# STATE OF MICHIGAN

# COURT OF APPEALS

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 16, 2008 |
| v<br><br>TIMOTHY LEWIS,<br><br>Defendant-Appellant. | No. 277353<br>Wayne Circuit Court<br>LC No. 99-003166-01 |

| | |
|---|---|
| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | |
| v<br><br>TIMOTHY LEWIS,<br><br>Defendant-Appellant. | No. 277355<br>Wayne Circuit Court<br>LC No. 99-003167-01 |

Before: Wilder, P.J., and Markey and Talbot, JJ.

PER CURIAM.

These consolidated appeals involve two consolidated cases that were tried jointly before a single jury in March 2000. In LC No. 99-003166 ("Case I"), defendant was convicted of two counts of assault with intent to commit murder, MCL 750.83, carrying a concealed weapon in a motor vehicle ("CCW"), MCL 750.227, and felon in possession of a firearm, MCL 750.227f. In LC No. 99-003167 ("Case II"), defendant was convicted of second-degree murder, MCL 750.317. On April 11, 2000, defendant was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 60 to 90 years for the murder conviction, 35 to 60 years for the assault convictions, and four to ten years each for the CCW and felon-in-possession convictions, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction.

In a prior appeal by right, this Court affirmed defendant's convictions and sentences, but remanded for correction of clerical errors in the judgments of sentence. *People v Lewis*, unpublished opinion per curiam of the Court of Appeals, issued September 11, 2003 (Docket Nos. 234418 & 236428), lv den 469 Mich 1017 (2004) ("*Lewis I*"). On October 9, 2003, the trial court issued amended judgments of sentence in accordance with this Court's decision in *Lewis I*.

Later, in April 2005, defendant filed a motion for relief from judgment, which the trial court denied on November 14, 2005. Defendant sought leave to appeal the trial court's November 14, 2005, order in this Court, but this Court denied the application on June 22, 2006. *People v Lewis*, unpublished order of the Court of Appeals, entered June 22, 2006 (Docket No. 266947) ("*Lewis II*"). Defendant failed to file a timely application with the Supreme Court for leave to appeal this Court's order denying leave. Accordingly, on March 14, 2007, defendant filed a motion in the trial court requesting that court to reissue the judgments of sentence. The motion alleged that defendant failed to file a timely application for leave to appeal to our Supreme Court because for some reason appellate counsel did not receive this Court's June 22, 2006, order denying leave. On March 30, 2007, the trial court granted defendant's motion and reissued a judgment of sentence in each case (labeled "re-sentence" judgments). The new judgments provide for the same sentences that were previously imposed but with credit for 2,545 days served. Defendant now claims an appeal by right from the "re-sentence" judgments issued in each case. We dismiss the appeals for lack of jurisdiction.

An issue of subject-matter jurisdiction may be raised at any time. *Polkton Twp v Pellegrom*, 265 Mich App 88, 97; 693 NW2d 170 (2005). "[A] court must take notice of the limits of its authority, and should on its own motion recognize its lack of jurisdiction and dismiss the action at any stage in the proceedings." *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992).

We disagree with defendant's claim that MCR 7.203(A) provides a basis for this Court's jurisdiction to consider defendant's challenges to the convictions, or to the trial court's November 14, 2005, decision denying his motion for relief from the judgment under MCR 6.500 *et seq.* MCR 7.203(A)(1) provides that this Court has jurisdiction of an appeal of right filed by an aggrieved party from a final judgment or order as defined in MCR 7.202(6). Under MCR 7.202(6)(b)(iii), a "final judgment" includes a "sentence imposed following the granting of a motion for resentencing." Substantively, however, there is no basis for concluding that the trial court granted a motion for resentencing. Defendant did not file a motion for resentencing, no resentencing proceeding was conducted, and no new sentences were imposed.

Further, an appellate court is not bound by a party's choice of labels for a claim, *Manning v Amerman*, 229 Mich App 608, 613; 582 NW2d 539 (1998), nor is an appellate court bound by the labels given by a trial court for its actions. See *State Treasurer v Abbott*, 468 Mich 143, 152 n 10; 660 NW2d 714 (2003), *People v Anderson*, 409 Mich 474, 486; 295 NW2d 482 (1980), and *Faircloth v Family Independence Agency*, 232 Mich App 391, 400-401; 591 NW2d 314 (1998).

In order for this Court to evaluate its jurisdiction, we must necessarily consider the authority under which the trial court undertook to enter the "re-sentence" judgments. Although a circuit court, as a court of general jurisdiction, has authority to exercise jurisdiction over criminal cases, *People v Goecke*, 457 Mich 442, 458; 579 NW2d 868 (1998), its jurisdiction typically ends when a valid sentence is pronounced, *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Various rationales have been cited to preclude a trial court from resentencing a defendant, which include the passing of authority over a defendant sentenced to prison to the parole board. *In re Jenkins*, 438 Mich 364, 368; 475 NW2d 279 (1991).

The only authority cited in defendant's motion to vacate the earlier judgments and enter new judgments related to principles applicable to claims of ineffective assistance of appellate counsel. In Michigan, MCR 6.428 addresses a trial court's authority in this context, but the rule only applies when an attorney's deficient representation deprives a defendant of a direct appeal, reviewable as of right. This court rule is consistent with a defendant's constitutional right to counsel in a first-tier appeal in a criminal case. "'[T]he Due Process and Equal Protection Clauses require the appointment of counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals.'" *People v James*, 272 Mich App 182, 183-184; 725 NW2d 71 (2006), quoting *Halbert v Michigan*, 545 US 605; 125 S Ct 2582, 2586; 162 L Ed 2d 552 (2005). But as explained in *Peña v United States*, 534 F3d 92, 94-95 (CA 2, 2008), the constitutional right to counsel does not apply to discretionary appeals after there has already been first-tier appellate review of a defendant's case, and thus there is no corresponding right to the effective assistance of counsel for such appeals. See also *People v Walters*, 463 Mich 717, 721; 624 NW2d 922 (2001) (a defendant has no constitutional right to counsel to pursue relief from judgment under subchapter 6.500, and thus cannot claim ineffective assistance of counsel in failing to timely file an application for leave to appeal); *People v Kincade (On Remand)*, 206 Mich App 477, 481-483; 522 NW2d 880 (1994) (while a defendant pursuing a motion for post-judgment relief may have a right to appointed counsel in certain circumstances, the right flows from the court rules, not the Sixth and Fourteenth Amendments).

Therefore, because defendant was previously afforded an appeal by right in each of these cases and the alleged deficient representation on which defendant relied to justify the entry of new judgments related solely to a discretionary appeal, we reject defendant's claim that principles applicable to claims of ineffective assistance of appellate counsel authorized the trial court's entry of the "re-sentence" judgments in these cases.

Furthermore, claiming that appellate counsel is ineffective is distinguishable from invoking a trial court's jurisdiction to consider and resolve a claim. MCR 6.500 *et seq.* provides a mechanism for seeking relief from a judgment where no further appeal by right is available. *Kincade, supra* at 482. An appeal by right can lie if a trial court grants resentencing and imposes a new sentence in a proceeding under MCR 6.500 *et seq. People v Martinez*, 193 Mich App 377, 380; 485 NW2d 124 (1992). In this case, however, there is no basis for concluding that the trial court proceeded under MCR 6.500 *et seq.* Specifically, the record fails to indicate that the prosecutor was given an opportunity to respond to defendant's motion as required by MCR 6.504(B)(4), that the trial court rendered a decision as provided in MCR 6.508(E), or that there was any basis for avoiding the prohibition against successive motions in MCR 6.502(G). Further, considering that defendant did not contest the validity of his sentences and that the trial court made no finding that the sentences were invalid, there is no substantive basis for concluding that the trial court granted a motion for resentencing. The authority to resentence depends on a determination that a previously imposed sentence is invalid, even in a proceeding under MCR 6.500 *et seq.* See *People v Moore*, 468 Mich 573, 579; 664 NW2d 700 (2003); see also *Miles, supra* at 96; MCR 6.429(B)(4).

Additionally, although the trial court recorded a new sentencing date and recomputed the amount of defendant's sentence credit in the "re-sentence" judgments, it did not follow the procedural requirements for imposing a new sentence. See MCR 6.425. Nothing in the record indicates that the trial court conducted any type of the de novo consideration that applies to an

actual resentencing. Cf. *People v Williams (After Second Remand)*, 208 Mich App 60, 65; 526 NW2d 614 (1994) (when a case is remanded because the entire sentence is invalid, every aspect of the sentence is before the judge de novo unless the remand indicates otherwise).

Substantively, we can only conclude that the trial court's March 30, 2007, "re-sentence" judgments, even with the changes in the sentencing date and the computation of sentence credit, are invalid. They do not comply with nor are they authorized by MCR 6.428. Because we are not bound by the "re-sentence" label attached to the new judgments and the trial court did not substantively impose new sentences in the context of a motion for resentencing, we conclude that this Court lacks jurisdiction to consider defendant's claims. Therefore, we dismiss the appeals for lack of jurisdiction.

In passing, we note that even were we to find the "re-sentence" judgments sufficient to invoke our jurisdiction, the scope of our review would be limited to the sentences imposed. *Martinez, supra* at 381. The questions defendant raised with respect to his convictions fall outside the scope of these appeals because defendant is not entitled to a second appeal as of right from the same final determination and may only challenge the trial court's November 14, 2005, decision denying relief from judgment in an application for leave to appeal. MCR 6.509(A); *Kincade, supra* at 482; *Martinez, supra* at 381; see also *People v Pickett*, 391 Mich 305, 316; 215 NW2d 695 (1974). Because defendant does not raise any sentencing issue, we have nothing to review.

We dismiss for lack of jurisdiction.

/s/ Kurtis T. Wilder
/s/ Jane E. Markey
/s/ Michael J. Talbot