

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

FOR PUBLICATION
April 25, 2013
9:00 a.m.

v

MARLON JERMELL HOWELL, a/k/a JIMMIE
GORDON, a/k/a JOHNNY DAVIS,

No. 300405
Wayne Circuit Court
LC Nos. 07-014023-FC &
07-011139-FH

Defendant-Appellant.

Before: OWENS, P.J., and WHITBECK and FORT HOOD, JJ.

PER CURIAM.

Defendant, Marlon Jermell Howell, appeals as on leave granted¹ the trial court's order denying his motion for relief from judgment² after the trial court amended his judgments of sentence to indicate that he must serve his new sentences consecutive to a previous parole sentence, as required by law. We affirm.

I. FACTS

A. THE SENTENCING AGREEMENTS

The prosecution charged Howell in three separate cases for offenses that he committed while he was on parole. For an arson that occurred on August 30, 2006, it charged Howell with six counts of assault with intent to commit murder, arson of a dwelling house, and felonious assault. For a home-invasion that occurred on January 8, 2007, it charged Howell with first-degree home invasion, felon in possession of a firearm (felon in possession), and possession of a firearm during the commission of a felony (felony-firearm). And for an assault that occurred on January 15, 2007, it charged Howell with assault with intent to do great bodily harm less than murder, disarming a police officer, carrying a firearm in a vehicle, two counts of felon in

¹ *People v Howell*, 491 Mich 919; 812 NW2d 733 (2012).

² MCR 6.502.

possession, two counts of felony-firearm, and three counts of resisting or obstructing a police officer.

In the arson case, Howell agreed to plead guilty to arson of a dwelling house (1) if the prosecution agreed to dismiss the remaining charges in that case and dismiss the home-invasion case, and (2) if the trial court sentenced him to eight to 20 years' imprisonment, to be served concurrent with the sentence in the assault case.

In the assault case, Howell agreed to plead guilty to attempted disarming a police officer, felon in possession, and felony-firearm, (1) if the prosecution agreed to dismiss the remaining charges in that case and dismiss the home invasion case, and (2) if the trial court sentenced him to serve terms of one to five years' imprisonment for the attempted disarming and felon in possession charges, to be served concurrent with the arson case, and a consecutive term of two years' imprisonment for the felony-firearm charge.

Neither agreement addressed Howell's status as a parolee. Howell's presentence investigation report indicated that, because he was a parolee when he committed the offenses, he must serve the new sentences consecutive to the sentence for which he was on parole.

B. THE SENTENCES AND AMENDMENTS

On September 21, 2007, Howell entered his pleas in the arson case and the assault case. On October 5, 2007, the trial court sentenced Howell to serve terms of (1) eight to 20 years' imprisonment in the arson case; (2) one to five years' imprisonment for disarming a police officer and one to five years' imprisonment for felon in possession in the assault case, to be served concurrently with each other and to the arson case; and (3) two years' imprisonment for felony-firearm in the assault case, to be served consecutive to the other sentences.

The trial court's judgment of sentence in the arson case indicated that Howell would serve his sentence concurrent with his sentences in the assault case, and did not give Howell any credit for jail time served. The trial court's judgment of sentence in the assault case indicated that Howell was to serve the terms for felon in possession and disarming a police officer *consecutive* to each other, and concurrent with the assault case, and granted Howell 262 days' credit for time served. On October 11, 2007, Howell wrote the court to request that it also grant him 262 days' credit for time served on the arson case. The trial court denied his motion for jail credit on the basis that the law does not allow credit for time served to parole violators.

On November 9, 2007, the trial court amended the judgment of sentence in the assault case. The new judgment of sentence reflected that Howell was convicted of *attempted* disarming a police officer, removed the indication that Howell was entitled to credit for time served, and clarified that Howell would serve the felony-firearm and attempted disarming sentences consecutively, and consecutive to "see recommendation." The court's recommendation stated, "[T]o run concurrent to [the arson case]."

Howell again wrote the court on August 19, 2009, requesting that the court correct his sentences in the assault case from consecutive to concurrent sentences. On September 14, 2009, the trial court again amended the judgment of sentence in the assault case, removing the word

“attempted” and clarifying that the felony-firearm and disarming sentences were consecutive to each other *and* to the arson case. The judgment of sentence again failed to mention Howell’s status a parolee.

On October 21, 2009, the trial court amended the judgment of sentence in the assault case a third time to again add the word “attempted,” and to indicate that Howell’s sentence was “consecutive to parole.” The term “consecutive to parole” typically refers to MCL 768.7a(2), which provides that a person must serve the remainder of the term of imprisonment for their previous offense before serving a new offense if he or she commits a felony while on parole.³

On October 22, 2009, the trial court amended the judgment of sentence in the arson case to add that Howell’s sentence was “consecutive to parole.”

C. HOWELL’S MOTION FOR RESENTENCING

On March 5, 2010, Howell moved the trial court for relief from judgment and requested resentencing. Howell contended that the trial court violated his constitutional right to due process by imposing consecutive sentences without affording him the opportunity to be heard and represented by counsel, that it failed to give him the benefit of his plea bargain, and that it improperly eliminated his jail credit.

The trial court issued a written opinion and order. The trial court declined to revisit its October 2007 decision concerning Howell’s jail credit. The trial court indicated that it amended Howell’s sentence to correct a typographical error, to reflect the plea agreement by adding “attempt” to the charge of disarming a police officer, and “to run these files consecutive to the defendant’s parole sentences according to Michigan law.” The trial court opined that Howell misunderstood the judgment of sentence because it reflected the plea agreements—that is, the arson sentence was concurrent with the assault case’s felon in possession and disarming sentences, and consecutive to the felony-firearm sentence. It further noted that

[t]he court’s later amendment to the judgments ran both of [Howell’s] files consecutive to his parole sentences as the law requires. [Howell], as a fourth habitual offender no doubt was informed that as a parolee any subsequent offenses would be served consecutive to his parole sentences.

The trial court therefore denied Howell’s motion for relief from judgment.

Howell filed a delayed application for leave to appeal to this Court, which we denied.⁴ Howell sought leave to appeal to the Michigan Supreme Court. In lieu of granting leave to appeal, our Supreme Court remanded to this Court “for consideration, as on leave granted, of the

³ See *People v Holder*, 483 Mich 168, 172; 767 NW2d 423 (2009).

⁴ *People v Howell*, unpublished order of the Court of Appeals, entered August 16, 2011 (Docket No. 300405).

issue whether the trial court erred in amending the judgments of sentence to impose consecutive sentences,” and directing us to consider MCR 6.435, the Michigan Court Rule concerning a trial court’s correction of error in a criminal judgment of sentence.⁵

II. CORRECTION OF ERROR ON A JUDGMENT OF SENTENCE

A. STANDARD OF REVIEW

This Court reviews de novo questions of law, including the interpretation and application of our Court Rules.⁶ “[W]e interpret court rules using the ‘same principles that govern the interpretation of statutes.’”⁷ If the plain and ordinary meaning of a court rule’s language is clear, judicial construction is not necessary.⁸

B. CORRECTION OF ERROR UNDER MCR 6.435

We conclude that the trial court appropriately modified Howell’s judgments of sentence to correct an omission, and that neither our Court Rules nor standards of constitutional due process required it to give him a hearing before doing so.

“[C]orrections or modifications to a judgment of sentence must comply with the relevant statutes and court rules.”⁹ MCR 6.435 provides the circumstances and manners by which the trial court may correct an error in a criminal judgment of sentence:

(A) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record 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, and after notice if the court orders it.

(B) Substantive Mistakes. After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.

Under this Court Rule, the trial court may not modify a judgment of sentence that contains a substantive mistake after it has entered the judgment of sentence.¹⁰ However, the trial court may

⁵ *Howell*, 491 Mich at 919.

⁶ *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

⁷ *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012), quoting *Lignons v Crittenton Hosp*, 490 Mich 61, 70; 803 NW2d 271 (2011).

⁸ See *People v Breidenbach*, 489 Mich 1, 8; 798 NW2d 738 (2011).

⁹ *People v Holder*, 483 Mich at 176.

¹⁰ *Id.* at 177; MCR 6.435(B).

correct “clerical mistakes in judgments . . . and errors arising from oversight or omission . . . at any time.”¹¹ Thus, this case hinges on whether the trial court’s modification imposing Howell’s new sentences consecutive to his parole sentence fell under MCR 6.435(A), in which case the trial court could correct the errors, or under MCR 6.435(B), in which case it could not.

1. THE AMENDMENT RELATING HOWELL’S NEW SENTENCES TO HIS PAROLE SENTENCE

We conclude that the trial court’s failure to address Howell’s parole status in the original judgments of sentence was a mistake arising from an omission under MCR 6.435(A), because the trial court was required to specify that Howell’s new sentences were to be served consecutively with the sentence for which he was on parole, but it entirely failed to do so.

MCR 6.435(A) indicates that the trial court may correct “errors arising from oversight or omission.” When interpreting a court rule, we generally give words their plain and ordinary meanings.¹² Because our Court Rules do not define what an “omission” is, we will consider a dictionary definition to assist our interpretation.¹³ *Random House Webster’s College Dictionary* defines “omission” as “the act of omitting . . . [or] something left out, not done, or neglected,”¹⁴ and defines “omit” as “to leave out; fail to include.”¹⁵

MCL 769.1h(1) requires the trial court to specify whether a defendant’s sentence is concurrent with or consecutive to any other sentence that the defendant is, or will be, serving. MCL 768.7a(2) provides that

[i]f a person is convicted and sentenced to a term of imprisonment for a felony committed while the person was on parole[,] . . . the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment for the previous offense.

Thus, “consecutive sentencing is mandatory when someone commits a crime while on parole[.]”¹⁶

Here, the trial court failed to specify whether Howell’s sentences were concurrent with or consecutive to his parole sentence at both the sentencing hearing and in its first judgments of

¹¹ MCR 6.435(A).

¹² *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999).

¹³ See *Id.*

¹⁴ *Random House Webster’s College Dictionary* (1997).

¹⁵ *Id.*

¹⁶ *People v Chavies*, 234 Mich App 274, 280; 593 NW2d 655 (1999), overruled in part on other grounds by *People v Williams*, 475 Mich 245, 254-255; 716 NW2d 208 (2006).

sentence. But our Legislature requires the trial court to both indicate whether any new sentences are consecutive to or concurrent with an existing sentence, and to run any new sentence consecutive to an existing parole sentence if the defendant committed the new sentence while on parole. The trial court recognized on the record at the sentencing hearing that Howell was on parole, and Howell's presentence investigation report indicated that Howell's new sentences were to run consecutive to his parole sentence. Thus, the trial court's failure to address whether Howell's new sentences were consecutive to or concurrent with his parole sentence was an omission—something that the trial court “left out” or “failed to include” in its original judgment of sentence.

Further, our conclusion is consistent with the staff comment to MCR 6.435(B), which suggests that a substantive mistake is one based on the trial court's mistake of facts or law.¹⁷ We recognize that a staff comment is not binding authority.¹⁸ But we consider the staff comment persuasive in this case because it is consistent with the plain language of MCR 6.435(B), which provides that “the court may *reconsider and modify, correct, or rescind* any order it concludes was erroneous.” Here, the trial court did not reconsider or correct any previous action. Nor was the trial court operating under the mistaken belief that Howell was not actually on parole. As noted above, the presentence investigation report clearly mentioned Howell's parolee status and the trial court recognized his status as a parolee at the sentencing hearing.

We conclude that our Court Rules allowed the trial court to amend Howell's judgments of sentence to reflect that he was to serve his new sentences consecutive to the sentence for which he was on parole at the time he committed the new offenses. The trial court's mistake was an “omission” within the meaning of MCR 6.425(A), not a reconsideration within the meaning of MCR 6.425(B).

2. THE PLEA AGREEMENT

Howell asserts that his plea agreement specifically mentioned concurrent sentences, and thus the trial court was required sentence him to serve concurrent sentences on *all* charges. If this were true, it may have affected whether the trial court impermissibly modified the judgments of sentence to correct a mistake of fact. However, we disagree with Howell's reading of his plea agreement.

The plea agreement for the assault clearly indicates that his sentence would be “served concurrent w/ case no. 07-14033 [the arson case]”; it does not mention Howell's parole sentence. Similarly, the plea agreement for the arson case indicates that its “term [is] concurrent w/ case no. 07-11139 [the assault case].” The agreement refers only to Howell's new sentences: it does not even *imply* that Howell would serve either sentence concurrent with *his parole sentence*. Further, Howell's presentence investigation report indicated that, because he was a parolee when he committed the new offenses, he must serve the new sentences consecutive to the sentence for

¹⁷ MCR 6.435, 1989 staff comment.

¹⁸ See *People v Petit*, 466 Mich 624, 632 n 9; 648 NW2d 193 (2002).

which he was on parole. Howell did not challenge the presentence investigation report on this ground at the sentencing hearing. Further, Howell's presentence investigation report indicated that Howell's new sentences were to run consecutively with his parole sentence and Howell's counsel indicated on the record that "we have had a[n] opportunity to go over the presentence report No changes, corrections or deletions."

C. ENTITLEMENT TO NOTICE AND A HEARING

We conclude that the court rule did not require the trial court to give Howell a hearing before correcting his judgments of sentence. The plain language of MCL 6.435(A) is that the trial court may correct clerical mistakes and omissions "at any time on its own initiative or on motion of a party, and after notice if the court orders it." There is no mention of a hearing in MCR 6.435(A). We will not add language to an unambiguous Court Rule.¹⁹ Because MCR 6.435(A) does not require the trial court to give the defendant a hearing before correcting a clerical error, we conclude that the trial court did not err when it denied Howell's request for a hearing.

Further, we conclude that a defendant's rights to due process do not require the trial court to give a defendant a hearing before correcting a clerical error under MCR 6.435(A). Generally, a person's rights of due process include the "'right to reasonable notice of a charge against him, and an opportunity to be heard in his defense'"²⁰ A defendant's due process rights must be satisfied before the trial court may correct a sentence.²¹

But this Court has held in several different contexts that, when the trial court corrects a mistaken sentence and it does not have discretion to sentence a defendant any differently, the defendant is not entitled to a hearing. In the context of MCR 6.429, which allows the trial court to modify an invalid sentence, this Court has concluded that even when the trial court was not aware at the time of sentencing that it was required to sentence a defendant to consecutive terms of imprisonment, the trial court need not resentence the defendant to correct the error because the trial court would not be capable of sentencing the defendant any differently.²² And in the context of statutory maximum sentences, where the trial court also lacks discretion, the trial court is not required by precepts of due process to give a defendant a hearing before correcting a mistaken maximum sentence.²³ We see no reason to distinguish these cases from this case.

¹⁹ See *id.* at 633.

²⁰ *People v McGee*, 258 Mich App 683, 699; 672; 672 NW2d 191 (2003), quoting *In re Oliver*, 333 US 257, 273; 68 S Ct 499; 92 L Ed 2d 682 (1948).

²¹ *People v Harris*, 224 Mich App 597, 601; 569 NW2d 525 (1997).

²² *People v Kaczorowski*, 190 Mich App 165, 174; 475 NW2d 861 (1991).

²³ *In re Pardee*, 327 Mich 13, 17-18; 41 NW2d 466 (1950).

We conclude that the trial court need not resentence Howell at a hearing to correct its mistake, because it lacks discretion to sentence him any differently. MCL 768.7a(2) requires the trial court to run Howell's sentences consecutive to the sentences for which he was already on parole. The trial court does not have any discretion to impose any other sentence than that contained in the judgments of sentence as amended. Thus, we conclude that precepts of due process did not entitle Howell to a hearing before the trial court corrected his judgments of sentence.

We affirm.

/s/ Donald S. Owens
/s/ William C. Whitbeck
/s/ Karen M. Fort Hood