

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DEXTER DURRELL COOPER,

Defendant-Appellee.

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UNPUBLISHED

December 23, 2008

No. 280024

Genesee Circuit Court

LC No. 98-002306-FC

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

PER CURIAM.

This is the second time this matter has been brought before this Court for a determination of the defendant's sentence. In the underlying action, on September 11, 1998, a jury convicted defendant of two counts of armed robbery, MCL 750.529, assault with intent to rob while armed, MCL 750.89, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to 15 to 30 years in prison for each of the armed robbery and assault with intent to rob while armed convictions and two years in prison for the felony-firearm conviction.<sup>1</sup> This Court affirmed defendant's convictions and sentences, but remanded for correction of the PSIR. *People v Cooper*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2001 (Docket No. 216492).

Following our prior opinion, on June 19, 2003, the trial court informed defendant that his motion for relief from judgment where he claimed for the first time that the trial court improperly relied on uncharged acts to depart from the minimum sentencing guidelines by noting his "7411"<sup>2</sup> probation, was not filed properly. Defendant then filed a petition for writ of habeas

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<sup>1</sup> The jury also convicted defendant's codefendant, Yashica Nicole Cooper, of two counts of armed robbery and assault with intent to rob while armed. The trial court sentenced her to 15 to 30 years in prison for each of these convictions. This Court affirmed these convictions and sentences. *People v Cooper*, unpublished opinion per curiam of the Court of Appeals, issued October 9, 2001 (Docket No. 216180).

<sup>2</sup> MCL 333.7411 provides:

[w]hen an individual who has not previously been convicted of [a controlled substance offense] pleads guilty to . . . [certain controlled substance offenses], the

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corpus with the Eastern District of Michigan on August 25, 2003, which was denied. Then, on February 8, 2006, defendant filed a motion for relief from judgment. He claimed that he had good cause for failing to raise the issues on direct appeal and could demonstrate actual prejudice. Defendant maintained that his 7411 proceedings had been dismissed and claimed he was innocent of the OUIL conviction listed in the PSIR. Thus, he argued that it was improper to consider these convictions at sentencing.

In a July 31, 2007, opinion, the lower court noted that a term of probation pursuant to 7411 does not result in a conviction. The court cited *People v James*, 267 Mich App 675, 678-679; 705 NW2d 724 (2005) and *Carr v Midland Co Concealed Weapons Licensing Bd*, 259 Mich App 428; 674 NW2d 709 (2003), for the propositions that the 7411 proceedings did not constitute a conviction and that 7411 probation makes a guilty plea a nullity. Given the construction of the statute and its purpose, the court concluded that consideration of defendant's 7411 proceedings at sentencing was improper.

Next, the court analyzed whether good cause and prejudice existed to proceed with the motion for relief from judgment pursuant to MCR 6.508(D). It noted that the appellate courts had not yet addressed the consideration of 7411 proceedings at the time of sentencing, but nevertheless, it concluded that there was no sound appellate strategy for failing to raise the 7411 objection on appeal. Therefore, the court concluded that appellate counsel erred and defendant demonstrated good cause. It also concluded that the improper consideration of defendant's 7411 probation made the sentence invalid, satisfying the prejudice prong. Consequently, the court granted defendant's motion for relief from judgment and ordered resentencing. Thereafter, the prosecutor appealed and this Court granted leave in a subsequent order granting defendant's motion for relief from judgment. For the reasons set forth below, we reverse the decision of the trial court.

The prosecutor's first argument on appeal is that the lower court should not have considered defendant's motion for relief from judgment because he waived any challenges to the PSIR when he told the trial court that he had no additions or corrections. We review the prosecutor's unpreserved argument for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 766-768; 597 NW2d 130 (1999).

An unpreserved challenge is waived where a party intentionally relinquishes or abandons a known right. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). At sentencing, defendant affirmatively approved the PSIR, which included the fact that he pleaded guilty to

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court, without entering a judgment of guilt with the consent of the accused, may defer further proceedings and place the individual on probation . . . . Upon fulfillment of the terms and conditions [of probation], the court shall discharge the individual and dismiss the proceedings. Discharge and dismissal under this section shall be without adjudication of guilt and . . . is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime . . . . [*People v James*, 267 Mich App 675, 678-679; 705 NW2d 724 (2005), quoting MCL 333.7411.]

possession of cocaine and, after successfully serving three years probation, his proceedings were discharged under MCL 333.7411. Therefore, he arguably abandoned the right to further review of the PSIR. Nevertheless, in his motion for relief from judgment, defendant argued that the trial court improperly considered the 7411 proceedings in sentencing him to the high-end of the minimum sentencing guidelines range. Defendant did not affirmatively approve the trial court's considerations or sentence. Therefore, the court lower did not plainly err in considering the motion for relief from judgment on the ground that it was waived.

The prosecutor's second argument on appeal is that defendant should have been precluded from moving for relief from judgment pursuant to MCR 6.508(D)(2). This Court reviews a trial court's grant of relief from judgment for an abuse of discretion and findings of fact supporting its ruling for clear error. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003).

[U]nder MCR 6.508(D)(2), a court may not grant relief from judgment if the criminal defendant's motion alleges grounds for relief that were decided against the defendant in a prior appeal or proceeding under MCR 6.500, "unless the defendant establishes that a retroactive change in the law has undermined the prior decision." [*McSwain, supra* at 679, citing MCR 6.508(D)(2).]

In defendant's prior appeal, he made a preserved challenge to the PSIR's accuracy because it referenced selling and using drugs, jail time he could not recall for an OUIL offense and gang-affiliated material. *Cooper, supra*, slip op, at 17-18. This Court remanded for these inaccuracies to be removed from the PSIR. *Id.* at 19-20. Defendant made two additional unpreserved challenges to the PSIR's accuracy regarding George Cook's name and his visit to Pearl Ruffin's home, which this Court refused to review. *Id.* In the prior appeal, defendant did not argue, and the Court did not decide, whether a trial court may consider 7411 proceedings in determining a defendant's sentence for a subsequent offense. Therefore, even though defendant made sentencing challenges in both his prior appeal and motion for relief from judgment, the grounds for sentencing relief in these actions differed. As a result, MCR 6.508(D)(2) did not preclude relief on this ground.

The prosecutor's third argument on appeal is that, because defendant failed to demonstrate good cause, he should have been precluded from moving for relief from judgment pursuant to MCR 2.508(D)(3).

Pursuant to MCR 6.508(D)(3), a court may not grant relief from judgment if the criminal defendant's motion alleges a ground for relief that could have been raised on appeal from the conviction and sentence or in a prior motion under MCR 6.500. *McSwain, supra* at 685-686. However, a criminal defendant can avoid this bar to relief by satisfying the following requirements:

- (a) [a demonstration of] good cause for failure to raise such grounds on appeal or in the prior motion, and
- (b) [a demonstration of] actual prejudice from the alleged irregularities that support the claim for relief. [*Id.* at 686.]

“[C]ollateral proceedings are intended as extraordinary protection against unreliable factfinding and unjust convictions.” *People v Reed*, 449 Mich 375, 387; 535 NW2d 496 (1995).

Ineffective assistance of appellate counsel, namely appellate counsel’s failure to raise a meritorious issue on direct appeal, may satisfy the good cause requirement. *Reed, supra* at 382. The test for ineffective assistance of appellate counsel is the same as that applicable to a claim of ineffective assistance of trial counsel. *Id.*, *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Hence, a defendant must show that appellate counsel’s decision not to raise a claim of ineffective assistance of trial counsel fell below an objective standard of reasonableness and prejudiced his appeal. The test is not whether, in hindsight, appellate counsel failed to raise all arguable or colorable claims. *Reed, supra* at 382. Such a test would “undermine the strategic and discretionary decisions that are the essence of skillful lawyering.” *Id.* at 386-387.

Even if this Court found that the trial court improperly considered defendant’s 7411 proceedings at sentencing and appellate counsel’s failure to argue this claim on direct appeal fell below an objective standard of reasonableness, we conclude that defendant was not prejudiced under the second prong of the ineffective assistance of counsel test. “[W]hen the alleged inaccuracies would have no determinative effect on the sentence, they may be harmless.” *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000).

Defendant’s 7411 proceedings had no determinative effect on his sentence. In making its sentencing determination at the high-end of the minimum sentencing guidelines range, the trial court focused its attention on the circumstances surrounding defendant’s armed robbery offenses. It noted that defendant chose a “highly visible” bank and terrorized patrons and tellers with a weapon. As to defendant’s contention that the trial court impermissibly considered defendant’s 7411 probation, we note that the trial court stated that defendant’s 7411 probation and prior OUIL probation were “probably of little consequence.” However, the trial court noted that the probationary periods “tell me that a person who has been exposed to the criminal justice system ought to have received a message.” Had the trial court excluded the 7411 probation from its consideration, however, defendant’s OUIL probation would have indicated the same failure to learn from past experience. Defendant’s codefendant’s sentence also indicates that the 7411 proceedings had no determinative effect on his sentence. Defendant’s codefendant had no prior offenses or probation. Nevertheless, the trial court sentenced her to the same 15 to 30-year sentence as it sentenced defendant. Because we are of the opinion that the trial court’s consideration of defendant’s 7411 proceedings had no determinative effect on his sentence, he did not demonstrate ineffective assistance of counsel. Absent ineffective assistance, defendant had no good cause for failing to raise the 7411 challenge on direct appeal. Consequently, defendant should have been barred from relief from judgment pursuant to MCR 6.508(D)(3). Therefore, the lower court abused its discretion when it granted defendant’s motion for relief from judgment.

In light of our conclusion above, this Court need not address the prosecutor’s final argument on appeal because defendant failed to demonstrate actual prejudice, he should have been precluded from moving for relief from judgment pursuant to MCR 2.508(D)(3).

Reversed.

/s/ Stephen L. Borrello  
/s/ Alton T. Davis  
/s/ Elizabeth L. Gleicher