

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN DEWITT WESLEY,

Defendant-Appellant.

UNPUBLISHED

October 23, 2001

No. 225310

Oakland Circuit Court

LC No. 1999-164759-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK SEAN MALONEY,

Defendant-Appellant.

No. 227209

Lenawee Circuit Court

LC No. 99-008329-FH

Before: K.F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

In these consolidated cases defendants appeal by delayed leave granted their judgments of sentence and post-conviction orders denying resentencing. We affirm in both cases. Although defendants were convicted of different offenses, they are represented by the same counsel and raise virtually identical arguments on appeal.

I. Basic Facts and Procedural History

A. People v Wesley, Docket No. 225310

In February, 1999, defendant Wesley admitted that he acquired \$970.00 by false pretenses. Consequently, he pleaded guilty to false pretenses over \$100 in contravention of MCL 750.218, and of being a fourth habitual offender, MCL 769.12. On September 17, 1998, the date of the offense, MCL 750.218 apportioned punishment based on the value of the item acquired by

false pretenses. If the value exceeded \$100, the offense was categorized as a felony punishable by a maximum term of ten years in prison.

Effective January 1, 1999, 1998 PA 312 amended MCL 750.218. The amendment created a new scheme whereby the penalty was determined using the value of the item together with the offender's prior record. In pertinent part, the amended statute provided that if the value of the item was at least \$200 but less than \$1,000 and the defendant had a prior conviction of false pretenses, the offense was punishable by a maximum term of five years in prison. MCL 750.218(4)(b). In March 1999, the trial court sentenced defendant Wesley as an habitual offender to two and one-half to fifteen years in prison. The trial court sentenced defendant under the version of MCL 750.218 in effect at the time of the offense.

Defendant Wesley filed a post-judgment motion for resentencing, arguing that he was entitled to be resentenced under the amended version of MCL 750.218 to take advantage of the more lenient sentencing provisions of that statute. Defendant Wesley relied on our Supreme Court's plurality opinion in *People v Schultz*, 435 Mich 517; 460 NW2d 505 (1990), wherein the Court held that two criminal defendants were entitled to the ameliorative benefits from reduced penalty provisions in amended versions of the statutes under which they were convicted, notwithstanding the fact that the amendments became effective subsequent to the dates of the offenses. Justice Archer, writing for himself and Justices Levin and Cavanagh, concluded that because the goals of indeterminate sentencing would continue to be served by application of ameliorative amended statutes and because a contrary interpretation would produce anomalous results, the general savings statute, MCL 8.4a,¹ did not mandate a different conclusion. *Id.*, 532-533. Justice Boyle concurred in the result only.

The trial court denied defendant Wesley's motion for resentencing, finding that the amended version of MCL 750.218 created an entirely new statutory scheme.

B. *People v Maloney*, Docket No. 227209

On April 7, 1999 defendant Maloney pleaded guilty to receiving or concealing stolen property over \$100 in contravention of MCL 750.535. The value of the property involved was

¹ That statute provides:

The repeal of any statute or part thereof shall not have the effect to release or relinquish any penalty, forfeiture, or liability incurred under such statute or any part thereof, unless the repealing act shall so expressly provide, and such statute and part thereof shall be treated as still remaining in force for the purpose of instituting or sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.

MCL 8.4a was enacted to avoid application of the common-law rule articulated in *People v Lowell*, 250 Mich 349, 353; 230 NW 202 (1930), that in the absence of a savings clause or general savings statute, the repeal of a penal statute would defeat any pending prosecutions under that statute. *Schultz, supra*, 539 (Brickley, J., dissenting).

approximately \$300. In August, 1998, when the offense occurred, MCL 750.535 provided that if the value of the stolen property exceeded \$100, the offense was categorized as a felony punishable by a maximum term of five years' imprisonment. Effective January 1, 1999, 1998 PA 311 amended MCL 750.535. The amendment provided that if the value of the stolen property was at least \$200 but less than \$1,000, the offense was categorized as a misdemeanor punishable by a maximum term of one year in jail. MCL 750.535(4)(a). After violating probation, defendant Maloney was sentenced to two to five years in prison. The trial court sentenced defendant Maloney under the version of MCL 750.535 in effect at the time of the offense.

Defendant Maloney filed a post-judgment motion for resentencing, arguing that he was entitled to be resentenced under the amended version of MCL 750.535 to take advantage of the more lenient sentencing provisions contained therein. Defendant Maloney relied on *Schultz*, *supra*. The trial court denied the motion, finding that *Schultz* was not binding precedent because it was a plurality opinion and was applied as precedent only in cases involving sentences for controlled substance offenses. In addition, the trial court concluded that MCL 8.4a compelled the conclusion that the version of the statute in effect at the time of the offense determined the applicable penalty.

II. Analysis

Statutory interpretation is an issue of law which we review de novo on appeal. *People v Denio*, 454 Mich 691, 698; 564 NW2d 13 (1997).

On appeal, each defendant argues that *Schultz* entitles them to benefit from the more lenient sentencing provision contained in the amended version of the statute under which they were convicted. Defendants assert that *Schultz* is controlling, notwithstanding its status as a plurality decision, and emphasize that both our Supreme Court and this Court have applied the *Schultz* rule and granted resentencing in controlled substance offenses. See, e.g., *People v Suggs*, 447 Mich 998; 525 NW2d 463 (1994); *People v Sammons*, 191 Mich App 351, 376; 478 NW2d 901 (1991). We disagree and affirm the sentence in each case.

Technically, the decision rendered in *Schultz* is not binding precedent for the reason that it is a plurality opinion. The opinion did not command a clear majority, as the justices did not agree on the precise basis for the decision. This particular decision has, however, been applied in cases involving controlled substance offenses on the rationale that defendants in similar positions (i.e., sentenced under statutes amended by the same legislation that amended the statutes at issue in *Schultz*) are entitled to similar treatment. *People v Scarborough*, 189 Mich App 341, 344; 471 NW2d 567 (1991). The decision in *Schultz* has not been applied in cases involving something other than controlled substance offenses even though the decision itself was released over a decade ago.

Even assuming, *arguendo*, that *Schultz* constitutes binding precedent, it is distinguishable and does not compel resentencing in the instant cases. Legislative enactments to existing law, including penal statutes, generally are applied prospectively. The only exceptions are when the Legislature expressly provides for retroactive application of amendatory legislation or when the amendment concerns procedural or remedial matters, as opposed to substantive law. *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992); MCL 8.4a. In both of the cases currently at

bar, the amendatory legislation affected substantive alterations to both MCL 750.218 (false pretenses), and MCL 750.535, (receiving or concealing stolen property), in that the amendments reconfigured the felony/misdemeanor classifications and altered the value elements of each offense to create new statutory schemes. The existence of these substantive alterations, coupled with the lack of language in the amendatory legislation expressly providing for retroactive application thereof, precludes application of the ameliorative sentencing provisions contained in MCL 750.218 and MCL 750.535 to the instant cases. MCL 8.4a; *Russo, supra*. We thus affirm the trial court's decisions.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Harold Hood
/s/ Brian K. Zahra