STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED September 7, 2001
V	No. 227845 Genesee Circuit Court
KENYA HALL, Defendant-Appellee.	LC No. 88-040085-FC

Before: Doctoroff, P.J., and Murphy and Zahra, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court for consideration as on leave granted. *People v Hall (Hall III)*, 462 Mich 878; 613 NW2d 722 (2000). Plaintiff appeals the trial court's decision to grant defendant's motion for relief from judgment and vacate defendant's conviction of conspiracy to commit second-degree murder. We affirm.

I

On the evening of September 8, 1988, defendant was drinking at an apartment complex in Flint with Monroe Mann, Cory Straham, Reginald Nailer, and Reginald Griggs. Earlier that day, Straham argued with the victim, Nailer, who apparently sold Straham bad drugs. Defendant, Mann, Straham, and Griggs discussed their intention to take Nailer away and "beat him down." Defendant claimed that he believed the plan was only to beat up Nailer.

Griggs and Straham, both of whom were armed with handguns, persuaded Nailer to get in a car with them on the premise that they were going to get "grass." Defendant, who also had a gun, went along as the group drove to Howard Estates. All four men got out of the car and walked through a hole in a fence. Griggs said, "Rush him now," but before they could rush Nailer, Straham pulled his gun and fired at Nailer. After an initial misfire, Straham fired three more times, then got in the car along with defendant and Griggs and drove away. The police were called to investigate a possible shooting and found Nailer unconscious at the scene. Nailer died from a bullet wound to the chest before he arrived at the hospital.

Straham and defendant were arrested and tried as codefendants. On April 21, 1989, a jury found defendant guilty of second-degree murder, MCL 750.317, and conspiracy to commit second-degree murder, MCL 750.157a(a); MCL 750.317. He was sentenced to concurrent terms

of twenty-five to forty years in prison for the second-degree murder conviction and twenty-five to forty years in prison for the conspiracy to commit second-degree murder conviction.

Defendant appealed as of right and filed his brief on appeal on March 12, 1990, arguing only that the trial court's jury instructions to the initially deadlocked jury were unduly coercive. On January 22, 1991, we decided *People v Hammond*, 187 Mich App 105; 466 NW2d 335 (1991), holding that conspiracy to commit second-degree murder was a nonexistent offense. *Id.* at 109. Defendant's appellate brief did not raise the issue of the validity of his conviction of conspiracy to commit second-degree murder, nor did defendant seek to supplement his arguments on appeal after *Hammond* was released. On November 15, 1991, we issued a memorandum opinion affirming defendant's convictions, concluding that defendant was not entitled to relief because manifest injustice did not result from the trial court's jury instructions. *People v Hall (Hall I)*, unpublished memorandum opinion of the Court of Appeals, issued November 15, 1991 (Docket No. 118022). The Supreme Court denied defendant's application for leave to appeal. *People v Hall (Hall II)*, 439 Mich 1016; 485 NW2d 508 (1992).

Defendant later filed a motion in the trial court for relief from judgment. On July 30, 1999, the trial court granted in part and denied in part defendant's motion. The court held that defendant was provided with the effective assistance of counsel and denied defendant's motion regarding that issue. However, the trial court set aside defendant's conviction for conspiracy to commit second-degree murder because *Hammond*, *supra*, was decided while defendant's prior appeal was pending. In granting this part of defendant's motion, the court relied on MCR 6.508(D)(2), concluding that defendant was entitled to relief from judgment because there was a change in the law affecting a prior decision of the trial court.

On September 1, 1999, plaintiff filed a delayed application for leave to appeal that we denied. *People v Hall*, unpublished order of the Court of Appeals, entered October 13, 1999 (Docket No. 221906). Plaintiff sought leave to appeal with our Supreme Court. In lieu of granting leave to appeal, on June 13, 2000, the Supreme Court remanded the case to this Court for consideration as on leave granted. *Hall III*, *supra*. In its order remanding the case, the Supreme Court directed the parties to

> include discussion of the good cause and actual prejudice provisions of MCR 6.508(D), whether the defendant's request for an instruction on conspiracy to commit second-degree murder constitutes a waiver or forfeiture of his right to raise this issue on appeal, and whether there can be a conspiracy to commit second-degree murder where the defendant and another agree to commit great bodily harm against the victim, but the victim dies. *Hall III*, *supra*.

II

Plaintiff first argues that *Hammond*, *supra*, should be overturned and that conspiracy to commit second-degree murder exists as an offense where a defendant and another agree to commit great bodily harm against a victim and the victim dies as a result. This issue is a question of law that we review de novo. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

To facilitate our analysis of this issue, we begin with a brief review of the pertinent case law. In *People v Hamp*, 110 Mich App 92; 312 NW2d 175 (1981), we first addressed whether conspiracy to commit second-degree murder is a legitimate crime. In *Hamp*, the defendant argued that the trial court erred by failing to instruct the jury on conspiracy to commit second-degree murder. We first noted that prior planning and agreement are requisite elements of the crime of conspiracy, and that, to prove conspiracy to commit murder, it must be proven that the alleged conspirators had the intent required for murder and foreknowledge of that intent. *Id*. at 103. Because planning and foreknowledge imply premeditation and deliberation, we found that these elements of conspiracy are compatible with the elements of first-degree murder, but that they are inconsistent with second-degree murder. "One does not 'plan' to commit an 'unplanned' substantive crime." *Id*. We concluded that the offense of conspiracy to commit first-degree murder does not include a lesser offence of conspiracy to commit second-degree murder, and found no error in the trial court's failure to instruct on the latter offense. *Id*.

Following *Hamp*, other panels of this Court reached a similar conclusion that the elements of conspiracy are inconsistent with the elements of second-degree murder.[1] We also reached the opposite conclusion in one case, holding that conspiracy to commit second-degree murder is a lesser included offense of conspiracy to commit first-degree murder. *People v Owens*, 131 Mich App 76, 83-84; 345 NW2d 904 (1983). However, our decision in *Owens* was vacated by the Supreme Court. *People v Owens*, 430 Mich 876; 423 NW2d 39 (1988). In *People v Gilbert*, 183 Mich App 741, 749-750; 455 NW2d 731 (1990), we renewed our conclusion that conspiracy to commit second-degree murder does not exist as a criminal offense and held that it was error for a trial court to instruct a jury on this nonexistent crime. *Id*. at 748-750.

In *Hammond*, *supra*, we adopted the reasoning of *Gilbert* that conspiracy is a specific intent crime that punishes the actual advance planning and agreement to perform the substantive criminal acts, whereas second-degree murder does not require premeditation and may not require a specific intent to kill. *Id*. at 107-108. The defendant in *Hammond* sought to withdraw his plea of guilty to conspiracy to commit second-degree murder, arguing that there was no such crime. We agreed and vacated his conviction and sentence, holding that "the state has no legitimate interest in securing a conviction of a nonexistent offense." *Id*. at 106-107. See also *People v Buck*, 197 Mich App 404, 427-428; 496 NW2d 321 (1992), rev'd in part on other grounds sub nom *People v Holcomb* 444 Mich 853 (1993).

Plaintiff urges that we "re-examine" our holding in *Hammond* because it conflicts with Supreme Court precedent and does not comport with the "majority rule" that conspiracy to commit second-degree murder is a valid criminal offense. Contrary to plaintiff's argument, our Supreme Court has yet to address this issue.[2] Further, even if other jurisdictions reached the

[1] See *People v Fernandez*, 143 Mich App 388, 393-395; 372 NW2d 567 (1985), remanded on other grounds 427 Mich 321 (1986); *People v Jackson*, 114 Mich App 649, 665-667; 319 NW2d 613 (1982), rev'd on other grounds sub nom *People v Bladel (After Remand)*, 421 Mich 39 (1984).

[2] As we noted in *Gilbert*, *supra* at 749, the Supreme Court expressly declined to determine whether conspiracy to commit second-degree murder is a lesser included offense of conspiracy to

(continued…)

conclusion that a defendant can be legitimately charged with conspiracy to commit second-degree murder, those holdings would be merely persuasive authority and would not be binding on this Court. See *People v Jamieson*, 436 Mich 61, 86; 461 NW2d 884 (1990). By contrast, because *Hammond* was decided after November 1, 1990, it is binding precedent and we are without authority to reach a contrary result. MCR 7.215(H)(1). Although we can question our holding in *Hammond* through the procedure provided in MCR 7.215, we decline to do so because we agree with the panel in *Hammond* that it is not logically consistent to be found guilty of planning an unplanned crime.

Plaintiff also argues that our holding in *Hammond* should not apply where the defendant's conviction for second-degree murder is based on an intent to cause great bodily harm. In addition to the "unplanned intent to kill" form of second-degree murder, the crime can also be found where a defendant merely intends to cause great bodily harm, or commits an act in wanton and wilful disregard of the probability that the act will cause death or great bodily harm. *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998). Therefore, if a group of defendants conspire to commit great bodily harm or conspire to act in wanton and wilful disregard of the probability of death or great bodily harm, their completed act would constitute second-degree murder if the victim died. However, the defendants in this situation could not be found guilty of conspiring to commit murder, but, rather, would only be guilty of conspiracy to commit some form of assault. *People v Jackson*, 114 Mich App 649, 666-667; 319 NW2d 613 (1982), rev'd on other grounds sub nom *People v Bladel (After Remand)*, 421 Mich 39 (1984).

In *Jackson* we concluded that

> an agreement to assault could never be elevated to conspiracy to commit second-degree murder—even where the assault does, in fact, result in the death of the victim. Where there is an agreement to assault, the conspiracy would be complete before any overt act occurred. If the assault resulted in an "unplanned" death, the conspirators could be found guilty of conspiracy to assault and of the substantive crime of second-degree murder where the requisite malice arose from the assault and the resultant death.
>
> * * *
>
> If the defendant had agreed with his coconspirators to murder, the completed conspiracy crime would have been conspiracy to commit murder in the first degree because of the planning and premeditation involved. On the other hand, if defendant had agreed with his coconspirators to assault his victim, and the coconspirators did not intend for the victim to die, even though death did in fact result, the conspiracy crime would have involved some sort of assault offense which would have been completed before the victim's death occurred. [*Id*. at 667.]

(…continued)

commit first-degree murder. *People v Fernandez*, 427 Mich 321, 342; 398 NW2d 311 (1986).

It is apparent that a defendant cannot be charged with conspiracy to commit second-degree murder where he agrees with another to commit great bodily harm against a victim, but the victim ends up dying from the assault. Instead, a defendant may be charged with second-degree murder and conspiracy to commit assault with intent to do great bodily harm or some other form of assault. Therefore, we find no error in the trial court's decision in this case to vacate defendant's conviction of conspiracy to commit second-degree murder.

III

Plaintiff also asserts that the trial court erred in granting defendant's motion for relief from judgment because defendant did not demonstrate the "good cause" and "actual prejudice" required by MCR 6.508(D)(3) in order to obtain a relief from judgment. We review a trial court's grant of a motion for relief from judgment for an abuse of discretion. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001).

A trial court may not grant a motion for relief from judgment if the defendant alleges grounds for relief which were decided against him in a prior appeal or proceeding, unless the defendant establishes that a retroactive change in the law undermined the prior decision. MCR 6.508(D)(2). Additionally, a trial court may not grant a motion for relief from judgment that alleges grounds for relief, other than jurisdictional defects, that could have been raised on appeal or in a prior motion, unless the defendant demonstrates both good cause for failure to raise the issue on appeal or in a prior motion and actual prejudice from the alleged irregularities that support the claim for relief. MCR 6.508(D)(3). "Good cause" is established by proving the ineffective assistance of counsel or by showing some external factor prevented counsel from previously raising the issue. *People v Reed*, 449 Mich 375, 378; 535 NW2d 496 (1995) (Boyle, J.). Actual prejudice exists where

> (i) in a conviction following a trial, but for the alleged error, the defendant would have had a reasonably likely chance of acquittal;
>
> * * *
>
> (iii) in any case, the irregularity was so offensive to the maintenance of sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case; . . . [MCR 6.508(D)(3)(b).]

"Postconviction relief is provided for the extraordinary case in which a conviction constitutes a miscarriage of justice." *Reed, supra* at 381.

In the instant case, the trial court relied on MCR 6.508(D)(2), stating that defendant was entitled to relief from judgment because there was a change in the law affecting a prior decision of the trial court. MCR 6.508(D)(2), however, only applies to situations where a defendant alleges grounds for relief that were decided against the defendant in a prior appeal or proceeding. The issue concerning conspiracy to commit second-degree murder was not decided against defendant in a prior appeal or proceeding. Therefore, the trial court should have looked to MCR 6.508(D)(3), rather than MCR 6.508(D)(2), when deciding defendant's motion.

As previously noted, a trial court may not grant a motion for relief from judgment that alleges grounds for relief, *other than jurisdictional defects*, that could have been raised on appeal, unless the defendant demonstrates both good cause for failure to raise the issue and actual prejudice. MCR 6.508(D)(3). The "good cause" and "actual prejudice" requirements of MCR 6.508(D)(3) need not be satisfied where the defendant properly alleges a jurisdictional defect in a prior proceeding that resulted in his conviction and sentence. *People v Carpentier*, 446 Mich 19, 27; 521 NW2d 195 (1994).

In *Carpentier*, our Supreme Court noted that a defendant "may always challenge whether the state had a right to bring the prosecution in the first place." *Id.*, quoting *People v Johnson*, 396 Mich 424, 442; 240 NW2d 729 (1976). "Such rights and defenses 'reach beyond the factual determination of defendant's guilt and implicate the very *authority* of the state to bring a defendant to trial . . .'" *People v New*, 427 Mich 482, 491; 398 NW2d 358 (1986), quoting *People v White*, 411 Mich 366, 398; 308 NW2d 128 (1981) (Moody, J., concurring in part and dissenting in part). A jurisdictional defect or its equivalent has been found where the defendant asserts improper personal jurisdiction, improper subject matter jurisdiction, double jeopardy, or imprisonment where the trial court had no authority to sentence the defendant to the institution in question, or when the defendant was convicted for no crime at all. *Carpentier, supra* at 47-48 (Riley, J., concurring). Another example of a defect similar to a jurisdictional defect, in that it involves the right of the state to prosecute the defendant in the first place, is when the defendant is charged under an unconstitutional or inapplicable statute. *New, supra* at 492.

In *Hammond*, we compared pleading guilty to a nonexistent offense to obtaining a guilty plea in violation of the constitutional bar against double jeopardy or pleading guilty to a violation of an unconstitutional statute. *Id.* at 112-113. In all of these cases, the state never had the power to bring the charges against the defendant in the first place, so it did not have a legitimate interest in securing a conviction for those charges. *Hammond, supra* at 112-113. Because the state never had the authority to convict the defendant in *Hammond* of conspiracy to commit second-degree murder, the defendant was allowed to withdraw his guilty plea of conspiracy to commit second-degree murder. *Id.* at 113.

Similarly, in the instant case, defendant was convicted of the nonexistent offense of conspiracy to commit second-degree murder. In reliance on the above cited case law, we conclude that conviction of a nonexistent crime is the equivalent of a jurisdictional defect. Therefore, defendant could raise the issue of the nonexistence of this offense in his motion for relief from judgment without showing "good cause" and "actual prejudice." MCR 6.508(D)(3).

Although the trial court erred by relying on MCR 6.508(D)(2) in granting defendant's motion for relief from judgment, defendant was entitled to relief from judgment under MCR 6.508(D)(3). When a trial court reaches the correct result for the wrong reason, its decision need not be reversed on appeal. *People v Smith*, 243 Mich App 657, 676; 625 NW2d 46 (2000). Consequently, the trial court did not abuse its discretion in granting defendant's motion for relief from judgment.

IV

In its final assertion of error, plaintiff argues that defendant's request for a jury instruction on conspiracy to commit second-degree murder constituted a waiver of his right to raise this issue on appeal. Normally, where defendant or his counsel specifically approves the jury instructions, defendant waives his right to challenge those instructions on appeal. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). One who waives his rights may not seek appellate review of a claimed deprivation of those rights, because the waiver extinguished any error. *Id.* at 215.

However, as previously discussed, being convicted of a nonexistent offense is the equivalent of a jurisdictional defect. Jurisdictional defenses or their equivalent involve the authority of the government to prosecute the defendant in the first place, and such rights may never be waived. *New, supra* at 492. In *Hammond, supra*, this Court held that, where the defendant pleaded guilty to the nonexistent offense of conspiracy to commit second-degree murder, he had not waived his right to assert that the state never had the power to proceed against him in the first place.[3] *Id*. at 112-113. The defendant was allowed to raise this issue on appeal, even though he pleaded guilty to the offense, because of the absence of a legitimate interest by the state in securing a conviction for a nonexistent offense. *Id.* at 113.

In the instant case, defense counsel requested an instruction for conspiracy to commit second-degree murder. This would normally result in a waiver by defendant of any argument that this instruction was erroneous. *Carter, supra* at 215-216. However, the issue raised by defendant in his motion for relief from judgment, that the jury was instructed on a nonexistent offense, was jurisdictional and could not have been waived. Defendant was not prohibited from arguing on appeal or in a motion that his conviction for conspiracy to commit second-degree murder should be set aside because the state had no legitimate interest in securing a conviction for a nonexistent offense.

V

In conclusion, the trial court did not err in relying on *Hammond*, as support for the determination that defendant was entitled to relief from his conviction for the nonexistent offense of conspiracy to commit second-degree murder. Our holding in *Hammond* is binding precedent that was not in conflict with any controlling authority. Further, the fact that the murder in question resulted from an agreement to commit great bodily harm rather than a specific intent to kill would not alter our conclusion that the elements of second-degree murder are not logically consistent with the elements of conspiracy. Because defendant's conviction of conspiracy to commit second-degree murder was the equivalent of a jurisdictional defect, defendant did not have to demonstrate "good cause" and "actual prejudice" in order to obtain postconviction relief. Finally, defendant did not waive this issue by requesting a jury instruction for conspiracy to commit second-degree murder because the trial court had no legitimate interest in obtaining a conviction on this nonexistent crime. Therefore, the trial court did not abuse its discretion in

---

[3] Generally, nonjurisdictional defects are waived by a guilty plea. *People v Ginther*, 390 Mich 436, 440; 212 NW2d 922 (1973).

granting defendant's motion for relief from judgment.

Affirmed.

/s/ Martin M. Doctoroff
/s/ William B. Murphy
/s/ Brian K. Zahra