STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 2, 2010
V	No. 292587 Calhoun Circuit Court
MICHAEL DEAN CARAWAY, Defendant-Appellant.	LC No. 2001-004982-FC

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

In light of the opinions in *People v Doxey*, 263 Mich App 115; 687 NW2d 360 (2004) and *People v Michielutti*, 266 Mich App 223, 225; 700 NW2d 418, rev'd in part on other grounds, 474 Mich 889 (2005), and our Supreme Court's order in *People v Dailey*, 469 Mich 1019; 678 NW2d 439 (2004), I believe I am bound to concur with the majority. I write separately, however, to point out the lack of clarity as to the status of *People v Schultz*, 435 Mich 517; 460 NW2d 505 (1990) and respectfully invite our Supreme Court to consider whether the issue requires clarification.

Schultz was the last time the Supreme Court gave plenary consideration to the question of whether a defendant was entitled to take advantage of Legislative changes to the punishments found in MCL 333.7401 when his or her offense was committed prior to the amendment of the statute. In that case, the Supreme Court reviewed the effect of 1987 PA 275, 1988 PA 47 and 1989 PA 143, "all of which mitigate[d] the terms of punishment . . . for the manufacture, delivery or possession of controlled substances." *Id.* at 526. The defendants in *Schultz* all committed their controlled substance offenses before the passage of the relevant mitigating statute, but were sentenced after the relevant statute took effect. Therefore, the issue in *Schultz* was whether the defendants were to be sentenced pursuant to the statutory punishment in place at the time they committed the offense, or pursuant to the more lenient statutory punishment in place at the time they were sentenced. *Id.* at 525. The Supreme Court held that the more lenient punishment in effect at the time of sentencing was to be imposed. *Id.* at 533. The Court explained that the general saving statute, MCL 8.4a, does not require that a defendant be sentenced under the punishment in place when he committed the crime if the statutory punishment is reduced prior to the subject defendant's sentencing. It contrasted this with the fact that the saving statute does not allow a person charged with a crime to take advantage of a repeal of the subject statute or modifications of its elements:

> the Legislature has expressed its intent that conduct remains subject to punishment whenever a statute imposing criminal liability either is repealed outright or reenacted with modification . . . . [However, section 8.4a] does not indicate that the Legislature intended the statute prior to amendment to provide the terms of punishment where an amendatory act mitigates the authorized terms of punishment but continues to proscribe the same conduct. [*Id.* at 528-529.]

More than a decade later, a related issue came before this Court in *People v Thomas*, 260 Mich App 450; 678 NW2d 631 (2004).[1] The defendant in *Thomas* alleged that he was entitled to resentencing under the amended version of MCL 333.7401, asserting that he was entitled to such relief based on *Schultz*. *Id.* at 457-458. However, given that the defendant in *Thomas* was sentenced *before* the effective date of the ameliorative amendment, *id.* at 458-459, it was clear that the defendant did not fall within *Schultz*, as in *Schultz* the issue was whether the lower sentencing scheme applied to defendants sentenced *after* the effective date of the change. Indeed, in *Thomas*, the defendant was sentenced long before the Legislature ever passed the ameliorative statute, let alone its effective date.[2] 260 Mich App at 458-459.

Curiously, however, *Thomas*, never discussed this clear distinction from *Schultz*. Instead, *Thomas* held that it need not follow *Schultz* as it "was a plurality." *Id.* at 457 n 1.[3] The Supreme Court denied leave to appeal without explanation and so did not indicate whether it viewed *Thomas* as distinguishable from *Schultz*, or if it viewed *Schultz* as non-precedential. 471 Mich 868 (2004).

Two years later, in *Dailey*, 469 Mich at 1019, the Supreme Court considered an application for leave from an unpublished opinion of this Court, in which the defendant had pled guilty under MCL 333.7401(2)(a)(iii). *People v Dailey*, unpublished opinion per curiam of the Court of Appeals, issued August 26, 2003 (Docket No. 239683), p 1. A panel of this Court had concluded that the defendant was entitled to resentencing on grounds not relevant to this discussion, and so vacated the defendant's sentence and remanded for resentencing. *Id.* In footnote 1, the panel concluded that when the defendant was resentenced, he would be entitled to the benefit of the lower sentences under the amended version of MCL 333.7401 which had come into effect since his original sentencing:

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[1] This is the case upon which the majority relies.

[2] The defendant was sentenced April 24, 2002. The legislation was not approved by the Governor until December 25, 2002, with an effective date of March 1, 2003. 2002 PA 665.

[3] I question the conclusion that *Schultz* lacked a majority analysis. Justice BOYLE, whose concurrence provided the fourth vote, clearly agreed with the critical area of the lead opinion's analysis. Although she did not rely specifically on the majority's interpretation of MCL 8.4a, she agreed that "had the Legislature thought of what they wanted done this result would have been their answer." *Id.* at 533 (BOYLE, J., concurring). Thus, there were four votes—a majority—for the view that the Legislature intended that statutes ameliorating draconian drug sentences were to be applied at all sentencings after the effective date of the statutes.

> 2002 PA 665, effective December 26, 2002, made extensive revisions to MCL 333.7401. MCL 333.7401(2)(a)(iii) now provides that possession with intent to deliver 50 grams or more but less than 450 grams of a controlled substance is punishable by imprisonment for not more than twenty years or a fine of not more than $250,000.00, or both. As a general rule, the proper sentence is that which was in effect at the time the offense was committed. See *People v Schultz*, 435 Mich 517, 530; 460 NW2d 505 (1990). The amended version of MCL 333.7401(2)(a)(iii) enacted while this case was pending on appeal is ameliorative in that it eliminates the requirement that the sentencing court impose a minimum term of not less than ten years. On remand, defendant is entitled to seek resentencing under the amended version of MCL 333.7401(2)(a)(iii). See *People v Shinholster*, 196 Mich App 531, 533-534; 493 NW2d 502 (1992); *People v Sandlin*, 179 Mich App 540, 543-544; 446 NW2d 301 (1989). [*Id.*, pp 1-2.]

Our Supreme Court denied leave to appeal, but vacated footnote 1, concluding that it was

> inconsistent with MCL 769.34(2) [which] provides that courts shall sentence defendants in accord with the minimum sentences prescribed by the 'version of those sentencing guidelines in effect on the date the crime was committed.' This demonstrates a legislative intent to have defendant sentenced under the law in effect on the date of his offense, which predated the amendment to MCL 333.7401. [*Dailey*, 469 Mich at 1019.]

The import of this order is not wholly clear. First, it neither overrules nor discounts the precedential authority of *Schultz*. Second, it relies on language from 769.34, a statute dealing with sentencing guidelines which, by its own limiting language, has no application to crimes carrying determinate sentences. MCL 769.34(5).

In 2005, this Court, in a published opinion, relied on the order in *Dailey* to support its holding that an ameliorative sentencing amendment to MCL 333.7401 "operates prospectively only and that the trial court erroneously applied the amended sentencing provisions" to a defendant whose sentencing, but not whose crime, occurred after the effective date of the relevant amendment. *Doxey*, 263 Mich App at 123. The Supreme Court denied leave without comment. 472 Mich 878 (2005). This view was further reinforced in *Michielutti*, 266 Mich App at 225, when, citing *Thomas* and *Doxey*, this Court held that "we have squarely resolved this issue, determining that the abolition of the mandatory minimum sentence was intended to apply prospectively only."[4] Given this chain of post-*Schultz* caselaw, I believe that, absent further

[4] It should also be noted that the defendants in both *Doxey* and *Michielutti* were not foreclosed from other retroactive relief, as the relevant amendment provided that each of those defendants "may avail [himself] of the parole provisions of the revised statute." *Michielutti*, 266 Mich App at 225; *Doxey*, 263 Mich App at 122. Indeed, the *Doxey* Court relied on the existence of those provisions to reach its conclusion of prospective application of the amended statute. *Doxey*, 263 Mich App at 122. However, these parole provisions provide no relief to the instant defendant because MCL 791.234 does not provide for parole for persons who violated MCL 333.7401(2)(a)(i), unless they were sentenced for life. MCL 791.234(7)(b) and (c). Having been

direction from the Supreme Court, I must concur that defendant is not entitled to the benefits of the ameliorative changes in sentencing provided for in the amendment to MCL 333.7401. However, given that *Schultz* has never been overruled and that its reasoning remains sound,[5] I respectfully suggest that we would be well-served if the Supreme Court would provide clarification on this issue.

/s/ Douglas B. Shapiro

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sentenced to a term of 20 years, rather than for life, this defendant is ineligible for the parole relief available in *Doxey* and *Michielutti*.

[5] Indeed, the *Michielutti* Court recognized that

> the fundamental tenets in *Schultz* remain good law: The Legislature intentionally granted sentencing courts greater discretion to fashion an appropriate sentence for these violations, and in light of a dramatic and ameliorative change in legislative policy, courts should determine whether an offender's case merits application of the Legislature's newfound leniency. [266 Mich App at 229.]