

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DERRICK E. HIGGINS,

Defendant-Appellee.

UNPUBLISHED

January 29, 2009

No. 282382

Wayne Circuit Court

LC No. 98-007531-FH

Before: Hoekstra, P.J., and Fitzgerald and Zahra, JJ.

PER CURIAM.

The prosecution appeals as of right from a circuit court order granting defendant's motion to dismiss due to lack of jurisdiction to resentence defendant. We reverse and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

In a prior appeal, this Court vacated defendant's sentences of 18 months to 20 years' imprisonment for his jury conviction of delivery of 50 or more but less than 225 grams of cocaine, MCL 333.7401(2)(a)(iii), and 1 to 30 years' imprisonment for his plea-based conviction of delivery of 225 or more but less than 650 grams of cocaine, MCL 333.7401(2)(a)(ii), and remanded for resentencing. *People v Higgins*, unpublished opinion per curiam of the Court of Appeals, issued February 15, 2007 (Docket Nos. 262756, 263966). Pursuant to MCR 7.215(F)(1)(a), this Court's judgment became effective on April 12, 2007. Resentencing was scheduled for August 24, 2007, but defendant requested and received an adjournment to allow defendant to file a sentencing memorandum. On September 30, 2007, before resentencing occurred, the Department of Corrections issued a "Parole Board Order for Discharge from Sentence." (Appendix A to defendant's brief.) Relying on the Parole Board's order and *People v Gregorczyk*, 178 Mich App 1; 443 NW2d 816 (1989), defendant argued that because he had been discharged from the prior invalid sentences by "executive commutation," resentencing him according to this Court's mandate would deny him due process and intrude on separation of powers. The trial court agreed and concluded that it lacked jurisdiction to resentence defendant.

On appeal, plaintiff argues that the trial court had jurisdiction to review and revoke the parole board discharge and to resentence defendant. This issue presents a question of law, which we review de novo. *People v Connor*, 209 Mich App 419, 423; 531 NW2d 734 (1995).

In *People v Lamb (After Remand)*, 201 Mich App 178; 506 NW2d 7 (1993), and *People v Hill (After Remand)*, 202 Mich App 520; 509 NW2d 856 (1993), this Court distinguished

Gregorczyk, supra, and explained that *Gregorczyk* was limited to its facts. The present case is distinguishable from *Gregorczyk*, as well as *Lamb* and *Hill*, because here the parole board discharge was issued after this Court's prior judgment vacating defendant's sentences became final. Assuming, arguendo, that the parole board discharge ordinarily "must operate as 'a remission of the remaining portion of his sentence[s],'" *Gregorczyk, supra* at 12, the remitted sentences here had already been vacated. Therefore, the discharge order was effectively a nullity. Unlike in *Gregorczyk*, resentencing in this situation does not implicate due process or separation of powers concerns.

Plaintiff argues that this case should be reassigned to a different judge because the trial court judge has previously erroneously found that defendant was entrapped,¹ improperly sentenced defendant to only a fraction of what was statutorily required, and now has improperly dismissed the case, suggesting that he is unwilling to set aside his previously formed opinion that defendant should not be held responsible for his criminal actions.

In deciding whether resentencing should occur before a different judge, this Court considers (1) whether the original judge would reasonably be expected on remand to have substantial difficulty in putting aside previously expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable for the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997), lv den 456 Mich 913 (1997). Reassignment is not necessary to preserve the appearance of justice, but it may entail waste or duplication that is out of proportion to any gain in preserving the appearance of fairness. Accordingly, we deny plaintiff's request to reassign this case to a different judge.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ E. Thomas Fitzgerald
/s/ Brian K. Zahra

¹ See *People v Higgins*, unpublished opinion per curiam of the Court of Appeals, issued October 6, 2000 (Docket No. 220697).