

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID RUSSELL SMITH,

Defendant-Appellant.

UNPUBLISHED
October 31, 1997

No. 174367
Hillsdale Circuit Court
LC No. 17-6964

ON REMAND

Before: Corrigan, C.J., and MacKenzie and Gage, JJ.

PER CURIAM.

This case returns to us on remand from our Supreme Court for reconsideration as on rehearing granted in light of *People v Miles*, 454 Mich 90; 559 NW2d 299 (1997). We affirm our prior decision.

Defendant contends that he is entitled to resentencing because the trial court amended the judgment of sentence to provide that he serve his sentence consecutive to his sentences in other cases without first holding a resentencing hearing. We addressed defendant's assertion that he is subject to consecutive sentencing in our June 30, 1995, opinion, stating:

Defendant also argues that he is subject to consecutive sentencing. However, the judgment of sentence does not so provide. Indeed, both the presentence report and the prosecutor represented in a document entitled Applicability of Consecutive Sentencing that consecutive sentencing is not applicable to this defendant.

Defendant moved for rehearing on July 18, 1995, arguing that he was serving consecutive sentences even though the judgment did not so provide. Defendant attached a letter from Jeff Stewart, Record Office Supervisor of the Department of Corrections, indicating that despite the terms of the judgment, the DOC believed that defendant's sentence should be served consecutive to his other sentences. Stewart also stated that he would contact the trial court to obtain an amended judgment providing for consecutive sentences, and if the court refused, the DOC would compute defendant's sentences as running concurrent. On July 27, 1995, the court entered an amended judgment providing for

consecutive sentencing. That judgment was not before us when we denied defendant's motion on August 29, 1995.

Defendant applied for leave to appeal in our Supreme Court, arguing that the trial court erred in entering the amended judgment without formal resentencing. Defendant conceded that the court did not enter the amended judgment until after he moved for rehearing in this Court. However, he maintained that he presented "circumstantial evidence that he was serving a consecutive sentence." In lieu of granting leave to appeal, the Court remanded this case to us for reconsideration as on rehearing granted. *People v David Smith*, 454 Mich 909; 564 NW2d 897 (1997) (summary disposition).

We will not consider the amended judgment in reviewing defendant's allegation of error because it is not part of the original record. This Court hears appeals on the original record, consisting of the original papers filed in the lower court or a certified copy, the transcript of relevant proceedings, and the exhibits introduced. MCR 7.210(A)(1). If the record is not correct, the complaining party must institute proper proceedings for certification of the correct record. *Cartwright v Grand Trunk Western Railroad*, 288 Mich 316, 322; 284 NW 727 (1939). Under MCR 7.216(A)(4), this Court may permit amendments, corrections and additions to the record. However, a party must move to amend the record before this Court issues its decision because we ordinarily will not grant a rehearing on the basis of defects or errors in the record. 5 CJS, Appeal and Error, § 680, p 93. In this case, defendant has never sought to amend the record.

Even if defendant had moved to amend and made the amended judgment part of the record, we would not reconsider our decision on the basis of the amended judgment because the trial court entered it after we issued our original opinion. A motion for rehearing in this Court is subject to the restrictions contained in MCR 2.119(F)(3). MCR 7.215(G). That court rule provides:

Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from the correction of the error.

As the court rule aptly demonstrates, rehearing is designed to correct an error by this Court in its original decision, and ordinarily may not be used by parties to raise new issues or inject new evidence. 5 CJS, Appeal and Error, § 678, pp 90-93. In this case, defendant's allegation of error is predicated on events that occurred after we issued our original opinion. We will not consider these events because to do so would defeat the purpose of rehearing. 5 CJS, Appeal and Error, § 683, p 94; *Layfield v Lewis*, 268 Ala 666, 670; 109 So2d 838 (1959). See *Vanneter v Grossman*, 39 Mich 610, 611-612 (1878). Considering the original record, we affirm our prior decision. The judgment of sentence does not provide for consecutive sentencing.

Our disposition of this case does not leave defendant without a means for raising the allegation regarding improper consecutive sentences. The amended judgment is obviously void because the trial

court did not have jurisdiction to enter it. Once a defendant files a claim of appeal, the trial court may not amend the judgment except by order of this Court, stipulation of the parties or as otherwise provided by law. MCR 7.208(A). The trial court regains jurisdiction when this Court returns the record. *People v Kennedy*, 384 Mich 339, 343; 183 NW2d 297 (1971). In this case, this Court did not return the record. It retained jurisdiction pending our decision on defendant's motion for rehearing and the Supreme Court's decision on defendant's application for leave to appeal. *People v George*, 399 Mich 638, 640; 250 NW2d 491 (1977). Because we did not grant leave to amend the judgment in this case, the amended judgment is void and the original judgment remains in effect.

Defendant may raise the argument concerning consecutive sentencing in a motion for relief from judgment under MCR 6.500 *et seq.* MCR 6.429(B)(4). If the trial court grants the motion, that court should consider the impact of *Miles, supra*, on the procedure for entering an amended judgment. While defendant may appeal the court's decision regarding whether to grant resentencing by leave only, he may appeal by right from the amended judgment if the court orders that he serve his sentence consecutive to his other sentences. *People v Martinez*, 193 Mich App 377, 379-382; 485 NW2d 124 (1992).

Affirmed.

/s/ Maura D. Corrigan
/s/ Barbara B. MacKenzie
/s/ Hilda R. Gage