

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRYL GEORGE FELDER,

Defendant-Appellant.

UNPUBLISHED

September 20, 2007

No. 271830

Wayne Circuit Court

LC No. 03-005243-01

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

PER CURIAM.

In 2003, defendant was convicted by a jury of assault with intent to rob while armed, MCL 750.89, assault with intent to do great bodily harm less than murder, MCL 750.84, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was originally sentenced to concurrent prison terms of 9 to 15 years for the assault with intent to rob and assault with intent to do great bodily harm convictions, and one to four years for the felonious assault conviction, to be served consecutive to a five-year term of imprisonment for the felony-firearm (second offense) conviction. In a prior appeal, this Court affirmed defendant's convictions and sentences. *People v Felder*, unpublished opinion per curiam of the Court of Appeals, issued April 19, 2005 (Docket No. 252307). It was later discovered that the sentencing information was incorrect because defendant did not have a prior felony-firearm conviction, and our Supreme Court remanded the case "for resentencing." *People v Felder*, 474 Mich 1073; 711 NW2d 328 (2006). Defendant was thereafter resentenced to concurrent prison terms of 9 to 15 years for the assault with intent to rob conviction, nine to ten years for the assault with intent to do great bodily harm conviction,¹ and one to four years for the felonious assault conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. Defendant again appeals by right. We vacate defendant's sentences and remand for resentencing.

Defendant argues that the trial court improperly restricted his right of allocution at sentencing. Defendant failed to raise this issue below; consequently it has not been preserved for

¹ Although the amended sentence of nine to ten years violates the two-thirds rule of MCL 769.34(2)(b), defendant does not raise this issue on appeal.

appeal. *People v Jones (On Rehearing)*, 201 Mich App 449, 452; 506 NW2d 542 (1993). Therefore, the issue is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Although defendant was before the court for resentencing, his case was actually in a "presentence posture." *People v Ezell*, 446 Mich 869; 522 NW2d 632 (1994). At sentencing, the court must give the defendant an opportunity to advise the court of any circumstances he believes the court should consider in passing sentence. MCR 6.425(E)(1)(c). "This directive permits a defendant to speak in mitigation of the sentence." *People v Petty*, 469 Mich 108, 119; 665 NW2d 443 (2003). The court must give the defendant an opportunity to allocute if he chooses to do so. *People v Petit*, 466 Mich 624, 628; 648 NW2d 193 (2002). The failure to strictly comply with this rule requires resentencing. *People v Wells*, 238 Mich App 383, 392; 605 NW2d 374 (1999).

The trial court offered defendant the opportunity to speak; however, as soon as defendant stated that he had "a whole lot to say," the court cut him off and directed him to limit his comments to the reduction of the felony-firearm sentence. Although it may have been proper for the court to limit defendant's comments to those relevant to the sentences to be imposed, the court in this case restricted defendant's comments only to those pertaining to the felony-firearm sentence even though defendant was before the court for resentencing on all convictions.² Further, defendant's right of allocution was rendered meaningless when the trial court indicated before defendant was allowed to speak that it would not be changing the sentences for the assault convictions. *People v McNeal*, 150 Mich App 85, 90; 389 NW2d 708 (1986). Therefore, the trial court plainly erred and resentencing is required.

We remand for resentencing. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder

² Although the Supreme Court determined that there was no factual support for the felony-firearm enhancement, the Court remanded the case "for resentencing," without specifying that resentencing was limited only to the felony-firearm conviction. *Felder, supra* at 1073. We agree that resentencing on all convictions was appropriate. Because defendant was sentenced on the basis of inaccurate information, the sentences for all of his convictions were invalid. See *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).