

STATE OF MICHIGAN
COURT OF APPEALS

IN RE ALEX JOEL GARCIA.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

ALEX JOEL GARCIA,

Respondent-Appellant.

UNPUBLISHED

March 2, 2010

No. 287275

Wayne Circuit Court

Family Division

Juvenile Section

LC No. 01-404473-DL

Before: Servitto, P.J., and Fort Hood and Stephens, JJ.

PER CURIAM.

Respondent appeals by right the trial court's judgment of conviction sentencing respondent, as an adult, to 81 to 135 months' imprisonment for an armed robbery conviction, MCL 750.529, and 2 years imprisonment for a felony firearm conviction, MCL 750.227b. We affirm respondent's judgment of conviction, but remand for resentencing.

Respondent appeared before the family division of the circuit court in 2005 (when he was 16 years of age) on charges of armed robbery, felony firearm, and malicious destruction of property. The case was designated as one in which respondent would be tried for the crimes in the same manner as an adult pursuant to MCL 712A.2d. Respondent pleaded guilty to the armed robbery and felony firearm charges; the malicious destruction of property charge was dismissed pursuant to a plea agreement. The trial court imposed a delayed sentence on the two convictions pursuant to MCL 712A.18(1)(m), which provides, in relevant part:

The court may delay imposing a sentence of imprisonment under this subdivision for a period not longer than the period during which the court has jurisdiction over the juvenile under this chapter by entering an order of disposition delaying imposition of sentence and placing the juvenile on probation upon the terms and conditions it considers appropriate, including any disposition under this section. If the court delays imposing sentence under this section, section 18i of this chapter [] applies.

Respondent was thereafter placed in a high security juvenile facility and, in mid-2007, returned to his parents' home while continuing with services.

On August 3, 2007, the parties appeared for a commitment review hearing at which the trial court was to determine whether it would extend its jurisdiction over respondent until the age of twenty-one. When the hearing began, however, the trial court was presented with information showing that on July 6, 2007, respondent pleaded guilty to attempted possession of less than 25 grams of a controlled substance before another circuit judge, thereby violating his probation in the instant matter. The trial court revoked respondent's probation and sentenced him to prison on the delayed sentencing convictions. After a series of motions and additional proceedings, the trial court held the prison sentence in abeyance. Respondent eventually waived his right to a probation violation hearing, and the trial court entered the judgments of conviction and sentence that form the basis of this appeal. At the time the challenged sentence was imposed, respondent was 19 years of age.

On appeal, respondent first contends that the trial court lacked jurisdiction, according to both statute and court rule, to impose an adult sentence upon him when it did, because the trial court had not extended his probationary term beyond his 19th birthday. We disagree.

This Court reviews questions of statutory interpretation and application, which are questions of law, de novo. *Mason v City of Menominee*, 282 Mich App 525, 527-528; 766 NW2d 888 (2009). The interpretation and application of court rules are reviewed in the same manner. *Peterson v Fertel*, 283 Mich App 232, 235; 770 NW2d 47 (2009).

Our primary goal in interpreting statutes and court rules is to ascertain and give effect to the intent of the Legislature. *People v St. John*, 230 Mich App 644, 647; 585 NW2d 849 (1998). To that end, we begin by looking at the rule or statute's plain language; "when that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation." *In re KH*, 469 Mich 621, 628; 677 NW2d 800 (2004).

The family division of circuit court has "[e]xclusive original jurisdiction superior to and regardless of the jurisdiction of another court in proceedings concerning a juvenile under 17 years of age who is found within the county if 1 or more of the following applies:"

(1) Except as otherwise provided in this sub-subdivision, the juvenile has violated any municipal ordinance or law of the state or of the United States. . . . The court has jurisdiction over a juvenile 14 years of age or older who is charged with a specified juvenile violation only if the prosecuting attorney files a petition in the court instead of authorizing a complaint and warrant. . . . [MCL 712A.2(a)(1).]

A "specified juvenile violation" includes armed robbery, MCL 750.529. MCL 712A.2(a)(1)(A).

Citing MCL 803.307(2), respondent argues that the trial court's jurisdiction automatically ended when he reached 19 years of age, because he was discharged from public wardship at that time. He claims that the trial court was permitted to extend jurisdiction over him until he reached 21 years of age, but that the trial court failed to take the necessary action in this matter to do so.

MCL 803.307(2) provides, in relevant part:

Except as otherwise provided in this section, a youth accepted as a public ward shall be automatically discharged from public wardship upon reaching the age of 19. Except as provided in subsection (3), a youth committed to a youth agency under section 18(1)(e) of chapter XIIA of 1939 PA 288, MCL 712A.18, for an offense that, if committed by an adult, would be a violation or attempted violation of section . . . 529. . . of the Michigan penal code, 1931 PA 328. . . 750.529 . . . shall be automatically discharged from public wardship upon reaching the age of 21 . . .

MCL 712A.18(1)(e), referenced in MCL 803.307(2), authorizes a court to “commit the juvenile to a public institution, county facility, institution operated as an agency of the court or county” In conjunction with the delayed imposition of sentence pursuant to MCL 712A.18(1)(m), respondent was committed to the Department of Human Services and placed in a high security juvenile facility. Because respondent was committed to a youth agency under section 18(1)(e) for the offense of armed robbery, the last sentence in MCL 803.307(2), as quoted above, is applicable. Thus respondent would not be automatically discharged from public wardship until the age of 21.

According to respondent, the trial court also no longer had jurisdiction to impose a sentence upon him after his 19th birthday, because according to MCL 712A.18i, if the trial court does not extend its jurisdiction past the juvenile’s 19th birthday, the probation period ends. Defendant contends that the trial court did not extend its jurisdiction pursuant to the mandates of MCL 712A.18i.

As previously indicated, the trial court imposed a delayed sentence pursuant to MCL 712A.18(1)(m). As such, MCL 712A.18i applies (“If the court delays imposing sentence under this section, section 18i of this chapter applies.” MCL 712A.18(1)(m)). MCL 712A.18i provides, in relevant part:

(3) If the court entered an order of disposition under section 18(1)[m] of this chapter delaying imposition of sentence, the court shall conduct a review hearing to determine whether the juvenile has been rehabilitated and whether the juvenile presents a serious risk to public safety. If the court determines that the juvenile has not been rehabilitated or that the juvenile presents a serious risk to public safety, jurisdiction over the juvenile shall be continued or the court may impose sentence . . .

(4) A review hearing shall be scheduled and held unless adjourned for good cause as near as possible to, but before, the juvenile's nineteenth birthday. If an institution or agency to which the juvenile was committed believes that the juvenile has been rehabilitated and that the juvenile does not present a serious risk to public safety, the institution or agency may petition the court to conduct a review hearing any time before the juvenile becomes 19 years of age or, if the court has continued jurisdiction, any time before the juvenile becomes 21 years of age.

(5) Not less than 14 days before a review hearing is to be conducted, the prosecuting attorney, juvenile, and, if addresses are known, the juvenile's parent

or guardian shall be notified. The notice shall state that the court may extend jurisdiction over the juvenile or impose sentence and shall advise the juvenile and the juvenile's parent or guardian of the right to legal counsel . . .

The first sentence in MCL 712A.18i(4) mandates a review hearing, but does not state that the failure to hold it has jurisdictional implications. The second sentence authorizes a petition to conduct a review hearing. Respondent's argument seems to be based on the inference drawn from the clause, "if the court has continued jurisdiction." Respondent evidently believes that this clause indicates that in the absence of "continued jurisdiction," jurisdiction ends when the juvenile becomes 19 years old. However, MCL 712A.18i(1) provides, "A delay in sentencing does not deprive the court of jurisdiction to sentence the juvenile under section 18(1)(n)[¹] of this chapter any time during the delay."

MCR 3.956(A)(1), also cited by respondent in support of his position, similarly requires that if the court has delayed the imposition of sentence, a review hearing must be held within 42 days before the juvenile attains the age of 19, unless adjourned for good cause. This court rule does not, however, indicate that the court automatically loses jurisdiction when the juvenile becomes 19 years old.

Moreover, both MCL 712A.18i(4) and MCR 3.956(A)(1) provide that a review hearing must be held prior to the juvenile's nineteenth birthday--unless adjourned for good cause. Here, a hearing was initiated on August 3, 2007 "for the purpose of determining whether or not the Court should extend jurisdiction over Alex until age twenty-one." The court noted, "I have to hold it before his nineteenth birthday, which is February 21st of next year, so this is a hearing in which I believe the People have to demonstrate that jurisdiction should or shouldn't be extended to age twenty-one." The court then corrected itself, recognizing that the burden of proof is on the juvenile to prove by a preponderance of the evidence that he has been rehabilitated. While respondent does present a passing comment suggesting that notice of this hearing may have been defective, all parties appeared at the hearing, respondent was represented by counsel, the judge clearly detailed the purpose of the hearing, and there were no objections concerning the proceeding.

In any event, the hearing began, but the trial court was advised that respondent had recently pleaded guilty to a felony in the same circuit court, but before a different circuit judge. Based upon this information, the trial court immediately revoked respondent's probation and sentenced him to a prison term for the armed robbery and felony firearm convictions. On February 20, 2008, the day before respondent's 19th birthday, a hearing was held on respondent's motion for an evidentiary hearing and motion to set aside the revocation of probation. At the hearing, the trial court was advised that respondent had a motion pending before the other circuit judge to withdraw the previously entered felony plea that resulted in the revocation of probation.

¹ MCL 712A.18 was amended by 2003 PA 71, and as a result, former subsection (1)(n) was redesignated as (1)(m). After the amendment, there was no longer a subsection (1)(n). However, other statutory provisions that refer to former subsection (1)(n) were not amended to reflect the redesignation.

Respondent's counsel also argued that, in any event, respondent had not been sentenced on the recent felony and there was no "conviction" upon which to revoke his probation. The trial court determined that it could revoke probation even without a conviction, but that respondent was entitled to a probation violation hearing. The trial court indicated that everything would be held in abeyance until the other felony charge was resolved.

Based upon the above, it can reasonably be concluded that the issue concerning continuing jurisdiction over respondent was adjourned. The court began a hearing to determine the same, but instead revoked respondent's probation. When the revocation and imposition of sentence was challenged (prior to respondent's nineteenth birthday), the trial court held everything in abeyance.

It is also reasonable to find that the issue was adjourned for good cause, given the uncertainty surrounding respondent's pending adult felony charge. In fact, at a later hearing challenging the trial court's continuing jurisdiction, the trial court implicitly indicted that the matter had simply been adjourned, stating, "As far as the required Commitment Review hearing, there's certainly good cause on this record for the Court not holding such a required Commitment Review Hearing given the subsequent post-judgment motions and hearings that were heard. . . .And the Court began hearings on February 20, 2008." The trial court further stated:

. . . assuming for a moment that you're right that the Court should have completed a required Commitment Review before his nineteenth birthday, there's good cause for having not done so for the reasons that I've already articulated on this record. And the law says that you're supposed to—yes, you're supposed to have a required Commitment Review hearing before the nineteenth birthday, but it doesn't take place if you can show good cause for not doing so.

Respondent does not challenge the trial court's statements that good cause existed for not holding the commitment review hearing prior to respondent's nineteenth birthday. We find that the hearing was, in fact, adjourned for good cause. We also note that after the trial court began the continued jurisdiction hearing, and ultimately revoked respondent's probation, there was no need to continue the hearing; the imposition of sentence made the issue moot. It was not until respondent challenged the probation revocation that continued jurisdiction was made an issue.

Furthermore, while respondent was not "convicted" of the adult felony charge until after his nineteenth birthday had passed, he was charged with and initially pleaded guilty to such charge prior to his nineteenth birthday. And, MCL 712A.18i provides:

(9) If a juvenile placed on probation under an order of disposition delaying imposition of sentence is found by the court to have violated probation by being convicted of a felony or a misdemeanor punishable by imprisonment for more than 1 year, or adjudicated as responsible for an offense that if committed by an adult would be a felony or a misdemeanor punishable by imprisonment for more than 1 year, the court shall revoke probation and sentence the juvenile to imprisonment for a term that does not exceed the penalty that could have been imposed for the offense for which the juvenile was originally convicted and placed on probation.

(10) If a juvenile placed on probation under an order of disposition delaying imposition of sentence is found by the court to have violated probation other than as provided in subsection (9), the court may impose sentence. . .

MCR 3.956(B)(1) similarly provides that if a juvenile placed on probation under an order of disposition delaying imposition of sentence has been convicted of a felony or misdemeanor punishable by more than 1 year imprisonment, the court must revoke the juvenile's probation and sentence him to imprisonment for his juvenile felony. MCR 3.956 (B)(2) provides, "If a juvenile placed on probation under an order of disposition delaying imposition of sentence is found by the court to have violated probation other than as provided in subrule (B)(1), the court may impose sentence . . ."

Here, when imposing the original delayed sentence (prior to respondent's nineteenth birthday) the trial court advised respondent that, "If you pick up any more offenses. . . then I will not hesitate to impose a delayed sentence on you." The trial court, then, indicated that if respondent were simply to be *charged* with an offense, he would be subject to probation revocation. The revocation procedure began prior to respondent's nineteenth birthday and was, as previously indicated, adjourned for good cause. The trial court, then, did not lose its jurisdiction over respondent and appropriately imposed sentence upon him under the delayed sentences.

Respondent next contends that even if the trial court had jurisdiction, respondent should be resentenced because the court did not hold a sentencing hearing pursuant to MCR 6.425. We agree.

In general, this Court reviews unpreserved claims of error pursuant to the "plain error" test of *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To obtain relief, respondent must show that a plain error affected his substantial rights. *Id.*

Respondent relies on MCR 3.955(C), which states:

If the court determines that the juvenile should be sentenced as an adult, either initially or following a delayed imposition of sentence, the sentencing hearing shall be in accordance with the procedures set forth in MCR 6.425.

MCR 6.425 governs sentencing procedures generally and requires completion of a presentence report, scoring of the sentencing guidelines, and sets forth the procedure for sentencing (assuring that the parties have the opportunity to read and challenge the information in the presentence report, an opportunity to allocute, etc.). Where the trial court fails to comply with MCR 6.425, resentencing is required. *People v Wells*, 238 Mich App 383, 392; 605 NW2d 374 (1999).

At the December 13, 2005, proceeding, the parties referenced a presentence report and respondent was given an opportunity to allocute. However, assuming that the 2005 sentencing hearing complied with MCR 6.425, that compliance would not satisfy MCR 3.955(C). The mandate for "*the* sentencing hearing" in compliance with MCR 6.425, follows the condition, "If the court determines that the juvenile should be sentenced as an adult, either initially or following a delayed imposition of sentence" MCR 3.955(C), then, contemplates a sentencing hearing that occurs when the trial court determines that the juvenile should be sentenced as an adult.

Respondent is correct that the trial court did not follow the requisite procedure at any of the proceedings after the delayed imposition of sentence in December 2005. A reasonably updated report must be used in felony sentencing and resentencing. *People v Triplett*, 407 Mich 510, 511, 515; 287 NW2d 165 (1980). There is no indication that a new presentence report or an update to the 2005 report was prepared before the trial court imposed the sentence on August 3, 2007, or on May 27 or June 23, 2008. The 2005 report was “manifestly outdated” as of June 23, 2008, because it would not have reflected the substantial periods of positive progress in respondent’s rehabilitation and the circumstances that led to his conviction before another circuit judge in 2008. Where a report is manifestly outdated, a defendant may not waive preparation of an updated report. *People v Hemphill*, 439 Mich 576, 582; 487 NW2d 152 (1992).

The trial court also did not determine that the parties had an opportunity to review a report, to discuss its contents, and to explain and to challenge any information included in it. MCR 6.425(E)(1)(a) and (b). Nor did the trial court give the respondent “an opportunity to advise the court of any circumstances [he] believes the court should consider in imposing sentence” (MCR 6.425(E)(1)(c)) when it sentenced respondent on June 23, 2008². Because the trial court did not comply with the requirements of MCR 6.425, respondent is entitled to resentencing.

Affirmed, but remanded for resentencing after preparation of an updated presentence report. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Cynthia Diane Stephens

² The trial court recognized that the August 7, 2007 proceeding wherein it imposed sentence upon respondent was flawed.