

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK EDWARD LEE,

Defendant-Appellant.

UNPUBLISHED

January 20, 2004

No. 241174

Calhoun Circuit Court

LC No. 99-000862-FH

Before: Zahra, P.J., Cavanagh and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of felon in possession of a firearm, MCL 750.224f; felony-firearm, MCL 750.227b; and possession of less than twenty-five grams of cocaine, MCL 333.7403(2)(a)(v). Defendant was sentenced to concurrent terms of 23 to 60 months' imprisonment for his felon in possession of a firearm conviction and 36 to 96 months' imprisonment for his possession of cocaine conviction, to be served consecutive to two years' imprisonment for his felony-firearm conviction, less 28 days credit for time served applied only to his felony-firearm sentence. We affirm, but remand administrative correction of the judgment of sentence to reflect eighty-nine days credit for time served.

This case has previously been before this Court.¹ In Docket No. 226144, defendant appealed his possession of cocaine sentence to this Court arguing that his thirty-six month minimum sentence was an improper upward departure from the sentencing guidelines. The guidelines range for defendant's minimum sentence for his possession of cocaine conviction was 7 to 23 months' imprisonment. The trial court's imposition of thirty-six month minimum sentence was an upward departure from the legislative guidelines. This Court found that the trial court did not have "substantial and compelling" reasons for its upward departure from the sentencing guidelines. On remand, defendant was re-sentenced to 23 to 96 months' imprisonment for his possession of cocaine conviction, less fifty-six days credit for time served. Defendant again appeals as of right.

¹ *People v Lee*, unpublished opinion of the Court of Appeals, issued February 26, 2002 (Docket No. 226144).

On appeal, defendant first argues that the trial court erred in failing to credit him with eighty-nine days time served instead of only fifty-six days time served on his possession of cocaine sentence. The prosecution concedes that defendant is entitled to credit for eighty-nine days time served. Defendant was credited twenty-eight days time served at his initial sentencing, which was to be applied only against his felony-firearm sentence. Defendant began serving his felony-firearm sentence on February 14, 2000, and served his last day of that sentence on January 16, 2002. The trial court resentenced defendant for his possession of cocaine conviction on April 15, 2002. The trial court credited defendant with fifty-six days time served, apparently finding that defendant's felony-firearm sentence ended on February 14, 2002, not January 16, 2002. The trial court overlooked defendant's initial twenty-eight day credit to his felony-firearm sentence. Accordingly, defendant is to be credited for time served from and including January 17, 2002, to and including April 14, 2002, which equals 88 days, rather than the 89 days agreed upon by the parties.

Defendant next argues that the trial court erred in sentencing defendant to the maximum time of imprisonment for his possession of cocaine sentence under MCL 333.7413(2) because the trial court believed such a sentence was mandatory. This Court has held that if a trial court enhances a defendant's sentence under the misapprehension that the enhancement is mandatory, when it is discretionary, remand for resentencing is necessary. *People v Green*, 205 Mich App 342, 347; 517 NW2d 782 (1994).

On remand, the trial court resentenced defendant to 23 to 96 months' imprisonment. The minimum sentence is within the guidelines, and the maximum sentence reflects an enhancement under MCL 333.7413(2),² which provides that:

Except as otherwise provided in subsections (1) and (3), an individual convicted of a second or subsequent offense under this article may be imprisoned for a term not more than twice the term otherwise authorized or fined an amount not more than twice that otherwise authorized, or both.

Defendant argues that various piecemeal statements made by the trial court at resentencing indicate that the trial court mistakenly believed that the sentence enhancement was mandatory. However, when the trial court's statements are viewed in context, none of them present clear evidence that the trial court believed that the sentence enhancement was mandatory. Rather, the record reflects that the trial court repeatedly stated that sentencing enhancement was "allowed," and never indicated that sentencing enhancement was "required." "Absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *People v Knapp* 244 Mich App 361, 389; 624 NW2d 227 (2001). Therefore, because defendant has failed to provide clear evidence that the trial court incorrectly believed that it lacked discretion, we conclude that trial court knew that the sentence enhancement under MCL 333.7413(2) was discretionary, and there is no error.

² MCL 333.7403(2)(a)(v), provides for punishment up to four years imprisonment. Because the instant offense was defendant's second under the article, MCL 333.7413(2) provides for up to eight years' imprisonment, or ninety-six months.

We remand for the limited purpose of an administrative correction to the judgment of sentence to reflect that defendant is entitled to eighty-eight days time served against defendant's possession of cocaine conviction sentence. Defendant's sentences are otherwise affirmed. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Jessica R. Cooper