

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
September 20, 2012

v

RAYMOND HARRIS, JR.,  
Defendant-Appellant.

No. 303745  
Wayne Circuit Court  
LC Nos. 09-029990-FC;  
09-029995-FC

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Before: MURPHY, C.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

In lower court docket number 09-029990-FC, defendant appeals by leave granted his plea-based convictions of second-degree murder, MCL 750.317, armed robbery, MCL 750.529, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm) (second offense), MCL 750.227b. He was sentenced, consistent with the plea agreement, to 27 to 50 years' imprisonment for the murder and armed robbery convictions, two to five years' imprisonment for the felon-in-possession conviction, and five years' imprisonment for the felony-firearm conviction. In lower court docket number 09-029995-FC, defendant appeals by leave granted his plea-based convictions of armed robbery, carjacking, MCL 750.529a, and felony-firearm (second offense). He was sentenced, consistent with the plea agreement, to 27 to 50 years' imprisonment for the armed robbery and carjacking convictions and to five years' imprisonment for the felony-firearm conviction. We affirm.

After the trial court imposed the sentences referenced above, the court commented that defendant "is not going to be allowed to have an early release." Defendant argues that the trial court violated *People v Fleming*, 428 Mich 408; 410 NW2d 266 (1987), by precluding early release. Defendant maintains that the trial court failed to give any reasons for barring early release and that, regardless, the court lacked the authority to prohibit early release. While acknowledging that early release is not currently available to him under Michigan law, defendant raises the issue on the possibility that the Legislature reinstitutes a program of early release in the future and during his tenure in prison. Defendant also contends that the trial court relied on impermissible, erroneous, and extraneous factors when imposing the sentences, given that the court took into consideration the possibility of early release in violation of *Fleming*. Defendant further requests that he be resentenced by a different judge.

Sentencing issues that concern questions of law are reviewed de novo on appeal. *People v Huston*, 489 Mich 451, 457; 802 NW2d 261 (2011). In *Fleming*, 428 Mich at 428, our Supreme Court held that “[t]he possibility of earlier release by virtue of the [Prison Overcrowding Emergency Powers Act, MCL 800.71 *et seq.*] OEPA and good-time credits or disciplinary credits may not be used to enhance a defendant’s sentence.” The Court further indicated that sentencing judges are not permitted to nullify or circumvent the OEPA “by taking away good-time credits in advance.” *Id.* at 427. As acknowledged in *Fleming*, the OEPA “was repealed by amendment in June, 1987.” *Id.* at 419-420. Here, under Michigan’s truth-in-sentencing laws, defendant is required to serve his minimum sentences prior to any possibility of parole; early release is currently not an available option. See MCL 791.233; MCL 791.233b; MCL 791.234; MCL 800.34.<sup>1</sup> Given that the crimes were committed by defendant in August 2009, the court’s statement precluding early release was consistent with the law. It is abundantly evident that the trial court was merely communicating that which the law demanded, i.e., that defendant fully serve his minimum sentences. The judgment of sentence also contains a notation prohibiting early release, but, once again, such a restriction exists in this case by operation of law. The notation serves as an indication to any official reviewing the judgment of sentence that defendant committed his crimes at a time that would subject him to the truth-in-sentencing statutes. Assuming a future change in the law as hoped for or envisioned by defendant, which is applicable to his case, the trial court’s ruling against early release will have no bearing on when he can be released, nor shall it be construed as being relevant, as it was not intended to cover such speculative prospective circumstances and the issue of early release would be, jurisdictionally, a matter for the Parole Board to initially decide, not the court. MCL 791.231 *et seq.*; *Jones v Dep’t of Corrections*, 468 Mich 646, 652; 664 NW2d 717 (2003) (“The granting, rescission, and revocation of parole in Michigan is overseen by the Bureau of Pardons and Paroles pursuant to MCL 791.231 *et seq.* This statutory scheme makes clear that, with limited exception, matters of parole lie solely within the broad discretion of the parole board[.]”). Furthermore, contrary to defendant’s assertion, there is no indication whatsoever in the record that consideration of an early release played any role in the sentencing. Rather, the sentences

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<sup>1</sup> As accurately indicated in a *Michigan Bar Journal* article, Deming, *Michigan’s Sentencing Guidelines*, 79 Mich B J 652, 653 n 19 (June 2000):

The truth-in-sentencing statutory amendments preclude a prisoner from earning disciplinary credits that allowed for parole eligibility prior to the service of a minimum sentence, and instead provide that a prisoner serve his or her entire minimum sentence. In addition, prisoners may accumulate disciplinary time for institutional misconduct that is submitted to the parole board as part of the parole decision-making process. Truth-in-sentencing (TIS) took effect for enumerated assaultive offenses committed on or after 12-15-98, and will take effect for all offenses committed on or after 12-15-00.

were imposed pursuant to and consistent with the plea agreement. Given our holding, there is no need to address defendant's argument that he should be resentenced by a different judge.<sup>2</sup>

Next, defendant argues that he is entitled to resentencing and specific performance of the actual plea agreement, or, alternatively, that he is entitled to withdraw his plea, where he was sentenced as a third habitual offender and prohibited from ever obtaining early release, but where neither matter was encompassed by the plea agreement. Defendant complains that treating him as a third habitual offender, absent his approval in the plea agreement, resulted in an upward shift in the minimum sentence guidelines range. We first reject the "early release" component of defendant's argument for the reasons stated above. With respect to defendant's habitual offender status, at the first sentencing hearing, the trial court expressly noted that the plea form failed to address defendant's habitual offender status; however, defendant agreed that it was proper to sentence him as a third habitual offender. At the second sentencing hearing,<sup>3</sup> the trial court once again raised the issue of defendant's habitual offender status:

*Trial Court:* For one thing, habitual third applies to this case, does it not?

*Prosecutor:* Yes.

*Defense Counsel:* That's correct, your Honor.

"A defendant may not claim error regarding an issue on appeal where his lawyer deemed the action proper at trial or otherwise acquiesced." *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Moreover, defendant was sentenced to concurrent terms of 27 to 50 years' imprisonment for the second-degree murder conviction, the two convictions of armed robbery, and for the carjacking conviction, *as specifically provided in the plea agreement*. See *People v Wiley*, 472 Mich 153, 154; 693 NW2d 800 (2005) (when a sentence conforms to a valid plea agreement in which the specific sentence later imposed was accepted by the defendant, the sentencing guidelines are rendered irrelevant, articulation of a substantial and compelling reason to exceed the guidelines is unnecessary, and appellate review of the sentence is waived); *People v Cobbs*, 443 Mich 276, 285; 505 NW2d 208 (1993) (a defendant who pleads guilty to a charge

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<sup>2</sup> Defendant also observes, "It is not irrelevant that Federal Statutes provide for good time." Defendant cites a couple of provisions in the United States Code, which provide no elucidation relative to defendant's proposition, and he fails to otherwise elaborate regarding the relevancy of federal statutes to a prisoner housed in a Michigan prison under Michigan law.

<sup>3</sup> The first sentencing hearing was adjourned without sentences being handed down, given that the trial court recognized that the plea agreement provided for two-year sentences for felony-firearm, but the statute mandated five-year sentences considering defendant's prior record. The trial court informed defendant that he had the option to withdraw his plea under the circumstances; an option that defendant never exercised. We also note that the plea agreement changed between the hearings in defendant's favor, where the initial agreement was for a 30 to 50 year prison term and the new agreement was for a 27 to 50 year term.

with knowledge of the sentence will not be entitled to appellate relief on the ground that the sentence is disproportionate to the offense and the offender). We note that, as reflected in the trial court's plea agreement form and other documents, as well as hearing transcripts, this case involved an agreement for a specific sentence, 27 to 50 years' imprisonment, and not an agreement for a sentence under or somewhere within the guidelines.<sup>4</sup> Defendant received the bargained-for sentences. Reversal is simply unwarranted.

Affirmed.

/s/ William B. Murphy  
/s/ Jane E. Markey  
/s/ William C. Whitbeck

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<sup>4</sup> The trial court still prepared a written "Babcock" statement, *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), wherein the court indicated that it was exceeding the sentencing guidelines because of the plea agreement, which was part of a "global" settlement in which other serious charges brought against defendant were dismissed.