

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL NEWBY,

Defendant-Appellant.

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UNPUBLISHED

November 21, 2006

No. 263412

Wayne Circuit Court

LC No. 02-003910-01

Before: White, P.J. and Zahra and Kelly, JJ.

MEMORANDUM.

We granted defendant's application for delayed appeal from his sentence of eight months' to twenty years' imprisonment, imposed for possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv). We dismiss this appeal as moot. We decide this appeal without oral argument in accordance with MCR 7.214(E).

Defendant was convicted, following a jury trial, of the cocaine offense, along with possession of marijuana, MCL 333.7403(2)(d), and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court initially imposed a sentence of 23 days' time served for the marijuana conviction, plus consecutive terms of imprisonment of two years for felony-firearm, and 17 months to 20 years for the cocaine conviction.

Another panel of this Court affirmed that result in defendant's first appeal. *People v Newby*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2005 (Docket No. 253766). However, while that appeal was pending, defendant moved the trial court to correct his presentence investigation report. This resulted in a resentencing proceeding, at which the trial court decided to reduce defendant's minimum sentence for the cocaine offense to the present eight months' imprisonment.

The prosecutor chose not to question the propriety of this postsentencing reduction. But defendant sought a delayed appeal to this Court, again asserting that the trial court erred in its scoring of certain of the variables under the sentencing guidelines, and in departing from the guidelines by requiring him to serve his eight-month minimum sentence in prison where the recommended range under the rescored guidelines called for an intermediate sanction, which cannot include imprisonment. See *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002), citing MCL 769.34(4)(a).

This Court granted defendant's application for delayed appeal on September 21, 2005. However, the order of conviction and sentence after resentencing was entered on October 24, 2004, with 677 days' sentence credit, causing defendant's new minimum sentence for the cocaine conviction to expire less than a year afterward. Indeed, it has come to this Court's attention that defendant won parole on September 9, 2005, with a discharge date one year later. Because defendant has served the minimum sentence over which he takes issue, thus leaving this Court without ability to fashion a remedy, we decline to reach the merits of plaintiff's arguments, as they are moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994)

Appeal dismissed.

/s/ Helene N. White  
/s/ Brian K. Zahra  
/s/ Kirsten Frank Kelly