STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS MOORE,

Defendant-Appellant.

UNPUBLISHED
July 9, 2002

No. 228323
Wayne Circuit Court
LC No. 80-005947

Before: White, P.J., and Murphy and Fitzgerald, JJ.

MURPHY (*dissenting).*

Although I agree with the majority that the sentencing court had jurisdiction to entertain defendant's motion for relief from judgment, there is no proper substantive basis to resentence defendant. Therefore, I respectfully dissent from the majority's decision to reverse and remand. I would affirm the sentencing court's denial of defendant's motion, albeit on different grounds.

"The court may correct an invalid sentence, but the court may not modify a valid sentence after it has been imposed except as provided by law." MCR 6.429(A). Defendant contends that the sentencing court was under a misconception of law when he was sentenced in 1981. I disagree with defendant's conclusion, although I agree with the majority that a sentence based on a misconception of law can be deemed invalid and thus subject to amendment. *People v Miles*, 454 Mich 90, 96-97; 559 NW2d 299 (1997).

Parole eligibility is governed by statute. MCL 791.234; see also *In re Parole of Johnson*, 235 Mich App 21, 22; 596 NW2d 202 (1999). For a prisoner to be eligible for parole within the meaning of the statute, several legal hurdles must be overcome. *Id*. at 23. Subsection 6 provides that a person serving a parolable life sentence is subject to the jurisdiction of the parole board after serving ten years in the case of a prisoner sentenced for a crime committed before October 1, 1992, or who has served fifteen years for a crime committed on or after October 1, 1992. *Id*. This subsection means that a defendant will be eligible for review by the parole board after serving ten or fifteen years, but not that the defendant will be released. *Id*. Additionally, all prisoners covered by Subsection 6 "shall" be interviewed by a member of the parole board after serving ten years, and every five years thereafter without regard to the sentencing date. MCL 791.234(6)(a); *Johnson, supra* at 24. Thus, inmates are interviewed, but not necessarily eligible for parole consideration. *Id*. The parole board then decides whether to "take action" toward paroling the prisoner. *Id*.

If the parole board votes to consider a prisoner for parole after the initial interview, the statute provides that "parole shall not be granted . . . until after a public hearing [is] held . . . . " MCL 791.234(6)(b); *Johnson, supra* at 24. The statute further provides that "parole shall not be granted if the sentencing judge, or the judge's successor in office, files written objections to the granting of the parole . . . ." MCL 791.234(6)(b); *Johnson, supra* at 24. "[A] prisoner's release on parole is discretionary with the parole board." MCL 791.234(7); *Johnson, supra* at 24.

Here, the sentencing court's language at the sentencing hearing indicated an intent that defendant be given an opportunity for parole, and MCL 791.234(6) does in fact provide defendant with said opportunity. The sentencing court expressly did not make any recommendation as to whether defendant should actually be paroled. The *Johnson* panel found a distinction between the defendant being "eligible for parole" and the defendant being "eligible for review," in the context of determining whether the defendant could appeal a "no action" letter issued by the Parole Board. *Johnson, supra* at 22-23. Here, I find that distinction irrelevant as to whether defendant has the opportunity to be paroled, or is subject to parole consideration, as indicated by the court at the original sentencing hearing. Indeed, MCL 791.234(6) specifically states that a defendant "may be released on parole by the parole board . . . ."

I also note that the provisions and conditions found in MCL 791.234(6) were virtually the same as contained in the statute at the time of defendant's sentence. 1978 PA 81. It is clear from the transcript of the original sentencing that the concerns of the court and defense counsel were about a possible misconception of law regarding the impact of the 1978 Initiative Proposal B on MCL 791.234, and specifically the concern that Proposal B may have eliminated parole consideration for prisoners serving non-mandatory life sentences. Proposal B did not eliminate parole consideration for such prisoners. *People v Waterman*, 137 Mich App 429; 358 NW2d 602 (1984).[1] Additionally, the focus of concerns at the sentencing hearing did not regard the conditions or obstacles to parole under MCL 791.234, which, as noted above, existed in a version similar to the present version. I cannot conclude that the original sentence was rendered under a misconception of law; therefore, the sentence was not invalid.

Moreover, the sentencing court, at the motion for relief from judgment, indicated that the *Johnson* decision has made clear that defendant is not truly "eligible" for parole. The *Johnson* decision was issued after defendant was sentenced, and to the extent that the decision modified existing law, it cannot be said that the sentencing court was under a misconception of law at the time of sentencing. Additionally, if it has in fact become more difficult to obtain release on parole under MCL 791.234, based on a more stringent approach by the Parole Board, that fact does not establish a misconception of law at the time of sentencing. A misconception of law would necessarily concern a misunderstanding of the law as it is existed at the time of sentencing, and it would not concern a subsequent change in the law or change in the manner in which the law is applied. To allow resentencing not based on a misconception of law as it existed at the time of sentencing, but on subsequent changes in the law, would open a Pandora's

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[1] Defendant's application for leave from the sentencing court's order denying a motion for resentencing was denied by this Court in 1984 [Docket No. 79268] based on *Waterman, supra.* Therefore, any Proposal B concerns have already been addressed.

box leading to numerous legal challenges to valid sentences. Here, there was no misconception of law as it existed at the time of sentencing. I would affirm.

/s/ William B. Murphy