STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BYRON K. MILLISOR,

Defendant-Appellant.

UNPUBLISHED
December 11, 2003

No. 241596
Wayne Circuit Court
LC No. 01-008048-01

Before: Saad, P.J., and Markey and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for larceny over $200 but less than $1,000, MCL 750.356(3)(b) and (4)(a). The trial court sentenced him to forty-six months to fifteen years' imprisonment. We reverse and remand.

The charges in this case arose from defendant's June 30, 2001, arrest for taking a toolbox and tools from the pickup truck bed of a customer in the Home Depot parking lot on Ford Road in Canton, Michigan. Defendant was charged with larceny over $200 but less than $1,000, MCL 750.356(4)(a), and enhancement was sought as a second or subsequent offender, MCL 750.356(3)(b), based on a prior first-degree retail fraud conviction, MCL 750.356c, and as a fourth-offense habitual offender, MCL 769.12.

Before trial, defendant filed a Motion to Quash the Information,[1] arguing that the plain language of the larceny statute only permitted prior larceny convictions to be used for sentence enhancement and that, therefore, defendant's prior retail fraud conviction could not be used in that manner. The motion also stated that the prosecution could not use the past convictions to sentence defendant as a habitual offender in addition to the second-offense enhancement under the larceny statute. Defendant argued that the language of MCL 750.356(3)(b) specifically states that the person must have one or more convictions for committing or attempting to commit an offense under "*this section*," which specifically means MCL 750.356, i.e., larceny. The trial court did not agree with defendant's analysis.

[1] At the hearing for the Motion to Quash, the defense attorney stated that the Motion to Quash was mistitled and that it was actually a Motion to Dismiss.

Defendant's jury trial commenced on January 31, 2002. The jury returned a guilty verdict for larceny over $200 but less than $1,000, on February 1, 2002. Defendant was sentenced on February 27, 2002. The sentencing guidelines computed for a fourth-offense habitual offender provided for a guidelines range of nine to forty-six months. Under the second-offense enhancement, the court imposed a one-to-five-year sentence, which was then vacated, and a sentence of forty-six months to fifteen years was imposed under the fourth-offense habitual offender statute.

Defendant first argues that the larceny section of the statute under which he was given an enhancement, MCL 750.356(3)(b), allows an enhancement only for prior convictions under that section, namely MCL 750.356. We agree. Statutory interpretation is a question of law that is reviewed de novo on appeal. *People v Phillips*, 469 Mich 390, 394; 666 NW2d 657 (2003).

The primary goal in construing a statute is "to ascertain and give effect to the intent of the Legislature." *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002); see also *People v Morey*, 461 Mich 325, 329-330; 603 NW2d 250 (1999). In doing so, the Court must begin by examining the plain language of the statute itself. *Pasha*, *supra* 466 Mich 382. If the language of the statute is clear and unambiguous, it is assumed that the Legislature intended its plain meaning and the statute is enforced as written. *People v Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). A court may go beyond the words of a statute to examine legislative intent only if the statutory language is ambiguous. *Phillips*, *supra*, 469 Mich 395. A statutory provision is considered ambiguous if it is subject to more than one reasonable interpretation. *People v Rutledge*, 250 Mich App 1, 5; 645 NW2d 333 (2002).

The issue in this case is whether the larceny statute, MCL 750.356, allows enhancement for prior larceny convictions only, or for any criminal conviction within the larceny chapter. The relevant portion of the larceny statute reads:

> (3) If any of the following apply, the person is guilty of a felony punishable by imprisonment for not more than 5 years or a fine of not more than $10,000.00 or three times the value of the property stolen, whichever is greater, or both imprisonment and a fine:
>
> * * *
>
> (b) The person violates subsection (4)(a) and has 1 or more prior convictions for committing or attempting to commit an offense under *this section*. . . . [MCL 750.356(3)(b) (emphasis added).]

The controlling phrase, "this section," is not defined by the statute. MCL 750.356 *et seq*. There is no statutory or judicial definition of "this section." The Court may examine dictionary definitions if the statute does not expressly define the term. *Rutledge, supra*, 250 Mich App 6. According to Black's Law Dictionary (7th Ed), p 1356, "section" is defined as "[a] distinct part or division of a writing, esp. a legal instrument. – Abbr. sec." Also, the Court may look to the common employment of terms to determine their meaning. *Rutledge, supra*, 205 Mich App 6.

In this case, the statute, MCL 750.356, is found in Chapter LII; Larceny. MCL 750.356 *et seq*. Under the chapter heading are various sections, each distinguished with the abbreviation

"sec." Examining the headings of each statute under the "larceny" chapter, the offense is contained in the "larceny" section, MCL 750.356. Retail fraud is also contained in the "larceny" chapter, but it is in its own section, noted by the abbreviation "sec." MCL 750.356c. Therefore, from the plain meaning of the statute, the dictionary definition, and the common usage, the term "this section" in MCL 750.356 refers to § 356 only and does not include § 356c of the larceny chapter.

In reviewing defendant's record, there is no prior larceny offense, and the felony information indicates that his sentence enhancement came from a prior retail fraud conviction, MCL 750.356c. The plain language of the statute indicates that only prior convictions of larceny under MCL 750.356 are considered to be within "this section," and thus, only those convictions under MCL 750.356 may be used to enhance a current larceny conviction. Consequently, we find that the trial court erroneously ruled that defendant's misdemeanor conviction could be enhanced to a felony for sentencing purposes.

Defendant further argues that because his conviction should be solely under MCL 750.356(4)(a), a misdemeanor offense, it cannot be enhanced under the fourth-offense habitual offender statute, MCL 769.12. We agree.

Under MCL 769.10 *et seq*., the sentence for a subsequent felony conviction may be enhanced under an habitual offender statute. MCL 769.12(1) provides that the enhancement provisions therein apply when a person commits a "subsequent felony." A felony, under the Code of Criminal Procedure, refers to a violation of penal law for which a defendant, upon conviction, may be punished by death, or by imprisonment for more than one year.[2] MCL 761.1(1)(g).

In this case, defendant was erroneously convicted under MCL 750.356(3)(b) and (4)(a), which together provide for a felony offense, instead of solely under MCL 750.356(4)(a), which sets forth a misdemeanor offense "punishable by imprisonment for not more than 1 year or a fine of not more than $2000.00 or 3 times the value of the property stolen, whichever is greater, or both imprisonment and a fine." Because defendant's conviction is a misdemeanor rather than a felony, the habitual offender sentencing provisions do not apply. Therefore, we reverse defendant's felony conviction and remand the case to the trial court for entry of a misdemeanor larceny conviction and for resentencing.

Reversed and remanded. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Jane E. Markey
/s/ Patrick M. Meter

[2] We note that the definition of "felony" listed in the Code of Criminal Procedure, MCL 761.1(1)(g), is applicable because the habitual offender statute at issue, MCL 769.12(1), is contained within the Code of Criminal Procedure.