

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LYNETTE VONDA PONTIUS,

Defendant-Appellant.

UNPUBLISHED

March 24, 2009

No. 282187

Kalamazoo Circuit Court

LC No. 07-000327-FC

Before: Sawyer, P.J., and Zahra and Shapiro, JJ.

PER CURIAM.

A jury convicted defendant of conspiracy to commit murder, MCL 705.157a/MCL 750.316 (Count 1); two counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b (Counts 2 and 4); and assault with intent to murder, MCL 750.83 (Count 3). Defendant appeals as of right her November 14, 2007, judgment of sentence wherein the trial court sentenced her as an habitual offender, fourth offense, MCL 769.12, to two years' imprisonment for each felony-firearm conviction, 50 to 75 years' imprisonment for conspiracy to commit murder, and life imprisonment for assault with intent to commit murder. Counts 2 and 4 were to be concurrent with each other and consecutive to the sentences for conspiracy and assault. Count 1 and Count 3 were also to be served concurrent with each other. Defendant presents only sentencing issues on appeal. We affirm in part, and remand for resentencing in part.

I. Facts

At the initial sentencing hearing, the presentence investigation report (PSIR) contained multiple errors and did not indicate that defendant was on felony bond at the time she committed the offenses in the instant case. In addition, the trial court's original sentence as to Count 1 was calculated based on the wrong criminal statute, MCL 750.91 (Attempted Murder). After filing a claim of appeal, defendant moved in the lower court for resentencing. At a motion hearing on the issue, the trial court agreed that the sentence imposed for Count 1 was invalid because of the inaccurate crime citation in the presentence report. The trial court and both litigants also agreed defendant was on felony bond for a Calhoun County case at the time she committed the offenses in the instant case, and that this information was missing from the original PSIR. Nevertheless, instead of agreeing to a full resentencing, the trial court stated it would only resentence defendant as to Count 1.

On June 2, 2008, at the resentencing hearing, the trial court modified defendant's sentence as to Count 1 to life imprisonment with the possibility of parole. The trial court ordered the sentence to run consecutive to defendant's Calhoun County sentence pursuant to MCL 768.7b. An amended judgment of sentence dated June 3, 2008, states: "Count 1 runs consecutive to Counts 2 & 4 & Calhoun County Case."

On June 20, 2008, the Michigan Department of Corrections sent a letter to the trial court notifying the court that June 3, 2008 judgment of sentence remained defective in that it indicated that the statutory citation for Count 1 was attempted murder MCL 750.91(C). In addition, the MDOC sought clarification as to whether all four of defendant's sentences were to be served consecutive to the sentence imposed for the Calhoun County case.

On September 17, 2008, the trial court, without holding a resentencing hearing, amended the judgment to state "Counts 1 & 3 run Concurrent with each other; Counts 2 & 4 run Concurrent with each other; Counts 1 & 3 run consecutive to Counts 2 & 4; All counts run Consecutive to Calhoun County Case and to previous prison term."

II. Analysis

Defendant contends that the trial court erred in amending any of defendant's sentences to run consecutive to the Calhoun County case because the trial court initially declined to order the sentences to run consecutive to Calhoun County case. A trial court's decision to sentence a defendant to consecutive sentences involves a question of statutory interpretation that we review de novo. *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003). Whether a trial court has jurisdiction to order resentencing involves a question of law we also review de novo. *People v Harris*, 224 Mich App 597, 599; 569 NW2d 525 (1997). However, we review a trial court's factual findings during sentencing for clear error. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

The ability of a trial court to modify a sentence that has been imposed on a defendant depends on the validity of the sentence. *In re Jenkins*, 438 Mich 364, 368-369; 475 NW2d 279 (1991); MCR 6.429(A). There is no dispute that the initial sentence was based on inaccurate information regarding the crime defendant committed (Count I). The inaccurate crime citation, MCL 750.91, led to the calculation of an inaccurate sentencing range and recommendation. We also agree that the PSIR contained inaccurate information, specifically that defendant was on parole and not on bond for two felonies. Given the inaccuracies contained in the PSIR and the ambiguity surrounding the initial sentencing hearing, we conclude that all defendant's sentences were invalid and the trial court should have sentenced defendant anew at the June 2, 2008 hearing. *People v Miles*, 454 Mich 90, 98; 559 NW2d 299 (1997).

At the June 2, 2008, resentencing for Count I, the PSIR had been corrected and the trial court properly resentenced defendant as to Count 1 to life imprisonment with the possibility of parole. Further, pursuant to MCL 768.7b(2), the trial court had discretion to order all of defendant's sentences to run consecutive to her Calhoun County sentence. *People v Fernandez*, 427 Mich 321, 330; 398 NW2d 311 (1986) (holding the proper sentence for conspiracy to commit murder is life in prison); *People v Jahner*, 433 Mich 490, 504; 446 NW2d 151 (1989) (holding a defendant convicted of conspiracy to commit murder is eligible for parole); *People v Wybrecht*, 222 Mich App 160, 173; 564 NW2d 903 (1997) (parole is not within the discretion of

a sentencing court). Given that the PSIR had been corrected to reflect that defendant was on bond for felonies, we cannot conclude that the trial court abused its discretion in ordering Count 1 to be served consecutive to her Calhoun County sentence. Although we agree with defendant that trial court had earlier indicated an intent not to sentence defendant consecutively to her Calhoun County sentence, courts speak through their written orders, not oral statements. *People v Vincent*, 455 Mich 110, 123-124; 565 NW2d 629 (1997).¹ Thus, the trial court did not abuse its discretion in resentencing defendant as to Count 1.

Further, because defendant's original sentences as to Counts 2, 3 and 4 were based on inaccurate information in the PSIR, they were all invalid and the trial court should have resentenced defendant on those counts at the June 2, 2008 hearing. *Miles, supra*. The trial court's September 17, 2008 amendment to the judgment of sentence does not render the sentences as to Counts 2, 3 and 4 valid. A trial court cannot modify an invalid sentence from concurrent to consecutive status without first holding a resentencing hearing. *Miles, supra*. Thus, with respect to Counts 2, 3, and 4, we hold that the trial court must resentence defendant at a hearing on remand as to these counts before they are modified in the trial court's discretion to run consecutive to the Calhoun County case. *Id.*

Affirmed in part as to defendant's sentence of life imprisonment with the possibility of parole, remanded as to Counts 2, 3 and 4 for resentencing, and remanded for administrative correction to accurately reflect the proper statutory citation for Count 1. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Brian K. Zahra
/s/ Douglas B. Shapiro

¹ "Many judges will think out loud along the way to reaching the final result. It is only proper that this thinking process not have final or binding effect until formally incorporated into the findings, conclusions, and judgment." *Vincent, supra*, at 124, quoting *State v Collins*, 112 Wash 2d 303, 308; 771 P2d 350 (1989).