

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNARD CALVIN MAPP,

Defendant-Appellant.

UNPUBLISHED

July 20, 2004

No. 246939; 252067

Wayne Circuit Court

LC Nos. 01-010573;

00-010591-01

Before: Zahra, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

In Docket No. 246939, defendant appeals as of right his jury trial convictions for carrying a concealed weapon, MCL 750.227, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as an habitual-offender, second offense, MCL 769.10, to two concurrent terms of nine months to seven-and-a-half-years, and to a two year consecutive term for felony-firearm. In Docket No. 252067, defendant appeals by leave granted his two to five year sentence for attempted possession with intent to deliver less than fifty grams cocaine (probation violation) MCL 750.92; MCL 333.7401(2)(a)(4). The cases have been consolidated on appeal. We affirm in part, vacate in part, and remand for resentencing.

In Docket No. 246939, defendant first contends that the trial court erred in refusing to grant a new trial based on newly discovered evidence that a Federal Grand Jury had indicted the arresting officers. We disagree. This Court reviews a trial court's decision to deny a motion for new trial based on newly discovered evidence for an abuse of discretion, and it reviews the lower court's factual findings for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "A mere difference in judicial opinion does not establish an abuse of discretion." *Id.* at 691.

In order to merit a new trial based on newly discovered evidence, defendant must demonstrate that: 1) the evidence itself is newly discovered, not just the materiality of that evidence; 2) the newly discovered evidence is not cumulative; 3) defendant, exercising reasonable diligence, could not have discovered and produced the evidence at trial; and, 4) the new evidence makes a different result probable on retrial. *Cress, supra*, 468 Mich 692, citing *People v Johnson*, 451 Mich 115, 118 n 6; 545 NW2d 637 (1996). Defendant fails to meet this standard.

Newly discovered evidence is not grounds for a new trial where defendant would merely use it for impeachment purposes. *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993). Defendant argues that he would use this evidence to question the police officer's testimony and states that it might change the jury's belief in that testimony, i.e., that he would use the evidence to impeach the officer. A new trial is not warranted on this ground, *Id.* at 516, and we find no abuse of discretion.

Next, defendant argues that this Court should remand for resentencing on his conviction for carrying a concealed weapon and felon in possession, because the trial court failed to articulate substantial and compelling reasons for its departure from the sentencing guidelines. We agree. When the "upper limit of the recommended minimum sentence range . . . is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate jail term may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less." MCL 769.34(4). The parties agreed at sentencing that defendant's guidelines range was zero to nine months, and do not dispute this fact on appeal. The parties also agree that the trial court departed from the required intermediate sanction by sentencing defendant to a term of imprisonment, without giving a reason for the departure. Accordingly, we remand for resentencing. MCL 769.34(11); *People v Babcock*, 469 Mich 247, 264-266; 666 NW2d 231 (2003).

Defendant asks that resentencing be before a different trial judge. However, the record does not support defendant's request. The trial judge did not indicate any prejudice against defendant, and made no remarks that would raise a question regarding his impartiality or taint the appearance of justice. We find no basis to reassign the sentencing on remand. *People v Hegwood*, 465 Mich 432, 440 n 17; 636 NW2d 127 (2001); *People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986).

In Docket No. 252067, defendant argues that the trial court erred in revoking probation and sentencing defendant without providing him notice, conducting a hearing, or taking a plea. We agree. Defendant did not raise this issue below or contemporaneously object to the sentence. Therefore, the issue is not preserved and is subject to plain error review. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

Although the full spectrum of constitutional rights applicable in a criminal proceeding does not attach at probation hearings, probationers are afforded certain due process rights due to the potential loss of liberty. *People v Pillar*, 233 Mich App 267, 269; 590 NW2d 622 (1998). Here, the prosecutor concedes that the trial court failed to follow the necessary due process requirements. MCR 6.445; MCL 771.4. This constitutes a plain error because it is clear and obvious. *Carines, supra*, 460 Mich 763. We therefore reverse and remand this issue to allow the lower court to afford defendant his due process protections, *id.*, and for resentencing. *People v Hendrick*, __ Mich App __; __ NW2d __ (Docket No. 248892, issued May 4, 2004).

In Docket No. 246939, we affirm defendant's convictions. We vacate his sentences for carrying a concealed weapon and felon in possession, and remand for resentencing pursuant to MCL 769.34(4). In Docket No. 252067, we vacate defendant's sentence for violation of probation and remand for further proceedings and resentencing.

Affirmed in part, vacated in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder