STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED August 10, 2004
v	No. 247769 Muskegon Circuit Court
THEODIS MINNIFIELD, JR., Defendant-Appellee.	LC No. 02-047659-FH

Before: Fort Hood, P.J., and Donofrio and Borrello, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the trial court's order denying its motion for resentencing. The instant case arises out of defendant's sentence in file no. 02-47659-FH-A (hereinafter 47659), and its relation to defendant's sentences in file nos. 01-46214-FH-A (hereinafter 46214) and 02-46889-FH-A (hereinafter 46889).

File No. 46214:

On June 27, 2001, defendant was charged with first-degree home invasion (MCL 750.110a(2)); assault with intent to do great bodily harm less than murder (MCL 750.84); assault with intent to rob while armed (MCL 750.89); felon in possession of a firearm (MCL 750.224f); and possession of a firearm during the commission of a felony (MCL 750.227b). On June 29, 2001, defendant was released on bond.

File No. 46889:

On December 8, 2001, while defendant was on bond in file no. 46214, he was charged with possession of less than 25 grams of cocaine (MCL 333.7403(2)(a)(v)); possession of marijuana (MCL 333.7403(2)(d)); possession of marijuana, second offense (MCL 333.7413(2); carrying a concealed weapon (MCL 750.227); and being a fourth-offense habitual offender (MCL 769.12). On December 10, 2001, defendant was released on bond.

On June 6, 2002, defendant pleaded guilty to possession of less than 25 grams of cocaine (MCL 333.7403(2)(a)(v)); possession of marijuana (MCL 333.7403(2)(d)); possession of

marijuana, second offense (MCL 333.7413(2)); attempted carrying a concealed weapon (MCL 750.227); and to being a fourth-offense habitual offender (MCL 769.12)).

File No. 47659:

On June 12, 2002, while defendant was on bond in file no. 46889, defendant committed the offenses in the instant case, and on June 13, 2002, was charged with possession with intent to deliver 50 grams or more, but less than 225 grams of cocaine (MCL 333.7401(2)(a)(iii)); possession with intent to deliver marijuana (MCL 333.7401(2)(d)(iii)); possession of Vicodin (MCL 333.7403(2)(b)); resisting and obstructing a police officer (MCL 750.479); and being a fourth-offense habitual offender (MCL 769.12). On June 13, 2002, defendant was released on bond in the instant case. On July 9, 2002, defendant's bond was revoked in file no. 46889.

On July 12, 2002, defendant was sentenced in file no. 46889 to 36 months to 14 years' imprisonment for possession of less than 25 grams of cocaine (MCL 333.7403(2)(a)(v)); 1 to 2 years' imprisonment for possession of marijuana (MCL 333.7403(2)(d)) and possession of marijuana, second offense (MCL 333.7413(2)); and 3 to 14 years' imprisonment for attempted carrying a concealed weapon (MCL 750.227).

On October 29, 2002, defendant pleaded guilty in file no. 46214 to first-degree home invasion (MCL 750.110a(2)), and to being a fourth-offense habitual offender (MCL 769.12), and on December 9, 2002, was sentenced to 10 to 40 years' imprisonment. On the same date, defendant pleaded guilty in the instant case (file no. 47659) to possession with intent to deliver 50 grams or more, but less than 225 grams of cocaine (MCL 333.7401(2)(a)(iii)); possession with intent to deliver marijuana (MCL 333.7401(2)(d)(iii)); possession of Vicodin (MCL 333.7403(2)(b)); resisting and obstructing a police officer (MCL 750.479); and to being a fourth-offense habitual offender (MCL 769.12).

At the plea hearing, the trial court indicated that defendant's sentence for the major controlled substance offense in the instant case (file no. 47659) would run consecutively to the other offenses in the instant case, consecutively to the sentence in file no. 46214, and consecutively to the sentence defendant was already serving in file no. 46889. However, at the sentencing hearing on December 9, 2002, the trial court failed to make the sentence in the instant case consecutive to the sentence he was already serving in file no. 46889. Additionally, the trial court failed to impose the mandatory minimum ten-year sentence for MCL 333.7401(2)(a)(iii), and instead imposed a nine-year minimum sentence.

On December 10, 2002, defendant was sentenced to 9 to 40 years' imprisonment for possession with intent to deliver 50 to 224 grams of cocaine (MCL 333.7401(2)(a)(iii)) (count I); 9 months to 15 years' imprisonment for possession with intent to deliver marijuana (MCL 333.7401(2)(d)(iii)) (count II); 6 months to 15 years' imprisonment for possession of Vicodin (MCL 333.7403(2)(b)(a)) (count III); and 9 months to 15 years' imprisonment for resisting and obstructing a police officer (MCL 750.479b) (count IV). [The judgment of sentence mistakenly placed the 9 year minimum for Count I in the 'months' column, and indicated a nine-month minimum instead of a six-month minimum for Count III; therefore, an amended judgment of sentence was entered on March 25, 2003 correcting the mistakes.] The sentences for counts II, III, and IV were to run concurrently with each other, and consecutively to Count I, as well as consecutively to the sentence in file no. 46214. The trial court did not make the sentences

consecutive to the sentence defendant was already serving for file no. 46889, contrary to its earlier statements at the plea hearing on October 29, 2002.

On January 21, 2003, plaintiff moved for resentencing, pursuant to MCR 6.429(B)(1), and argued that the trial court erred when it failed to make defendant's sentence in the instant case run consecutive to his sentence in file no. 46889, and when it failed to impose the mandatory minimum ten-year sentence required by MCL 333.7401(2)(a)(iii). At the February 24, 2003 hearing, the trial court denied plaintiff's motion for resentencing. The trial court acknowledged its mistake in failing to make defendant's sentence in the instant case consecutive to his sentence in file no. 46889, yet declined to correct the error, stating that "to correct the mistake now would do more damage to everybody than it would be if I went back and tried to fix it." The trial court then articulated its reasoning in sentencing defendant to nine years instead of the mandatory minimum of ten years required by statute:

> Frankly, I think by the time we got done with the case, I believed that a nine year sentence was – taken in conjunction with all these other ones – a pretty big chunk. When they're added all up, I think [defendant] has got approximately 20 years here on all these things. And the Court felt that the 9 year sentence – I know I'm rambling, and I apologize for that. But I think the Court felt that the 9 year sentence on that provided some insurance for appellate issues. The Court felt that that would close the door on some of those *Schultz* type issues. In other words, it would close the door on a defense motion for resentencing which essentially said, hey, Judge, *People v Schultz* [435 Mich 517, 526; 460 NW2d 505 (1990)] says that the 10 year mandatory minimum doesn't apply because [defendant's] case is on direct appeal to the Court of Appeals, and *Schultz* gives him the benefit of that scheme.
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> And perhaps I didn't articulate it as well as I could have at the time of sentence, but, frankly, by the time we got there, I believed then, in that case, that it was better to say as little as possible because this was such an intricate piece of work, that to say too much would really I think create all kinds of appellate issues whether intended or unintended.
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> And so that remains my decision here today. I think the 9 year sentence here which is albeit below the 10 year mandatory minimum which is technically in effect now. I will say that clearly. I do believe the 10 year mandatory minimum is in effect. I believe the *Schultz* dissenters are more correct than the *Schultz* plurality/concurring/majority opinion. I'll say that for the record.
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> But I think that under that under *People v Scarborough* [189 Mich App 341; 471 NW2d 567 (1991)] and other cases, *Schultz* is good law. And I think I can strain to follow. If the Court of Appeals or the Supreme Court want to take it on and reverse it, that's something they have to do. And so that probably more than anything was the driving force in the 9 year decision there.

On March 21, 2003, the trial court entered an order denying plaintiff's motion for resentencing, and we granted plaintiff's application for leave to appeal.

On appeal, plaintiff argues that the trial court erred in failing to make defendant's sentence in the instant case run consecutive to his sentence in file no. 46889, in violation of MCL 768.7b(2). We agree. We review a trial court's sentencing decisions for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227; 646 NW2d 875 (2002). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling made." *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000).

MCL 768.7b(2) provides in pertinent part:

> Beginning January 1, 1992, if a person who has been charged with a felony, pending the disposition of the charge, commits a subsequent offense that is a felony, upon convictions of the subsequent offense or acceptance of a plea of guilty, guilty but mentally ill, or nolo contendere to the subsequent offense, the following shall apply:
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> > (a) Unless the subsequent offense is a major controlled substance offense, the sentences imposed for the prior charged offense and the subsequent offense may run consecutively.
> >
> > (b) If the subsequent offense is a major controlled substance offense, the sentences imposed for the prior charged offense and the subsequent offense **shall** run consecutively. [Emphasis added.]

MCL 761.2(b) provides that a violation of MCL 333.7403(2)(a)(iii) is a "major controlled substance offense." In *People v Morris*, 450 Mich 316, 330-331; 537 NW2d 842 (1995), our Supreme Court explained the application of MCL 768.7b:

> In pertinent part, MCL 768.7b(1); MSA 28.1030(2)(1) provides that when a person is charged with a felony and, "*pending the disposition of the charge*," commits a subsequent major controlled substance offense, the sentence for the prior offense shall run consecutively. A charge remains "pending" for the purposes of § 7b "until a defendant is sentenced on the conviction arising out of the first offense and until the original charge arising out of the first offense is dismissed." *People v Smith*, 423 Mich 427, 452; 378 NW2d 384 (1985) (Williams, C.J.). The purpose of this statute is "to deter those charged with one felony from committing another prior to final disposition of the first. Absent such a deterrent, a person could be assured of 'one free crime' because of the usual policy of concurrent sentencing." *Id*. at 450. Section 7b therefore requires consecutive sentencing where a defendant commits a major controlled substance offense after being charged, but before being sentenced for a prior felony.

In the instant case, the trial court abused its discretion in failing to impose a consecutive sentence, as mandated by MCL 768.7b(2). Defendant was charged with felonies in file no. 46889 on December 8, 2001, and was released on bond on December 10, 2001. Defendant was sentenced for file no. 46889 on July 12, 2002. However, on June 12, 2002, pending the disposition of file no. 46889, defendant committed subsequent felonies, including a major controlled substance offense (MCL 333.7401(2)(a)(iii)). Therefore, upon pleading guilty to the

charges in the instant case, the sentence was required to be consecutive to the sentence in file no. 46889.

At the hearing on plaintiff's motion for resentencing, the trial court acknowledged its error in failing to impose consecutive sentencing; however, the trial court declined to amend the sentence to accurately reflect the consecutive sentence mandated by MCL 768.7b(2). The trial court's decision not to amend defendant's sentence to comply with the law constituted an abuse of discretion, because "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling made." *Williams, supra* at 320.

Plaintiff next argues that the trial court erred in failing to make defendant's sentence in the instant case run consecutive to his sentence in file no. 46889, in violation of MCL 333.7401(2)(a)(iii). We agree. The version of MCL 333.7401(3) that was in effect at the time defendant was sentenced provided in pertinent part:

> A term of imprisonment imposed pursuant to subsection (2)(a) or section 7403(2)(a)(i), (ii), (iii), or (iv) **shall** be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony. [Emphasis added.]

The version of MCL 333.7401(3) that became effective on March 1, 2003 modified the statute to allow for discretionary consecutive sentencing, as opposed to mandatory consecutive sentencing. This Court has held that "the term 'another felony,' as used in subsection 7401(3), includes 'any felony for which the defendant has been sentenced either before or simultaneously with the controlled substance felony enumerated in § 7401(3) for which a defendant is currently being sentenced." *People v Lee*, 233 Mich App 403, 406; 592 NW2d 779 (1999), quoting *Morris, supra* at 320. Additionally, this Court stated that "by its clear terms, subsection 7401(3) mandates consecutive sentencing for any sentence imposed for a major controlled substance felony *after* a defendant has been sentenced for any other felony." *Lee, supra* at 406. "The only relevant inquiry under the statute is whether, at the time of sentencing for the enumerated offense, the defendant has already been sentenced for another felony." *Id*. at 407.

In the instant case, at the time defendant was sentenced for his major controlled substance offense (MCL 333.7401(2)(a)(iii)) on December 10, 2002, he had already been sentenced for his felonies in file no. 46889 on July 12, 2002. Therefore, the trial court was required to make defendant's sentence in the instant case run consecutively to his sentence in file no. 46889, pursuant to MCL 333.7401(3). At the hearing on plaintiff's motion for resentencing, the trial court acknowledged its error, but declined to amend defendant's sentence to make the sentence in the instant case run consecutively to his sentence in file no. 46889, stating that "to correct the mistake now would do more damage to everybody than it would be if I went back and tried to fix it," and that "also, frankly, gets into a *Schultz* issue. Because if the Court imposes a consecutive sentence there as required to do so, again, the argument on appeal or on a defense motion for resentencing is, hey, Judge, he gets the benefit of the *Schultz* ameliorative effect, and so the consecutive sentence does not apply either."

"The general rule is that the sentence or punishment imposed is that prescribed by the statute in force at the time of the commission of the crimes," and that "amendments to criminal statutes concerning sentence or punishment are not retroactive." *People v Marji*, 180 Mich App

525, 543; 447 NW2d 835 (1989). However, the trial court apparently relied on our Supreme Court's holding in *Schultz*, *supra*, 526-531, 533-534, for the proposition that "the amended penalty provisions of the controlled substances act should be applied in cases which were pending in the trial court when the amendments took effect." *Scarborough*, *supra* at 343-344. However, in the instant case, the amendment to MCL 333.7401(3) took effect on March 1, 2003, after defendant committed the crimes on June 12, 2002, and after defendant was sentenced on December 10, 2002. Defendant's sentence was only amended on March 25, 2003 to correct the mistake made by placing nine years for count I in the 'months' column, and by indicating nine months instead of six months for count III. Therefore, defendant's case was not "pending" in the trial court when the amendment took effect; rather, he had already been sentenced, and the March 25, 2003 amended judgment of sentence merely corrected clerical mistakes.

Although the trial court was merely attempting to follow the legislation which it thought was going to come into effect when defendant was sentenced in December 2002, and attempting to follow the newly-enacted legislation which had come into effect at the time defendant's judgment of sentence was corrected to remedy clerical errors in March 2003, the fact remains that the trial court abused its discretion by not following the law in effect at the time defendant committed the crimes in the instant case, and at the time he was sentenced. The trial court's decision not to amend defendant's sentence to comply with the law constituted an abuse of discretion, because "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification for the ruling made." *Williams*, *supra* at 320.

Plaintiff next argues that the trial court erred in failing to impose a ten-year mandatory minimum sentence as required by the version of MCL 333.7401(2)(a)(iii) that was in effect that the time defendant committed the crime and was sentenced. We agree. "The issue whether a statute should be applied retroactively is a legal issue that is reviewed de novo." *People v Thomas*, ___ Mich App ___; ___ NW2d ___ (Docket No. 243817, rel'd 2/3/04), slip op p 4.

The version of MCL 333.7401(2)(a)(iii) that was in effect at the time defendant was sentenced provided in pertinent part:

> A person who violates this section as to a controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(iv) and which is in an amount of 50 grams or more, but less than 225 grams, of any mixture containing that substance is guilty of a felony and **shall** be imprisoned for not less than 10 years nor more than 20 years. [Emphasis added.]

An exception to the imposition of a mandatory minimum sentence was set out in MCL 333.7401(4), which provided in pertinent part:

> The court may depart from the minimum term of imprisonment authorized under subsection (2)(a)(ii), (iii), or (iv) if the court finds on the record that there are substantial and compelling reasons to do so.

This Court, discussing the exception, held that "departure from the range recommended by the guidelines, however, is allowed only in rare and exceptional cases where the original legislative purpose [to deter drug offenses] will not be defeated." *People v Shinholster*, 196

Mich App 531, 534-535; 493 NW2d 502 (1992), quoting *People v Hill*, 192 Mich App 102, 118-119; 480 NW2d 913 (1991).

In the instant case, at the time of sentencing, the trial court failed to articulate any substantial and compelling reasons to warrant a downward departure from the mandatory minimum ten-year sentence set out in MCL 333.7401(2)(a)(iii). The trial court stated that it was engaging in a downward departure because it was aware of pending legislation to change mandatory minimums, and "want[ed] to send a clear message to any reviewing authority that the Court is aware of that legislation," despite the fact that "it's not law yet." The trial court's sole reason for engaging in a downward departure was that it believed that an amendment to the mandatory minimum sentencing law was imminent, and wanted to follow law which it believed would be enacted. The trial court's rationale in engaging in a downward departure from the statutorily mandated ten-year minimum sentence did not constitute a substantial and compelling reason, as required by MCL 333.7401(4).

Further, this Court recently decided the precise question at issue in the instant case, i.e., whether the Legislature intended the amended drug sentence laws to have retroactive application to crimes committed before the statute was enacted. This Court determined that our Supreme Court's decision in *Schultz*, *supra*, the defendant was entitled to be resentenced under the amended sentencing provisions of MCL 333.7401(2)(a)(iii), was inapplicable to instant issue. *Thomas*, *supra*, slip op p 4. This Court also noted that "because the *Schultz* decision was a plurality in which a majority of the justices did not agree on the reasoning, we are not bound under stare decisis by that decision." *Id*. at n 1, citing *People v Gahan*, 456 Mich 264, 274; 571 NW2d 503 (1997), quoting *Negri v Slotkin*, 397 Mich 105, 109; 244 NW2d 98 (1976).

This Court stated that its "concern [wa]s to ascertain and give effect to the legislative intent as expressed by the plain language of the statute." *Thomas*, *supra*, slip op p 4. "Where the language used is unambiguous, '[this Court] presume[s] that the Legislature intended the meaning clearly expressed – no further judicial construction is required or permitted, and the statute must be enforced as written.'" *Id*., quoting *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). This Court analyzed the issue:

> The trial court sentenced defendant under the version of MCL 333.7401(2)(a)(iii) in effect at the time of the sentencing, which provided a punishment of "not less than 10 years nor more than 20 years." Effective March 1, 2003, the punishment provision was amended to provide for "imprisonment for not more than 20 years or a fine of not more that $250,000.00, or both." The legislature also amended MCL 791.234 by adding paragraph (12), which states:
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> > An individual convicted of violating or conspiring to violate section 7401(2)(a)(iii) or 7403(2)(a)(iii) of the public health code . . . before the effective date of the amendatory act that added this subsection is eligible for parole after serving the minimum of each sentence imposed for that violation or 5 years of each sentenced imposed for that violation, whichever is less.
>
> "Amendments of statutes are generally presumed to operate prospectively unless the Legislature clearly manifests a contrary intent." *Tobin v Providence*

> *Hosp*, 244 Mich App 626, 661; 624 NW2d 548 (2001), citing *Selk v Detroit Plastic Products*, 419 Mich 1, 9; 345 NW2d 184 (1984). We observe that there is no language in either amended statute indicating that the elimination of the mandatory minimum sentence in MCL 333.7401(2)(a)(iii) was intended to apply to defendants who committed their offenses and were sentenced before March 1, 2003. Additionally, we note that the plain language of MCL 791.234 specifically provides that individuals *previously convicted* under MCL 333.7401(2)(a)(iii) may become eligible for parole "after serving the minimum sentence of each sentence imposed for that violation, whichever is less."
>
> It appears plain that the Legislature has specifically provided relief – in the form of early parole eligibility – for individuals, such as defendant, who were convicted and sentenced before the amendatory act became effective. Because the Legislature declined to specifically apply the amended sentencing provisions MCL 333.7401(2)(a)(iii) retroactively and instead specifically provided early parole eligibility to such defendants, we decline defendant's invitation to ignore the plain language of the statute. [*Thomas, supra*, slip op pp 4-5.]

This Court revisited this issue in *People v Doxey*, ___ Mich App ___ (Docket No. 247767, July 20, 2004), holding that 2002 PA 665 should not be applied retroactively.

Therefore, in the instant case, the trial court's decision to apply the amended sentencing provisions in MCL 333.7401(2)(a)(iii) eliminating the mandatory minimum, before the amended provisions were enacted into law, constituted an abuse of discretion. The Legislature did not intend for the amended sentencing provisions to apply retroactively to defendants who committed their offenses and were sentenced before March 1, 2003; therefore, the trial court was required to sentence defendant under the version of MCL 333.7401(2)(a)(iii) in effect at the time defendant committed the crimes and was sentenced. *Doxey*, *supra*.

Remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello