

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES JERMEL SUTTON,

Defendant-Appellant.

UNPUBLISHED

December 22, 2005

No. 256284

Grand Traverse Circuit Court

LC No. 01-008561-FH

Before: Owens, P.J., and Saad and Fort Hood, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the trial court's denial of his motion for relief from judgment in which he asserted that he was entitled to be resentenced under the amended statutory scheme for controlled substance offenses because the amendments should be applied retroactively, and his former appellate counsel was ineffective for failing to argue that position. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

The underlying offense occurred on June 12, 2001. On March 19, 2002, pursuant to a plea agreement, defendant pleaded guilty to possession of 225 or more but less than 650 grams of cocaine, contrary to former MCL 333.7403(2)(a)(ii). He was sentenced on April 19, 2002, to 20 to 30 years' imprisonment, consistent with the mandatory minimum and maximum sentences prescribed in MCL 333.7403(2)(a)(ii) at that time.

On April 21, 2003, defendant filed an application for leave to appeal, which this Court denied for lack of merit. *People v Sutton*, unpublished order of the Court of Appeals, entered May 27, 2003 (Docket No. 248174), lv den 469 Mich 952 (2003).

Defendant, acting in propria persona, subsequently filed a motion for relief from judgment, arguing that appellate counsel was ineffective for failing to argue that he was entitled to be resentenced under the amended version of MCL 333.7403(2)(a), which became effective on March 1, 2003, after defendant was sentenced, but before the application for leave to appeal was filed. Relying on *People v Thomas*, 260 Mich App 450; 678 NW2d 631 (2004), the trial court held that defendant was properly sentenced in accordance with the statute then in effect and, accordingly, denied defendant's motion.

On appeal, defendant frames his issues in terms of whether appellate counsel was ineffective for failing to challenge defendant's sentence. However, the ruling on review is the trial court's denial of defendant's motion for relief from judgment. This Court reviews a denial of a motion for relief from judgment for an abuse of discretion. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001).

Pursuant to MCR 6.508(D)(3), a court may generally not grant relief to a defendant if the motion alleges grounds (other than jurisdictional defects) that could have been raised in an earlier appeal unless the defendant demonstrates good cause for failure to raise those grounds and actual prejudice, which in the case of a challenge to a sentence means that the sentence is invalid. A sentence is invalid when it is based on inaccurate information, if it is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of the law, or when it conforms to local sentencing policy rather than individualized facts. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

We conclude that defendant did not establish either good cause or actual prejudice and, therefore, the trial court did not abuse its discretion in denying defendant's motion. Defendant's request for relief is premised on his claim that he is entitled to be resentenced under the amended sentencing provisions that became effective on March 1, 2003. However, the amended provisions apply "only to offenses committed on or after the effective date of the legislation, March 1, 2003." *People v Doxey*, 263 Mich App 115, 122; 687 NW2d 360 (2004). Because the offense in this case occurred before March 1, 2003, the amended provisions do not apply to defendant.¹

We reject defendant's contention that he is entitled to the benefit of the ameliorative provisions because his appeal was pending on direct appeal at the time of the amendment. See, *People v Doxey*.

Because defendant's sentence was not invalid, he cannot establish "actual prejudice." MCR 6.508(D)(3)(iv). In addition, he cannot establish "good cause" for failure to raise the issue by showing that his former appellate attorney was ineffective. Had appellate counsel raised the issue in the first application for leave to appeal, this Court would not have granted defendant relief. Because defendant did not show good cause or actual prejudice, the trial court did not abuse its discretion in denying defendant's motion.

Affirmed.

/s/ Donald S. Owens
/s/ Henry William Saad
/s/ Karen M. Fort Hood

¹ We reject defendant's contention that he is entitled to the benefit of the ameliorative provisions because his appeal was pending on direct appeal at the time of the amendment. See *People v Doxey*.