

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

BENJAMEN JASON LYONS,

Defendant-Appellee.

UNPUBLISHED
December 9, 2004

No. 254644
Calhoun Circuit Court
LC No. 03-002582-FH

Before: Markey, P.J., and Fitzgerald and Owens, JJ.

PER CURIAM.

This case is before us pursuant to our Supreme Court's order remanding this case for plenary consideration by this Court. 471 Mich 864; 684 NW2d 364 (2004). The prosecution appeals from an order vacating defendant's conviction of second-degree home invasion. We reverse. This case is being decided without oral argument under MCR 7.214(E).

The prosecution argues that the trial court erred in vacating defendant's conviction because the trial court's actions were beyond its authority. This Court's February 17, 2004 order remanded this case to the trial court solely to articulate reasons for its downward departure from the sentencing guidelines. We agree.

Whether the trial court exceeded the scope of its authority on remand is a question of law, which we review de novo. *People v Milton*, 257 Mich App 467, 470; 668 NW2d 387 (2003). Defendant argues that this issue is unpreserved because the prosecution did not object below to the trial court's decision to vacate his home invasion conviction. Regardless, we may review it because it is question of law and all facts necessary for its resolution have been presented. *Conlin v Scio Twp*, 262 Mich App 379, 385; 686 NW2d 16 (2004).

When a case is remanded for further proceedings, the lower court may not take action inconsistent with the appellate court's remand order. *In re TM (After Remand)*, 245 Mich App 181, 191; 628 NW2d 570 (2001). The February 17, 2004 remand order directed the trial court to articulate reasons for its sentencing departure with regard to defendant's home invasion conviction. By instead vacating that conviction, the trial court acted inconsistently with the remand order. Further, in *McCormick v McCormick*, 221 Mich App 672, 679; 562 NW2d 504 (1997), this Court held that an order by the circuit court removing a case to the probate court "exceeded the scope" of an underlying remand order that directed the circuit court to make certain determinations. This Court stated that the circuit court "was required to dispose of these

issues on remand, but it was not authorized to remove the case to the probate court in order for that court to resolve those issues.” Likewise, this Court’s February 17, 2004 remand order required the trial court to articulate reasons for its sentencing departure, but did not authorize it to act beyond the scope of that remand by vacating the underlying conviction. Accordingly, the trial court erred by vacating defendant’s home invasion conviction during the remand proceedings.

Defendant refers to MCR 6.310 and 6.311 as allowing a trial court to vacate a defendant’s no contest plea with the defendant’s consent; however, MCR 6.310(B) only allows withdrawal of a plea with the defendant’s consent before sentence is imposed. In this case, defendant was sentenced before the trial court vacated the plea-based conviction at issue on remand. Similarly, MCR 6.311 cannot be plausibly read to grant the trial court authority to vacate that plea-based conviction during the proceedings on remand.

Defendant’s arguments fail to recognize that the pertinent critical question of whether the trial court acted outside the scope of its authority on remand.¹

We reverse the trial court’s order vacating defendant’s second-degree home invasion conviction and reinstate that home invasion conviction. We remand this case to the trial court to articulate reasons for its downward departure from the sentencing guidelines in sentencing defendant for that home invasion conviction in accordance with this Court’s February 17, 2004 remand order. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Donald S. Owens

¹ Accordingly, we note that our decision to reinstate defendant’s home invasion conviction does not preclude defendant from eventually seeking to vacate that conviction in a motion for relief from judgment. MCR 6.311(A) provides that after the time for filing an application for leave to appeal, a defendant may seek relief from a plea-based conviction in accordance with the procedure set forth in subchapter 6.500 of the Michigan Court Rules.