

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DION SAMUEL GOODELL,

Defendant-Appellant.

UNPUBLISHED

April 29, 2008

No. 272216

Bay Circuit Court

LC No. 99-001112-FH

Before: Zahra, P.J., and White and O'Connell, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from his sentence of 40 to 60 months in prison imposed following a conviction of probation violation. We vacate the sentence imposed for defendant's conviction of probation violation and remand for further proceedings consistent with this opinion. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

A jury convicted defendant of carrying a firearm with unlawful intent, MCL 750.226, and possession of a firearm during the commission of a felony, MCL 750.227b. On September 13, 1999, the trial court sentenced defendant to the mandatory two-year prison term for the conviction of felony-firearm, and to a consecutive three-year term of probation for the conviction of carrying a firearm with unlawful intent. In *People v Goodell*, unpublished per curiam opinion of the Court of Appeals, issued October 5, 2001 (Docket No. 223138), another panel of this Court affirmed defendant's convictions.

Defendant was released from prison, and on August 18, 2004, he was charged with violating his probation by assaulting a person with a sword. Defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84, after a jury trial. At a proceeding that served both as a sentencing hearing for the assault conviction and a probation violation hearing, the trial court found that defendant violated his probation in this case by being convicted of another criminal offense, and sentenced defendant to 40 to 60 months in prison, with credit for 545 days, for the underlying offense of carrying a weapon with unlawful intent. This sentence was to be served concurrently with the third habitual offender sentence of eight years, four months to 20 years, with credit for 545 days, for the assault conviction.

If a defendant is convicted of a felony that is not among certain enumerated offenses, the trial court may impose a term of probation that does not exceed five years. MCL 771.1(1). The

trial court must fix the term of probation. MCL 771.2(1) and (2). The trial court acted within its authority when it sentenced defendant to a three-year term of probation for the 1999 conviction of carrying a firearm with unlawful intent. The trial court did not act within its authority when it ordered defendant's probationary sentence to run consecutive to defendant's two-year term of incarceration for the felony firearm conviction. Where probation is the sentence for an underlying felony, the mandatory felony-firearm sentence is served concurrent with the term of probation. *People v Brown*, 220 Mich App 680, 682-684; 560 NW2d 80 (1996). The consecutive sentencing requirement of the felony-firearm statute only applies where the sentence for the underlying felony is a term of imprisonment. *Id.*

Defendant argues that the trial court lacked jurisdiction to impose a sentence based on a conviction of probation violation because his term of probation for carrying a firearm with unlawful intent was required to run concurrently with instead of consecutively to his sentence for felony-firearm.¹ Plaintiff argues that defendant's sentence is valid. Plaintiff notes that defendant could have been sentenced to a maximum term of five years' probation, MCL 771.2(2), and that defendant had not been discharged from probation at the time sentence was imposed. Plaintiff contends that because defendant was still under the jurisdiction of the trial court when sentence was imposed, the sentence is valid

Defendant's challenge to the imposition of a consecutive term of probation should have been raised in his prior direct appeal from the original judgment of sentence for his 1999 convictions. It was not. Had this occurred, defendant's sentence would have been vacated and the matter remanded to the trial court for imposition of a proper probationary sentence. On remand, the trial court could have imposed a probationary sentence consistent with its intent. If the court imposed a consecutive probationary sentence only because it was under the misconception that consecutive sentencing was required, then the court would have imposed a three-year probationary sentence that ran concurrent to defendant's incarceration. However, if the intent of the court was to have defendant serve three years' probation after being released from incarceration on the felony firearm conviction, the trial court would have imposed a five-year probationary sentence that would have run concurrent to the felony firearm incarceration.

We conclude that defendant's failure to challenge to the imposition of a consecutive term of probation in his prior direct appeal from the original judgment of sentence does not preclude clarification of the trial court's intent at this stage of the proceedings. We therefore vacate defendant's sentence for his conviction of probation violation and we remand for further proceedings. On remand, the trial court shall clarify its intent as it relates to the sentence imposed for defendant's 1999 conviction for carrying a firearm with unlawful intent and correct *nunc pro tunc* the judgment of sentence in that matter. If defendant's probationary sentence is for a term of three years, no sentence for a probation violation may be imposed on defendant and the trial court shall vacate defendant's probation violation conviction. Conversely, if defendant's

¹ Defendant attempted to raise this issue at the probation violation/sentencing hearing. The trial court asserted that defendant was incorrect, and that the issue could be raised on appeal. Review of defendant's issue is appropriate. See *People v McNeil*, 104 Mich App 24, 26; 303 NW2d 920 (1981).

probationary sentence is for a term of five years, then the trial court shall re-sentence defendant for his conviction for violating probation.

Defendant's sentence is vacated and this matter is remanded for further proceedings consistent with this opinion.

We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Helene N. White

/s/ Peter D. O'Connell