STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v KING GROSS, Defendant-Appellant.	UNPUBLISHED May 1, 2008 No. 277319 Oakland Circuit Court LC No. 94-133228-FH

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

PER CURIAM.

This case comes before the Court on remand from our Supreme Court to decide as on leave granted. *People v Gross*, 477 Mich 1086; 729 NW2d 242 (2007). Defendant appeals the trial court's order denying his motion for relief from judgment. We affirm.

In 1995, defendant pleaded guilty to conspiracy to deliver 225 grams or more but less than 650 grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(*ii*), possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(*iv*), four counts of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(*iii*), and possession with intent to deliver 225 grams or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(*ii*). On March 17, 1995, the trial court imposed consecutive terms of imprisonment of five to 30 years for the conspiracy conviction, one to 20 years for the conviction of possession of less than 25 grams, and three to 20 years for three of the four convictions of possession with intent to deliver 50 or more grams but less than 225 grams.[1] The trial court did not impose sentence on defendant's conviction for possession with intent to deliver 225 grams or more but less than 650 grams of cocaine.

[1] The original judgment of sentence also transposed the sentence imposed for the conviction of possession of less than 50 grams of cocaine with the sentence imposed for one of the counts of possession with intent to deliver 50 grams or more but less than 225 grams of cocaine. This error was corrected in the amended judgment of sentence that followed.

At that sentencing hearing, the prosecutor indicated that there should be seven sentences, not just the five then imposed. The trial court conceded that an investigation was in order and stated, "If my sentence is incorrect, I'll come back and correct it."

An additional sentencing proceeding took place on June 23, 1995. The trial court reiterated the five sentences so far imposed and added consecutive sentences of imprisonment of three to 20 years for the remaining conviction of possession with intent to deliver 50 grams or more but less than 225 grams, and three to 30 years for the conviction of possession with intent to deliver 225 grams or more but less than 650 grams.

This Court dismissed defendant's untimely claim of appeal for lack of jurisdiction, unpublished order entered October 18, 1996 (Docket No. 192216), and then dismissed his delayed application for leave for lack of merit, unpublished order entered June 9, 1997 (Docket No. 199011).

In his motion for relief from judgment subsequently brought before the circuit court, defendant argued that he was entitled to resentencing because the trial court had failed to recognize or exercise its discretion to impose less than the most severe possible maximum sentence, that the court improperly resentenced him without an updated presentence report, and that the court improperly vacated a valid earlier sentence. The circuit court denied the motion, concluding that the maximum sentence was set by statute, not the court, and that defendant had not in fact been resentenced where the court only amended the sentence to correct clerical omissions.

This Court denied defendant's delayed application for leave to appeal. Unpublished order entered July 10, 2006 (Docket No. 266975). Defendant sought leave to appeal to our Supreme Court, which remanded the case to this Court for consideration as on leave granted.

We review a decision on a motion for relief from judgment for an abuse of discretion. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001). An abuse of discretion occurs where the court's decision falls outside a principled range of outcomes. See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A defendant seeking post-appellate relief from judgment bears the burden of establishing entitlement to the relief requested. MCR 6.508(D). Where the defendant seeks such relief on grounds other than jurisdictional ones which could have been raised on appeal, the defendant must show good cause for failing to raise such grounds earlier and actual prejudice. MCR 6.508(D)(3)(a) and (b).

To satisfy the good cause requirement, defendant asserts that appellate counsel was ineffective and that defendant himself had serious ongoing health problems. Assuming without deciding that defendant has shown good cause, we nonetheless conclude that he is not entitled to relief from judgment because he has failed to show actual prejudice.

Proof that a sentence is invalid satisfies the requirement for actual prejudice. MCR 6.508(D)(3)(b)(iv). Defendant first argues that the sentencing court erred in failing to recognize and exercise its discretion in imposing the maximum sentences.

"A trial judge has the authority to resentence a defendant only when the previously imposed sentence is invalid." *People v Moore*, 468 Mich 573, 579; 664 NW2d 700 (2003). In this regard, a trial court's "misapprehension of the law can be a ground for finding a sentence to be invalid." *Id*. Thus, "a defendant is entitled to resentencing where a sentencing court fails to exercise its discretion because of a mistaken belief in the law." *People v Green*, 205 Mich App 342, 346; 517 NW2d 782 (1994). A serious legal or procedural error can likewise render a sentence invalid. See *People v Thenghkam*, 240 Mich App 29, 70-71; 610 NW2d 571 (2000), abrogated in part on other grounds in *People v Petty*, 469 Mich 108; 665 NW2d 443 (2003).

Defendant suggests that the trial court misapprehended the law when the court stated at the second sentencing proceeding, "I cannot reduce the maximum." Defendant premises his argument on the words "nor more than" that precede the maximum years of imprisonment for the offenses at issue. MCL 333.7401, at the time relevant, prescribed terms of imprisonment of "not less than 20 years nor more than 30 years" for possession of 225 grams or more but less than 650 grams of cocaine, subsection (2)(a)(*ii*), "not less than 10 years nor more than 20 years" for 50 grams or more but less than 225 grams, subsection (2)(a)(*iii*), and "not less than 1 year nor more than 20 years" for less than 50 grams, subsection (2)(a)(*iv*). Defendant argues from this that "[a] sentencing [j]udge has the discretion to sentence a convicted [d]efendant to no more than a maximum sentence of 20 years, or a maximum sentence of 30 years. But that each maximum sentence is discretionary." Defendant is mistaken.

In our indeterminate sentencing system for a crime for which the Legislature has prescribed a maximum term of years' imprisonment, a trial court must usually impose a sentence ranging between its discretionary minimum and that statutory maximum. MCL 769.8(1). In this case, the maximum sentences imposed for the violations of subsections (2)(a)(*ii*), (*iii*), and (*iv*) precisely reflect those statutory requirements. Those maximums were nondiscretionary, and the sentencing court properly imposed them. See *People v Mitchell*, 175 Mich App 83, 93-94; 437 NW2d 304 (1989).

Defendant next argues that his sentence was rendered invalid because the sentencing court engaged in resentencing without having an updated presentence investigation report (PSIR) prepared. However, we reject defendant's characterization of the June 23, 1995 proceedings as a resentencing. The trial court did not change any of the five sentences imposed at the first proceeding. The court convened the second one only to impose sentences for the two remaining convictions. The second proceeding was thus a continuation of the first, not a resentencing.[2]

Further, whether an updated PSIR was required was discussed at that second proceeding. The court asked if there were something to change and offered to obtain an updated report, but neither defendant nor his attorney expressed any such desire. It is apparent from the record that defendant and his counsel did not desire further input from the probation department because the trial court had determined to impose major downward departures from the statutory minimum

[2] Notwithstanding that the transcript of the second sentencing proceeding, and the amended judgment of sentence, are styled respectively a "resentencing" or "resentence." The labels attached do not trump the procedural realities.

sentences. Moreover, on appeal defendant gives no indication what information might have been changed or added to an updated PSIR except for a vague reference to his institutional record. For these reasons, defendant has failed to show actual prejudice in this regard.

Finally, defendant argues that with the second sentencing proceeding, the trial court improperly vacated a sentence properly imposed at the first. We disagree.

Although a sentencing court "may not modify a valid sentence after it has been imposed except as provided by law," MCR 6.429(A), "Clerical mistakes in judgments . . . and errors arising from oversight or omission may be corrected by the court at any time . . . ." MCR 6.435(A). In this case, during the second sentencing proceeding the trial court merely confirmed the initial sentencing for five convictions and then imposed sentence for the two remaining convictions for which defendant has not been sentenced at the first sentencing. Thus, the trial court was simply correcting an oversight or omission, i.e., imposing two required sentences. The initial, valid, sentence was not vacated; it was corrected.

For these reasons, the circuit court properly denied defendant's motion for relief from judgment.

We affirm.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey