordingly, this Court concludes that the decision of the trial court should be affirmed because the single sentence challenged requires mandatory consecutive sentencing and, consequently, under *Miles*, the amendment is purely ministerial and any error would be harmless. The trial court's sua sponte order amending the judgment of sentence is affirmed.

Finally, defendant raises several sentencing issues that we conclude are without merit. Defendant primarily challenges whether the court properly articulated its reasons for the sentence imposed and questions its proportionality.

Generally, to facilitate appellate review, the sentencing court must articulate on the record the criteria considered and the reasons supporting its decision regarding the sentence imposed. MCR 6.425(D)(2)(e); *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). Failure to articulate the reasons for sentencing requires remand for a statement of the reasons sentence was imposed. *People v Triplett*, 432 Mich 568, 569; 442 NW2d 622 (1989). Permissible considerations include the circumstances surrounding the criminal behavior, the defendant's social and personal history, the defendant's attitude toward his criminal behavior, and defendant's criminal history. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). These factors should be balanced against the objectives of imposing sentence, which include: (1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses. *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972). However, there is no requirement that the trial court expressly mention each goal when imposing sentence. *Rice, supra* at 446.

A review of the record indicates that the trial court considered several of the applicable criteria in arriving at its sentence determination. The court considered defendant's PSIR, his conviction as a fourth felony offender, the nature of his prior felonies, the fact that the offense was committed while on active parole supervision, and that his parole was terminated on being sentenced to prison on two new felony drug charges. Also considered was his failure to attend treatment programs, poor reporting habits, and absconding from probation supervision. The trial court concluded that all attempts to rehabilitate defendant had failed because of his lack of cooperation, and the court consequently considered prison the only available alternative. The trial court's consideration of the various criteria balanced against the sentencing objectives that included the probability of rehabilitation and the need to protect society was sufficient to satisfy the articulation requirements of MCR 6.425(D)(2)(e). *Fleming, supra*.

Similarly, defendant's sentence was proportionate because the trial court properly articulated reasons demonstrating that the sentence was tailored to the circumstances of the offense and the offender. Here, defendant's sentence was warranted under the circumstances of the offense and the offender. Where, as here, a review of defendant's underlying felony and criminal history demonstrates that he is unable to conform his conduct to the law, a sentence

within the statutory limits is proportionate. *People v Hansford* (After Remand), 454 Mich 320, 326; 562 NW2d 460 (1997).

Likewise, because defendant's sentence was proportionate, it survives constitutional scrutiny, and we cannot conclude that defendant's sentence was cruel or unusual. *People v Bullock*, 440 Mich 15, 32, 37; 485 NW2d 866 (1992) (a sentence that is "grossly disproportionate" will be considered "cruel or unusual"); see, also, *People v Lorentzen*, 387 Mich 167; 194 NW2d 827 (1972).

We affirm.

/s/ Mark J. Cavanagh

/s/ Jane E. Markey

/s/ Jeffrey G. Collins