STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 10, 2008
v	No. 275210 Macomb Circuit Court
CONNY GEORGE MORITZ, Defendant-Appellant.	LC No. 03-000991-FC

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

PER CURIAM.

Defendant appeals by right from his consecutive sentences of 18 years, nine months to 50 years for kidnapping, MCL 750.349, and seven years, 11 months to 20 years for first-degree home invasion, MCL 750.110a(2). We affirm.

A jury convicted defendant of kidnapping, first-degree home invasion, carrying a dangerous weapon with unlawful intent, MCL 750.226, four counts of felonious assault, MCL 750.82, and three counts of possession of a firearm during the commission of a felony, MCL 750.227b. Initially, the trial court sentenced defendant to 23 years, nine months to 50 years for kidnapping, 11 years, eight months to 20 years for first-degree home invasion, two to five years for carrying a dangerous weapon, two to four years for each count of felonious assault, and two years for each count of felony-firearm. The trial court ordered the sentence for first-degree home invasion to run consecutively to the sentence for kidnapping.

Thereafter, the trial court granted defendant's motion for resentencing and resentenced defendant to consecutive terms of 23 to 50 years in prison for kidnapping, and 11 to 20 years for first-degree home invasion. Both minimum terms constituted an upward departure from the guidelines.[1] Defendant's other sentences remained the same.

This Court consolidated defendant's appeals from the original sentencing and his resentencing, and in *People v Moritz*, unpublished per curiam opinion of the Court of Appeals,

[1] The statutory guidelines recommended a minimum sentence range of 135 to 225 months for kidnapping, and 57 to 95 months for first-degree home invasion.

issued August 3, 2006 (Docket Nos. 251265, 258436), this Court affirmed defendant's convictions but reversed his sentences for kidnapping and first-degree home invasion and remanded for further proceedings. In Docket No. 258436, this Court rejected defendant's assertion that in imposing sentence, the trial court erred by relying on facts not determined by the jury, in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). The *Moritz* Court reversed defendant's sentences for kidnapping and first-degree home invasion on the ground that the trial court failed to articulate substantial and compelling reasons for exceeding the guidelines and remanded the matter to the trial court for resentencing.[2] *Id*. at 3-5.

At the resentencing hearing, the trial court indicated that it would impose minimum terms within but at the high end of the guidelines ranges. The trial court sentenced defendant to 225 months to 50 years for kidnapping and to a consecutive sentence of 95 months to 20 years for first-degree home invasion. After the trial court announced the sentences, defendant asked if he was allowed to speak. The trial court inquired, "What do you want to say?" Defendant stated that he wanted to speak on the record about a letter that he had sent to the trial court. The trial court said, "Tell me about it." When defendant asked if he should read the letter, the trial court said, "No. I want you to talk to me. What are you asking me to do?" Defendant indicated that he wished to challenge his conviction of kidnapping on the basis that he was the legal guardian of the victim, an incapacitated person. The trial court noted that was a legal issue that the court had already decided. Defendant agreed it was a legal question, and he "wanted to do an interlocutory appeal on that." The court advised defendant his remedy was to appeal to the Court of Appeals. Defendant continued to argue stating, "it's impossible to charge me with kidnapping my wife when she's in my care." After the trial court read defendant his appeal rights, defendant complained about the availability of transcripts and also referred to all three sentencing proceedings as "sham sentences."

On appeal, defendant, through appointed counsel, argues that he is entitled to another resentencing on his convictions of kidnapping and first-degree home invasion because the trial court scored the guidelines based on facts not found beyond a reasonable doubt by the jury as required by *Blakely*, *supra*, and other cases. We disagree.

Defendant raised this argument in his previous appeal, and this Court rejected it. *Moritz*, *supra*, slip op at 3 n 2, citing *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). The principles articulated in *Blakely*, *supra*, do not apply to Michigan's indeterminate sentencing scheme. See *Drohan*, *supra* at 159-164. The law in Michigan has not changed since our prior opinion. See *People v McCuller*, 479 Mich 672, 677-678; 739 NW2d 563 (2007), and *People v Harper*, 479 Mich 599, 615; 739 NW2d 523 (2007). Thus, in addition, the law of the case doctrine bars defendant's argument. *People v Herrera (On Remand)*, 204 Mich App 333, 340; 514 NW2d 543 (1994).

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[2] This Court also opined that as an alternative to resentencing the trial court could articulate on the record a substantial and compelling reason for its guidelines departures. *Moritz*, *supra*, slip op at 4-5, citing *People v Babcock*, 469 Mich 247, 258-259; 666 NW2d 231 (2003).

Next, defendant argues through appointed counsel that the trial court abused its discretion by ordering his sentence for first-degree home invasion to run consecutively to his sentence for kidnapping. Defendant asserts that because he received minimum terms at the high end of the guidelines for both convictions, consecutive sentencing was unnecessary. We disagree.

We review a trial court's decision to impose consecutive sentences for an abuse of discretion. *People v St. John*, 230 Mich App 644, 646; 585 NW2d 849 (1998).

MCL 750.110a(8) provides:

> (8) The court may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction.

Defendant did not preserve this issue; therefore, our review is for plain error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004). MCL 769.34(10) states in part: "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." Because we have rejected defendant's arguments regarding guidelines scoring and defendant does not argue his sentences were based on inaccurate information, and because each consecutive sentence is within the appropriate guidelines sentence range, it is doubtful defendant may appeal this issue. See *Kimble*, *supra* at 310-312. Moreover, defendant has not demonstrated plain error occurred. *Id.* Defendant was convicted of serious offenses: he drove from Tennessee to Michigan, kidnapped his estranged wife at gunpoint, and wounded two children while firing a gun in a vehicle. Consecutive sentences were not outside the range of principled outcomes, *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003), and thus did not constitute an abuse of discretion.

Next, defendant, acting *in propria persona*, argues that he is entitled to be resentenced before a different judge because the trial court denied him the right to engage in allocution before imposing sentence. We disagree.

"At sentencing, the court, must, on the record: . . . (c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence." MCR 6.425(E)(1)(c). The determination of the applicability and scope of the common-law right to allocute is a question of law that we review de novo. *People v Petty*, 469 Mich 108, 113; 665 NW2d 443 (2003).

Here, at resentencing, the trial court stated that when it had imposed sentence in the second proceeding, it had intended to stay within the sentence guidelines. The court then pronounced sentence, without first asking the parties if they desired to advise the court of any matter of which the court should take consideration before imposing sentence. After the trial court pronounced sentence, defendant requested that he be permitted to speak, and the colloquy already noted occurred.

This Court has held that affording a defendant the right to allocute after sentence has been imposed effectively denies the right. See *People v Parks*, 183 Mich App 647, 649; 455 NW2d 368 (1990). But in so holding, the *Parks* Court applied the predecessor of the current court rule, MCR 6.101(G)(2), and also relied in part on *People v Berry*, 409 Mich 774; 298 NW2d 434 (1980), which in turn applied the even earlier version of the court rule, GCR 1963, 785.8. See *Parks*, *supra* at 649, and *People v Petit*, 466 Mich 624, 631; 648 NW2d 193 (2002). As the *Petit* Court observed, "[t]he principal difference between the former and the present court rule is that the latter no longer provides that 'failure to comply shall require resentencing.'" *Petit, supra* at 632. Instead, "'[w]hether failure to comply with a provision in this subrule will entitle a defendant to resentencing [now] depends on the nature of the noncompliance and must be determined by reference to past case law or on an individual case basis.'" *Id*., quoting MCR 6.425, 1989 Staff Comment.

There is no doubt that the right of allocution is an important one the denial of which will generally merit reversal. *Petty*, supra at 119-120. But we conclude that on the facts and circumstances of this case, remand for resentencing is unnecessary even though the trial court did not offer defendant the opportunity of allocution until after announcing the sentences. First, the sentencing proceeding currently under review was defendant's third opportunity to advise the trial court of any factors defendant believed were important for the court to consider in imposing sentence. Second, when defendant expressed his desire to speak, the trial court allowed him to do so. The trial court in the past had demonstrated its willingness to reconsider whether its decisions were correct and to take appropriate corrective action. For example, the trial court granted resentencing after the first sentencing and acknowledged it had erred regarding the sentence guidelines with respect to the second sentencing proceeding. Consequently, we conclude the trial court's query to defendant - - "What are you asking me to do?" - - was neither a sham nor meaningless. Third, when defendant did speak, his comments had nothing to do with his sentence. Instead of arguing for some mitigation of the sentence, defendant only sought to argue the legal merits of his conviction. Then, the trial court properly noted that defendant's remedy in that regard was to perfect his appeal in this Court. The transcript of the proceeding plainly reflects the events. For these reasons, we conclude resentencing is not warranted.

We affirm.

/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey
/s/ Michael R. Smolenski