STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CHRISTOPHER MICHAEL ALEXANDER,

Defendant-Appellee.

UNPUBLISHED
December 18, 2007

No. 270550
Ingham Circuit Court
LC No. 05-001066-FH

Before: Davis, P.J., and Murphy and Servitto, JJ.

PER CURIAM.

Plaintiff appeals by leave granted the guilty plea conviction of defendant for two counts of possession with intent to deliver less than 50 grams of a narcotic drug (cocaine and heroin), MCL 333.7401(2)(a)(*iv*). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to consecutive prison terms of two years 6 months to 10 years to be served consecutively to the convictions in case no. 05-202-FH (the separate action). We reverse and remand for resentencing.

According to plaintiff, defendant was charged in the separate action with two counts of conspiracy to deliver less than 50 grams of cocaine, MCL 750.157a, two counts of delivery of less than 50 grams of a narcotic drug (cocaine and heroin), MCL 333.7401(2)(a)(*iv*), and possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(*v*). Pursuant to a plea agreement, defendant pleaded guilty on August 16, 2005 in the separate action to delivery of less than 50 grams of heroin and to possession of less than 25 grams on cocaine. The third-habitual offender charge was dismissed, and sentencing was held in abeyance.

In this action, while on bond for the charges in the separate action, defendant was charged with six counts of possession with intent to deliver less than 50 grams of a narcotic drug (cocaine and heroin), a felony with a 20-year maximum prison term, MCL 333.7401(2)(a)(*iv*), along with being a third offense habitual offender. The third-habitual offender charge was based on defendant's prior felony convictions of entering without breaking, MCL 750.111, and maintaining a drug house, MCL 333.7405(d). Pursuant to a plea agreement in this action, defendant pleaded guilty on February 21, 2006 to two counts of possession with intent to deliver less than 50 grams of a narcotic drug and with being a third-offense habitual offender.

On March 22, 2006, the trial court sentenced defendant on both files. In the separate action, the trial court sentenced defendant to jail terms of nine months for each conviction, with

nine months credit for time served.[1] For this action, the judgment of sentence provides that the trial court sentenced defendant as a third habitual offender to consecutive prison terms of two years and 6 months to 10 years to be served consecutively to the convictions in the separate action. At sentencing, the trial court stated that it had discretion to set both the minimum and maximum sentence in light of the convictions and because defendant was being sentenced as a habitual offender.

Plaintiff argues that the trial court plainly erred when it imposed a maximum sentence of less than 20 years for defendant's convictions. We agree.

This issue is unpreserved because it was not raised before and decided by the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Therefore, we review the issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Resolving this issue involves a question of statutory interpretation, which is a question of law reviewed de novo. *Griffith v State Farm Mut Automobile Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005). The primary goal of statutory interpretation is to ascertain and give effect to the intent of the Legislature, and the Legislature is presumed to have intended the meaning it plainly expressed. *Linsell v Applied Handling, Inc*, 266 Mich App 1, 15; 697 NW2d 913 (2005). If statutory language is clear and unambiguous, then a court is required to apply the statute as written. *Id.*

MCL 333.7401(2)(a)(iv) provides that a person who manufacturers, creates, delivers, or possesses with intent to manufacture, create, or deliver less than 50 grams of a controlled substance "is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $25,000.00, or both."

MCL 769.8(1) provides as follows:

> When a person is convicted for the first time for committing a felony and the punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment, but shall fix a minimum term, except as otherwise provided in this chapter. *The maximum penalty provided by law shall be the maximum sentence in all cases except as provided in this chapter and shall be stated by the judge in imposing the sentence.* [Emphasis added.]

Thus, except as otherwise provided, the trial court was required to sentence defendant to a maximum of 20 years imprisonment as required under MCL 333.7401(2)(a)(*iv*). See *People v Harper*, 479 Mich 599, 603; 739 NW2d 523 (2007).

Relevant to the instant matter, MCL 769.11, provides an exception to MCL 769.8. MCL 769.11 provided, at the time of defendant's sentencing, as follows:[2]

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[1] The record does not indicate whether these terms were concurrent or consecutive.

[2] 1998 PA 317, amended by 2006 PA 665, effective January 9, 2007.

(1) If a person has been convicted of any combination of 2 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:

(a) *If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, the court, except as otherwise provided in this section or section 1 of chapter XI, may sentence the person to imprisonment for a maximum term that is not more than twice the longest term prescribed by law for a first conviction of that offense or for a lesser term.*

(b) If the subsequent felony is punishable upon a first conviction by imprisonment for life, the court, except as otherwise provided in this section or section 1 of chapter XI, may sentence the person to imprisonment for life or for a lesser term.

(c) *If the subsequent felony is a major controlled substance offense, the person shall be punished as provided by part 74 of the public health code, 1978 PA 368, MCL 333.7401 to 333.7461.*

(2) *If the court pursuant to this section imposes a sentence of imprisonment for any term of years, the court shall fix the length of both the minimum and maximum sentence within any specified limits in terms of years or a fraction of a year, and the sentence so imposed shall be considered an indeterminate sentence.*

(3) A conviction shall not be used to enhance a sentence under this section if that conviction is used to enhance a sentence under a statute that prohibits use of the conviction for further enhancement under this section. [Emphasis added.]

Under MCL 769.11(1)(c), a violation of MCL 333.7401(2)(a)(*iv*) is a "major controlled substance offense" as defined by MCL 761.2(b). However, our Supreme Court has concluded that a trial court does not err when it sentences a defendant under the habitual offender statutes, MCL 769.10-12, even when the defendant's subsequent felony is a "major controlled substance offense" as used in subsections (1)(c) of MCL 769.10-12. See *People v Wyrick*, 474 Mich 947, 947; 707 NW2d 188 (2005), relying on *People v Primer*, 444 Mich 269, 271-272; 506 NW2d 839 (1993) (concluding that the language in subsections (1)(c) of MCL 769.10-12, "shall be punished as provided" in the Public Health Code, does not preclude a trial court from imposing sentences under the habitual offender statutes).

Here, because defendant's convictions were punishable on a first conviction of not more than 20 years imprisonment, MCL 333.7401(2)(a)(*iv*), under the plain language of MCL 769.11(1)(a), the trial court had discretion[3] to sentence defendant to a maximum term of not more than 40 years imprisonment. However, the trial court was required to fix the maximum term "within any specified limits in terms of years" under MCL 769.11(2). For purposes of the maximum term, the above phrase plainly requires a trial court to sentence a defendant to the maximum term required by law for that conviction. To conclude otherwise would be contrary to the purpose of the habitual offender statutes, i.e., to increase the terms of imprisonment as a deterrent against second or subsequent felonies. *People v Cervantes*, 448 Mich 620, 624-625; 532 NW2d 831 (1995). The Legislature made this abundantly clear when it recently amended MCL 769.11(2) to provide that "[t]he court shall not fix a maximum sentence that is less than the maximum term for a first conviction." See *Burton v Reed City Hosp Corp*, 471 Mich 745, 752; 691 NW2d 424 (2005) (reasoning that the word "shall" in legislation "indicates a mandatory and imperative directive").[4] This amendment serves to emphasize what a sentencing court is required to do. Accordingly, we conclude that the trial court plainly erred by failing to sentence defendant at least to the statutory maximum term of 20 years imprisonment.[5]

A maximum sentence that deviates from that provided by statute is a nullity. *In re O'Dell*, 365 Mich 429, 431; 113 NW2d 220 (1962). Accordingly, we remand for the trial court to reconsider the maximum sentence but to, at least, set the maximum sentence to no less than 20 years.

Also, there may be additional corrections to the judgment of sentence that are necessary. At sentencing for this action, the trial court stated that it was sentencing defendant to *concurrent* prison terms of *two* to 10 years to be served consecutively to the two convictions in the separate action. However, the original judgment of sentence provides that the convictions in this action are to run *consecutively to each other* and that defendant's minimum sentence for each conviction is *two years six months.* The judgment of sentence was later amended, but those areas

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[3] As used in the statute, the word "may" designates discretion. See *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003).

[4] This amendment was considered only to the extent that it is illustrative of our interpretation of the former version of MCL 769.11(2). Because amendments are presumed to apply prospectively and the amendment did not become effective until January 9, 2007, after defendant's sentencing, we do not apply it retroactively because the Legislature did not instruct us to do so. See *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 584; 624 NW2d 180 (2001) (reasoning that for purposes of determining whether a statute should apply retroactively or prospectively, most instructive is when the Legislature includes no express language regarding retroactivity).

[5] Defendant's reliance on *People v Mauch*, 23 Mich App 723; 179 NW2d 184 (1970) for the proposition that the trial court had discretion whether to set the maximum term of imprisonment at 20 years is misplaced. The trial court in *Mauch* failed to recognize its discretion to set the maximum term between the maximum term required by law and the enhanced term allowed under the relevant habitual offender statute. *Id.* at 730-731. By the plain language of the statutory scheme, the trial court in *Mauch* and the trial court in the case at hand lacked discretion to set the maximum term below the maximum set by statute, which here is 20 years.

remained unchanged. Consecutive sentences for the convictions in this action are authorized under MCL 333.7401(3). However, based on the record before us, it appears that the amended judgment of sentence does not reflect the trial court's actual sentence. Accordingly, on remand, the trial court should also amend the judgment of sentence if, in fact, the judgment of sentence does not correspond with the trial court's actual intended sentence.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Deborah A. Servitto