

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

NATHANIEL ERNEST PASSMORE,

Defendant-Appellee.

UNPUBLISHED

April 15, 2008

No. 276967

Wayne Circuit Court

LC No. 05-005811-01

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

The prosecutor appeals by delayed leave granted from an order of resentencing entered by a successor judge of the circuit court. Because the successor judge improperly resentenced defendant in violation of the doctrine of the law of the case, we vacate the orders on resentencing and remand for reinstatement of the sentences imposed by the original circuit judge as modified to reflect a correct arrangement of consecutive and concurrent sentencing. We vacate and remand.

I. Facts

Defendant pleaded guilty to nine counts of felonious assault, MCL 750.82, and one count each of discharging a firearm at a building, MCL 750.234b, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. In September 2005, Judge Leonard Townsend sentenced defendant to prison terms of 33 to 48 months for each felonious assault conviction, two to four years for the discharge of a firearm conviction, and 40 to 60 months for the CCW conviction. The minimum sentences for the CCW and felonious assault convictions constituted upward departures from the sentencing guidelines range.

Judge Townsend issued a first amended judgment of sentence in November 2005, which specified that defendant's felony-firearm sentence was to run consecutively to all other sentences, which were to be served concurrently. Judge Townsend issued a second amended judgment of sentence in February 2006, specifying that defendant was to serve the felony-firearm and CCW sentences concurrently with each other, but consecutive to the felonious assault and discharge of a firearm sentences.

Subsequently, defendant filed a motion for resentencing. While Judge Townsend allegedly agreed that the arrangement of consecutive and concurrent sentencing needed correction, he rejected defendant's challenges regarding his decision to depart from defendant's sentencing guidelines range. No order correcting the arrangement of consecutive and concurrent sentencing followed.

Defendant filed an application for leave to appeal with this Court, raising issues relating only to the trial court's departure from the guidelines. This Court denied the application "for lack of merit in the grounds presented." *People v Passmore*, unpublished order of the Court of Appeals, entered February 20, 2007 (Docket No. 274196).

While the application for leave to appeal was pending in this Court, defendant's original motion for resentencing was filed with Judge Townsend's successor, Judge Carole Youngblood. Judge Youngblood acted on the motion and ultimately entered an order granting resentencing on the grounds that "[t]he defendant is subject to an invalid sentence that runs his conviction for carrying a concealed weapon concurrent to his conviction for felony-firearm," and that the original "sentencing court erred when it failed to state substantial and compelling reasons to exceed the guidelines."

At a hearing that followed, the prosecutor protested that resentencing was improper because the matter was pending before this Court. Judge Youngblood determined that Judge Townsend, as a visiting judge, lacked the authority to decide posttrial matters and, therefore, was without jurisdiction when he denied defendant's motion for resentencing. One week after this Court denied defendant's application for leave to appeal for lack of merit in the grounds presented, Judge Youngblood resentenced defendant, within the guidelines, to one to four years for each of the felonious assault and the discharge of a firearm convictions, one to five years for the CCW conviction, and two years for the felony-firearm conviction.

II. Law of the Case

We need not decide whether Judge Townsend lacked jurisdiction in this matter after February 12, 2006, the date on which this case allegedly was administratively transferred from Judge Townsend to Judge Youngblood. Before that date, Judge Townsend, as a sitting Wayne Circuit Court judge, accepted defendant's plea, imposed sentence, and then corrected the felonious assault sentences to comport with the statutory two-thirds rule, MCL 769.34(2)(b). The terms of incarceration went unchanged as Judge Townsend, after February 12, 2006, attempted to correct the arrangement of consecutive and concurrent sentencing, and then later denied defendant's motion for resentencing. As such, the sentences that defendant challenged in his application for leave to appeal with this Court arose from a judgment of sentence the validity of which was not in question.

This Court's denial of defendant's application for lack of merit in the grounds presented in Docket No. 274196 established the law of the case with respect to the validity of Judge Townsend's departure sentences. See *People v Douglas*, 122 Mich App 526, 529-530; 332 NW2d 521 (1983).

Under the law of the case doctrine, an appellate court ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue.

The law of the case mandates that a court may not decide a legal question differently where the facts remain materially the same. [*Webb v Smith*, 224 Mich App 203, 209; 568 NW2d 378 (1997) (internal citations omitted).]

Because this Court rejected defendant's sentencing issues on their merits on February 20, 2007, Judge Youngblood erred in deciding otherwise and sentencing defendant anew by way of judgments of sentence issued thereafter. Similarly, because the law of the case binds the appellate court as well as lower courts, we may not review the merits of Judge Townsend's decision to exceed the sentencing guidelines range when sentencing defendant for felonious assault and CCW. Accordingly, we vacate Judge Youngblood's orders in this matter, and remand this case to the circuit court for reinstatement of the sentences reflected in Judge Townsend's orders of November 17, 2005, and thereafter.

III. Consecutive and Concurrent Sentencing

Concurrent sentencing is the norm. *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). Consecutive sentences may be imposed only when specifically authorized by statute, such as for felony-firearm and the underlying felony. *Id.* at 681-682.

A sentence for felony-firearm may run consecutively only to a sentence imposed for a conviction of an underlying felony. MCL 750.227b(1) and (2). CCW is among those statutorily listed crimes that cannot serve as the underlying offense for felony-firearm. MCL 750.227b(1). See also *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000). Therefore, Judge Townsend erred in initially calling for the felony-firearm and CCW sentences to run consecutively, but was ultimately correct in making them concurrent in his last judgment of sentence.

However, no authority allows defendant's CCW sentence to run consecutively to his sentences for felonious assault or discharge of a firearm where those sentences stem from the same criminal conduct. Instead, the felonious assault and discharge of a firearm sentences should be consecutive only to the felony-firearm sentence. The result is that the CCW sentence would run concurrently with the felony-firearm sentence, and then, after the felony-firearm sentence has expired, the remaining portion of the CCW sentence would continue to run concurrently with the felonious assault and discharge of a firearm sentences.

Although the parties do not raise this issue, pursuant to MCR 7.216(A)(1) and (7), we direct the trial court on remand to specify that on reinstatement of Judge Townsend's terms of imprisonment as indicated by his November 2005 and February 2006 amended judgments of sentence, only the felony-firearm sentence is to run consecutively to the concurrent sentences for felonious assault and discharge of a firearm, and that the CCW sentence is to run concurrently with all sentences.

Vacated and remanded for reinstatement of the sentences imposed by Judge Townsend as

modified to reflect the ministerial correction of the arrangement of consecutive and concurrent sentencing. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Pat M. Donofrio
/s/ Alton T. Davis