

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAVON MICHAEL ROBINSON,

Defendant-Appellant.

UNPUBLISHED

November 25, 1997

No. 196421

Recorder's Court

LC No. 95-011975

Before: Jansen, P.J., and Fitzgerald and Young, JJ.

MEMORANDUM.

Originally charged with assault with intent to murder, MCL 750.83; MSA 28.278, and felony firearm, MCL 750.227b; MSA 28.424(2), defendant was convicted of the lesser included offense of felonious assault, MCL 750.82; MSA 28.277, and felony firearm. On this appeal of right, which is being adjudicated without oral argument pursuant to MCR 7.214(E), defendant contends that the trial court erred in denying his motion for new trial predicated on the notion that defendant should be accorded an opportunity to plead guilty to the conviction charges, felonious assault and felony firearm, so as to make himself eligible for Holmes Youthful Trainee Act (HYTA) status, MCL 762.11; MSA 28.853(11).

HYTA status is available only to those who plead guilty, unlike defendant who was convicted at trial, *People v Dash*, 216 Mich App 412, 413-414; 549 NW2d 76 (1996), and who are charged, inter alia, with offenses not carrying a potential penalty of life imprisonment. As assault with intent to murder does carry such a possible capital sentencing potential, where as here the prosecutor declined to authorize acceptance of a plea of guilty by defendant to any lesser included offense, and the capital charge was not subject to dismissal on motion for directed verdict at the close of the people's proofs during trial, defendant by the terms of the Holmes Youthful Trainee Act was never in position to be accorded HYTA status. *Genesee Prosecutor v Genesee Circuit Judge*, 391 Mich 115, 122; 215 NW2d 145 (1974).

The terms of the HYTA are clear; the Legislature has refused to make persons in defendant's situation eligible for HYTA status, even though they are convicted of lesser included offenses which, had

such offenses been initially charged, would have put the defendant in a posture to plead guilty and seek HYTA status. As this Court held in *Dash, supra*, however, where the language of the statute is clear, the Legislature must have intended the meaning it has plainly expressed and judicial construction or interpretation is precluded. *Id.* at 414. Under the circumstances, therefore, even if the trial judge had desired to accommodate defendant, it would have been beyond the power of the trial court to grant a motion for new trial for this purpose, since a motion for new trial requires as a predicate some error which has denied the defendant a fair trial. The new trial procedure may not be used to accomplish indirectly what the trial court lacks power to accomplish directly. *Wayne Prosecutor v Recorder's Court Judge*, 148 Mich App 320, 325; 384 NW2d 47 (1985), and cases there cited.

It should be noted in the present case that even if the trial court had such authority, any error in failing to utilize that power to accomplish the result defendant desires was harmless, because in denying defendant's motion for new trial the trial judge noted that, whether defendant had pled guilty or, as here, was convicted after trial of these offenses, his sentences would have been the same and he would not have been accorded Holmes Youthful Trainee Act status. Since defendant was not prejudiced by the failure to grant a new trial, therefore, appellate relief on this issue would in any event be unwarranted. *People v Grant*, 445 Mich 535; 520 NW2d 123 (1994).

Affirmed.

/s/ Kathleen Jansen

/s/ E. Thomas Fitzgerald

/s/ Robert P. Young, Jr.