

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN JOHNSON,

Defendant-Appellant.

UNPUBLISHED

January 17, 2006

No. 253692

Wayne Circuit Court

LC No. 99-002236-01

Before: Donofrio, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's order denying his motion for relief from judgment. Because we are not persuaded by any of defendant's arguments on appeal, we affirm.

I

Defendant was charged with second-degree murder, MCL 750.317, and possession of a firearm during the commission of a felony, MCL 750.227b, in connection with the February 19, 1999, shooting death of his father. According to testimony at the preliminary examination, the two men argued over possession of defendant's house. The victim later entered defendant's house while defendant was sleeping. When defendant woke up and observed the victim in his bedroom, he repeatedly shot at the victim. Defendant believed the victim planned to kill him, so he opened fire. The victim suffered fourteen gunshot wounds.

The trial court initially determined defendant competent to stand trial. However, his mental condition deteriorated after the initial determination and, in October 1999, the trial court found defendant incompetent to stand trial. Defendant remained in a mental hospital until January 2000 when the trial court determined defendant competent to stand trial. Pursuant to a plea agreement whereby the prosecutor dismissed the original charges of second-degree murder and felony-firearm, defendant pleaded no contest to voluntary manslaughter, MCL 750.321. The trial court provided a preliminary sentence evaluation of five years' probation beginning when defendant could be placed in a psychiatric treatment facility. On February 9, 2000, the trial court sentenced defendant in accordance with the initial sentencing evaluation. The trial court qualified defendant's probationary sentence, indicating that defendant remain at the county jail until placed in an appropriate psychiatric treatment facility. The trial court ordered that

defendant's probationary sentence would begin once the psychiatric treatment center admitted him and he would stay in the facility until "medically discharged."

Over the next three months, defendant remained in jail while the court, probation department, and jail personnel worked to find psychiatric placement for defendant, but were unsuccessful. On May 12, 2000, the parties appeared before the trial court. Defense counsel reminded the court that the original sentence was conditioned on defendant's placement in a residential treatment program. The trial court indicated that it would resentence defendant because due to the lack of placement options, compliance with defendant's original sentence was impossible. Defendant opposed resentencing and sought to withdraw his plea. The trial court denied defendant's request to withdraw his plea, and ruled that in light of the impossibility of securing defendant's placement in a suitable psychiatric facility, resentencing was appropriate. The trial court resentedenced defendant to two to fifteen years' imprisonment with credit for time served and a recommendation for psychiatric counseling.

Just short of a year later, on May 7, 2001, defendant sent a motion to correct or modify his sentence and a motion for guidance and/or disqualification of the original trial judge to the chief judge of the Wayne Circuit Court. Defendant explained in his cover letter that he sent the motions directly to the chief judge because an injustice would result if he filed the materials normally. On May 24, 2001, the chief judge's office responded informing defendant that the motions needed to be placed on the trial judge's docket. The letter dated May 24, 2001 contained enclosures, presumably defendant's motions. On June 5, 2001, defendant sent his motions to the original trial judge and asked that the judge "kindly file" them with "his Court." Defendant's letter to the trial judge indicated that the clerk's copy of the motions had been placed in the "Court's file." The record does not indicate that a "clerk's copy" of any motion existed in the court file. In the circuit court file, the first copies of defendant May 2001 motions are located behind a copy of the May 24, 2001, letter sent by the chief judge's office.

Because the court did not act on his motions for hearing, on August 10, 2001, defendant "re-noticed" the motions. In his "notice of hearing," defendant referenced the motion for guidance and/or motion to disqualify the original sentencing judge and the motion to correct or modify his sentence, which he "filed with the judge on or about June 5, 2001." Once again, because the trial court took no action on defendant's motions, on November 4, 2001, defendant signed and dated several motions and sent them to the chief judge. The motions included a new motion for specific performance of his initial sentence, a motion to disqualify the original sentencing judge, and a motion to correct or modify his sentence. Defendant served the motions on the prosecutor.

On November 20, 2001, the chief judge forwarded the motions and defendant's correspondence to the trial judge. The trial court thereafter considered and denied the motions in a written order dated November 26, 2001. The order states, in relevant part:

[I]t is hereby ordered that inasmuch as the original sentence was impossible to implement because of the insufficiency of mental health resources, that defendant upon request may withdraw his original plea. The defendant is hereby given the option to withdraw his plea and proceed to trial on the original charges of Murder Second Degree (MCL 750.317) and Felony Firearm (750.227).

Subsequently, defendant filed a motion for relief from judgment through his appellate counsel on July 30, 2003. Finding the motion a successive motion for relief from judgment barred by MCR 6.502(G)(1), the trial court entered an order denying the motion on October 9, 2003.

II

Defendant asserts on appeal that his July 30, 2003, motion was not a “successive” motion for relief from judgment because his 2001 pro se motions were not properly filed with the trial court. Defendant specifically argues that because the lower court docket entries do not reflect the actual filings of the 2001 motions, the 2003 motion is not a successive motion. Because defendant cites no authority to support his proposition, it may be deemed abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Further, although the lower court docket entries do not reflect the filing of the pro se motions, there is no question that defendant attempted to file the motions, he served these motions on the prosecuting attorney, and the chief judge forwarded the motions to the trial judge. In any event, the trial judge considered and decided the motions. A trial court speaks through its written orders. *People v Vincent*, 455 Mich 110, 123; 565 NW2d 629 (1997). Regardless whether defendant complied with procedural filing requirements, the trial court decided the motions for relief from the May 12, 2000, judgment of sentence as if defendant properly filed the motions. Because the motion July 30, 2003, motion was a successive motion for relief from judgment, the trial court properly denied that motion on procedural grounds. MCR 6.502(G)(1).

We also reject defendant’s alternative argument that his July 30, 2003, motion should be considered the first motion for relief from judgment. Defendant argues that if he presented his pro se motions within 12 months of May 12, 2000, they are not technically motions for relief from judgment that fall within the scope of MCR 6.500 *et seq.* Defendant reasons that because there is no record of when his pro se motions were “filed,” this Court should not assume they were presented after May 12, 2001, and conclude that his July 30, 2003, motion was the first motion for relief from judgment. The record discloses that defendant’s November 4, 2001 pro se motions were sent to the chief judge and served on the prosecutor on that date. The trial court’s order of November 26, 2001, specifically refers to defendant’s motion for specific performance. The first motion for specific performance brought by defendant and referenced in the record is defendant’s motion dated November 4, 2001. Based on the record, we are certain that the motions decided by the trial court were presented for resolution after May 12, 2001 and were clearly motions for relief from judgment.

III

Defendant also raises several substantive issues related to his resentencing on May 12, 2000. However, defendant’s appeal of the merits of his May 12, 2000, sentence is untimely. The issues are not properly before us because a defendant may not appeal a final judgment or other order unless the application for leave to appeal is filed within 12 months of the date of the order. MCR 7.205(F). Further, defendant does not have a right to appeal from the trial court’s November 26, 2001, order denying his motions for specific performance of the original sentence or motion to correct or modify the May 12, 2000, sentence. MCR 6.509(G)(1) (a defendant has 12 months from the denial of a motion for postjudgment relief to seek an appeal). Defendant is well past the applicable dates for an appeal.

Nevertheless, we will briefly review defendant's substantive claims. First, defendant argues he is entitled to reinstatement of his original judgment of sentence because the initial sentence was valid and thus, the trial court could not modify it. A court may not modify a valid sentence. *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994). It may, however, modify an invalid sentence. MCR 6.429(A); *People v Catanzarite*, 211 Mich App 573, 582-583; 536 NW2d 570 (1995). A sentence that is based on inaccurate information is an invalid sentence. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). See also *People v Harris*, 224 Mich App 597; 569 NW2d 525 (1997).

The trial court sentenced defendant to remain in jail until he entered a psychiatric facility for treatment, at which time his five-year probationary sentence would begin to run. Plainly, the trial court based its sentence on inaccurate information, namely, the availability of a psychiatric facility to admit defendant as a patient. Practically, defendant could not continue to wait indefinitely in the county jail for psychiatric placement that was not forthcoming. Because defendant's sentence was based on inaccurate information regarding psychiatric placement and could not be served, the trial court properly resentenced defendant when it became evident that serving the initial sentence was an impossibility.

Next, defendant argues that the trial court improperly revoked his probation on May 12, 2000 because the trial court cannot revoke probation absent a violation of that probation. The issue is without merit because the trial court did not revoke defendant's probation. Rather, it properly resentenced defendant to a term of years. MCR 6.429(A); *Catanzarite*, *supra*.

Finally, defendant argues that he was deprived of due process and was entitled to specific performance of his initial sentence. When, as in this case, a plea is based on a *Cobbs* agreement, the defendant is entitled to withdraw his plea if the *Cobbs* evaluation is not, or cannot be, upheld. *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993); *People v Connor*, 209 Mich App 419, 432; 531 NW2d 734 (1995). Defendant's reliance on *Santobello v New York*, 404 US 257; 92 S Ct 495; 30 L Ed 2d 427 (1971), for the proposition that specific performance of the probationary sentence can and should be ordered in this case is misplaced. In *People v Siebert*, 450 Mich 500, 518; 537 NW2d 891 (1995), the Court concluded that *Santobello* "does not propose specific performance by a trial court or by any actor not making the promise at issue." A plea agreement is a bargain between the prosecutor and the defendant. *Cobbs*, *supra* at 281-282. In *Cobbs*, the Court held that the judge is not bound by his preliminary evaluation of a case during negotiation of a plea between the prosecutor and the defendant. A trial court's preliminary sentence evaluation cannot therefore be considered a promise by the trial court.

In this case, the trial court did not make any promise to defendant on which defendant could demand specific performance from the trial court. When defendant pleaded guilty, he did so based on the trial court's "preliminary indication" that his sentence would be five years of probation, beginning with placement in a psychiatric treatment facility. The trial court initially attempted to sentence defendant in accordance with the *Cobbs* evaluation. After the trial court was compelled to resentence defendant, it offered defendant the opportunity to withdraw his plea in its order of November 26, 2001. Defendant was not entitled to specific performance, and the

trial court properly afforded defendant the option to withdraw his plea. Defendant was not deprived of due process.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Alton T. Davis