

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEWITT L. SETTLES,

Defendant-Appellant.

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UNPUBLISHED

October 28, 2008

No. 278704

Wayne Circuit Court

LC No. 98-013901-FH

Before: Wilder, P.J., and Jansen and Owens, JJ.

PER CURIAM.

Defendant pleaded guilty on January 20, 1999, to assault with intent to rob while unarmed, MCL 750.88. Defendant was sentenced to 2½ to 15 years' imprisonment on November 30, 1999. On November 22, 2006, defendant requested appointed appellate counsel, pursuant to *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005). Defendant appeals by leave granted from the order denying his *Halbert* request for appointed appellate counsel. *People v Settles*, unpublished order of the Court of Appeals, entered April 7, 2008 (Docket No. 278704). We affirm.

Defendant argues that *Halbert* applies retroactively to his conviction and the trial court denied defendant his right to first-tier appellate review with the assistance of counsel. We disagree.

The retroactive applicability of a rule of criminal procedure is a question of law that this Court reviews de novo. *People v Parker*, 267 Mich App 319, 326; 704 NW2d 734 (2005). Defendant pleaded guilty in 1999. At the time of defendant's plea, Michigan law provided him with 42 days to seek appointed appellate counsel from the trial court. MCR 6.425(F)(2)(c); *People v James*, 272 Mich App 182, 186; 725 NW2d 71 (2006). It is undisputed that defendant did not do so. However, in 2005, the United States Supreme Court decided *Halbert*, holding that indigent defendants convicted by plea in a Michigan court have a federal constitutional right to appointed appellate counsel for first-tier review by the Michigan Court of Appeals.

Pursuant to *Halbert*, defendant sought appointed appellate counsel from the trial court in 2006. The trial court denied defendant's request and concluded that ". . . to date, neither the United States Supreme Court nor Michigan Courts have held that *Halbert* is to be applied retroactively to cases which were final at the time *Halbert* was decided." It is undisputed that

defendant's case was "final" at the time *Halbert* was decided. Therefore, we must decide whether the trial judge correctly concluded that *Halbert* may not be retroactively applied to defendant's plea-based conviction.

In 2005, our Supreme Court was confronted with this very issue, however, the Court held the application for leave in abeyance pending the outcome of a case before the United States Court of Appeals for the Sixth Circuit. *People v Houlihan*, 474 Mich 958, 706 NW2d 731 (2005). *Simmons v Kapture (On Rehearing)*, 516 F3d 450 (CA 6, 2008), dealt with the same issue and was on remand from the United States Supreme Court for reconsideration in light of *Halbert*.

In *Simmons, supra* at 451, the Sixth Circuit concluded that because the petitioner's state conviction was final when the United States Supreme Court decided *Halbert*, the issue of *Halbert's* applicability was governed by *Teague v Lane*, 489 US 288; 109 S Ct 1060; 103 L Ed 2d 334 (1989). According to *Teague*, a "new rule" of criminal procedure will not apply retroactively to cases on collateral habeas review, unless that rule "either decriminalizes a class of conduct or is a 'watershed' rule that implicates the fundamental fairness and accuracy of a criminal proceeding." *Id.* at 311. The Sixth Circuit concluded that *Halbert* constitutes a "new rule" and does not decriminalize certain conduct and is not a "watershed" rule. *Simmons, supra* at 451. Therefore, *Halbert* could not be applied retroactively to a conviction that was already final. *Id.*

After reviewing the Sixth Circuit's decision in *Simmons*, our Supreme Court denied the application for leave to appeal held in abeyance in *Houlihan*, concluding that it was not persuaded that it should review the question presented. *People v Houlihan*, 480 Mich 1165; 746 NW2d 879 (2008). Thus, our Supreme Court indicated approval of the Sixth Circuit's holding by denying leave in *Houlihan* after *Simmons* was decided. Therefore, we conclude that the trial court properly denied defendant's *Halbert* request for appointed appellate counsel.

Affirmed.

/s/ Kurt T. Wilder  
/s/ Kathleen Jansen  
/s/ Donald S. Owens