

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
February 14, 2012

v

STEPHEN DEVON HILL,

Defendant-Appellant.

No. 300350
Kalamazoo Circuit Court
LC No. 1995-000639-FC

Before: BECKERING, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

The trial court in this case amended defendant's prison sentence after the Department of Corrections notified the court that defendant's sentence should have been consecutive to a prior sentence, rather than concurrent. After this Court denied leave, the Supreme Court remanded the case for our consideration as on leave granted. *People v Hill*, 489 Mich 984; 799 NW2d 563 (2011). Defendant argues that the trial court did not have authority to modify a substantive mistake in a judgment of sentence that was more than a decade old. We agree that the mistake in sentencing was not merely clerical, because there is no indication that the trial court intended to apply consecutive sentencing. We therefore reverse and remand.

I. BACKGROUND

In 1995, defendant was arrested and charged with having committed criminal sexual conduct on or about April 1, 1992. On April 22, 1996, defendant pleaded no contest to a charge of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a) and on May 28, 1996, defendant was sentenced to one year in jail and five years of probation by Kalamazoo Circuit Court Judge Schma. A short time thereafter defendant was charged with having violated the terms of his probation. Judge Schma revoked defendant's probation and on August 27, 1996, sentenced him to serve a term of 7 to 15 years' imprisonment on the CSC conviction.

In 1992, when defendant committed the CSC offense, he had been a prisoner on tether status for a prior offense. Accordingly, MCL 768.7a mandated that defendant's sentence on the CSC conviction run consecutive to the sentence he was serving when he committed it. However, the sentencing court failed to order that the sentence be served consecutively. Defendant filed an

appeal of right¹ challenging the proportionality of his sentence and this Court affirmed. For the next 12 years, defendant's possible release dates were calculated upon a concurrent sentencing status.

On April 8, 2008, the Department of Corrections sent a letter to Judge Schma's successor stating that the CSC sentence should have been imposed as a consecutive sentence and asking that he issue an amended judgment of sentence. Copies of the letter were sent to defendant and the prosecutor's office. On April 10, 2008, the trial court amended the 1996 judgment of sentence so as to provide for a consecutive sentence. On January 13, 2009, the court received a letter from defendant challenging the amended judgment and asserting that defendant had been properly sentenced by Judge Schma to a concurrent sentence. The trial court responded with a letter to defendant on January 21, 2009 stating that the amendment was entered pursuant to the DOC's April 8, 2008 letter, a copy of which defendant had received.

On or about February 2, 2010, defendant filed an in pro per motion under MCR 6.500 asserting that the amended judgment of sentence was invalid as he was on parole at the time of the offense and that it was prior to the statutory change mandating consecutive sentences for parolees. On February 18, 2010, the trial court issued an Opinion and Order granting defendant's motion, vacated the April 10, 2008 amended judgment of sentence and reinstated the August 27, 1996 original judgment of sentence. The court also at that time denied defendant's motion for appointment of counsel as moot.

On March 8, 2010, the prosecutor filed an objection to the February 18, 2010 opinion and order. The prosecutor asserted that defendant had not been a parolee at the time of the CSC offense, but had instead been a prisoner of the Kalamazoo Corrections Center, on tether, and therefore was in fact subject to mandatory consecutive sentencing on the CSC charge. The trial court appointed counsel for defendant, stayed its February 18th order and scheduled a hearing.

Appointed counsel agreed that defendant had been on tether and not on parole at the time of the CSC offense in 1992.² However, defendant's counsel argued that the defendant's sentence could not be changed after 14 years and that the prosecution had waived the issue by not cross-applying initially. The parties and the court agreed that MCR 6.435 allowed for correction of clerical errors in judgments at any time and on its own initiative or on motion of a party while substantive errors in judgments could only be corrected prior to the entry of judgment or during appeal. The trial court concluded that the error had been clerical as the imposition of a consecutive sentence was mandatory and on April 14, 2010, issued an order reinstating the amended judgment of sentence. Defendant filed an application for leave to appeal which this Court denied. On July 20, 2011, the Michigan Supreme Court remanded the case to this Court as on leave granted. 489 Mich 984; 799 NW2d 563 (2011).

¹ Defendant was not subject to Proposal B and so had a right of appeal.

² Defendant maintains in his Standard IV brief, that he was on parole at the time and not a prisoner.

II. ANALYSIS

Whether the trial court lacked authority to modify the judgment of sentence in this case presents an issue of law. Issues of law are reviewed de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004).

Under MCL 768.7a, defendant's CSC sentence should have been consecutive to his prior sentence. The trial court stated that it was amending defendant's sentence under MCR 6.435(A), which provides that "[c]lerical mistakes . . . and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party." The same principles that apply to interpretation of statutes are applied to interpretations of a court rule. *People v Lacalamita*, 286 Mich App 467, 472; 780 NW2d 311 (2009), lv den 486 Mich 929 (2010) (citation omitted). When applying a statute, courts look first to the language of the statute. *People v Fox*, 232 Mich App 541, 553 (1998). "If the plain and ordinary meaning of the language is clear, judicial construction is normally neither permitted nor necessary." *Id.* (citation omitted). According to its plain language, MCR 6.435 allows clerical mistakes in judgments to be corrected at any time by the court. MCR 6.435(A). Substantive mistakes, however, may only be corrected before judgment has been entered in the case. MCR 6.435(B).

The relevant question, therefore, is whether the failure to impose consecutive sentencing in this case was a clerical mistake or a substantive mistake. The court rule does not provide definitions to guide this analysis. However, dictionary definitions may be used to ascertain the plain and ordinary meaning of words. *People v Kowalski*, 489 Mich 488, 500 n 13; 803 NW2d 200 (2011). *Random House Webster's College Dictionary* (1997) defines "clerical" as "of, appropriate for, or assigned to an office clerk" or "doing the work of a clerk." The definition of "clerk" includes "a person employed to keep records, file, type, or do other general office tasks" or "a person who keeps the records and performs the routine business of a court." "Substantive" is defined as, among other things, "belonging to the real nature or essential part of a thing," "real or actual," or "possessing substance, having practical importance, value, or effect." In accordance with these definitions, the 1989 staff comment to MCR 6.435 states that "[s]ubstantive mistake refers to a conclusion or decision that is erroneous because it was based on a mistaken belief in the facts or the applicable law." The comment illustrates the difference in types of mistake by noting that errors that occur because a judge misspoke or a clerk made a typing error are clerical errors, while errors based on mistakes of fact or law are substantive errors.

The prosecution refers us to several unpublished opinions where we have found mistakes to be clerical when there was evidence of the trial court's intention to impose a sentence different than that recorded in the judgment. However, we have never held that a trial court's error of law can be construed as merely clerical. Further, our Supreme Court has provided us with some guidance in *People v Peck*, 481 Mich 863; 748 NW2d 235 (2008). In that case, the defendant was initially sentenced to a term of 1-1/2 to 5 years' imprisonment. Almost five years later, after defendant's sentence was nearly complete, the Department of Corrections sent a letter advising the trial judge that he neglected to impose a maximum sentence of 15 years, as required by statute, and the trial judge amended the sentence accordingly. *Id.* The Michigan Supreme Court denied leave to appeal the amended sentence. Justice Corrigan, concurring, stated that the error was clerical in nature because the defendant was informed of the required maximum sentence at

two different hearings, “the judge observed that all of his notes in the case reflected” the required maximum, and when the judge amended the sentence, he characterized the error as a clerical mistake. *Id.* at 863 (Corrigan, J., concurring). Justice Kelly would have found the error to be substantive, noting that the judge’s notes were not part of the record and that he “did not claim that he misspoke at defendant’s sentencing.” *Id.* at 865-866. While the justices disagreed over whether the evidence of the trial judge’s intention was required to be in the lower court record, both appeared to agree that some evidence of the trial judge’s intentions was required in order to find that the error was a clerical mistake.

In the present case, there is no evidence in the record that the trial court intended to impose a consecutive sentence nor that defendant was ever informed of that fact. The judgment of sentence does not reflect consecutive sentencing, and the trial court did not mention consecutive sentencing at any time during the sentencing hearing. Unlike *Peck*, where the trial court stated during the resentencing proceeding that the error was the result of a clerical error, the trial court in this case made no such statement and in fact, could not have, since the judge who amended defendant’s sentence was not the judge who imposed the original sentence. On this record, the error cannot be classified as merely clerical. Rather, the original trial court judge made an error of law.³ Accordingly, the trial court could not correct the error under MCR 6.435(A).

Reversed and remanded. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Donald S. Owens
/s/ Douglas B. Shapiro

³ Even if the prosecution was correct that a failure to impose a consecutive sentence in compliance with the statutory requirement could be construed as merely clerical, we would still not affirm. In such a circumstance we would be required to remand for resentencing as we cannot assume that the trial court would have imposed the minimum term that it did had it been aware that the term would be served consecutively. Taking the consecutive nature of the sentence into account may have led the sentencing court to impose a different minimum term.