

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERANCE ANTOINE MAGEE,

Defendant-Appellant.

UNPUBLISHED

January 29, 2009

No. 277029

Saginaw Circuit Court

LC No. 04-024281-FH

Before: Markey, P.J., and Whitbeck and Gleicher, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted, challenging the circuit court's enhancement of a March 2006 sentence premised on a 1998 plea-based conviction for which he did not receive an appointment of counsel to challenge on appeal. We affirm.

In November 2004, defendant pleaded guilty of possessing with intent to deliver cocaine in an amount between 50 grams and 450 grams, MCL 333.7401(2)(a)(iii), and possessing a firearm during the commission of a felony, MCL 750.227b, in exchange for the prosecution's dismissal of two additional charges. In January 2005, the circuit court sentenced defendant as a second habitual offender, MCL 769.10, to 15 to 30 years' imprisonment for the drug possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction.¹ In February 2005, defendant wrote to the circuit court requesting "to be appointed a lawyer for my appeal for my conditional plea," and the court appointed appellate counsel.

In January 2006, defendant filed a motion for resentencing on the basis that the circuit court (1) miscalculated the prior record variable score applicable to the possession with intent to deliver conviction, and (2) deprived him of due process by enhancing "his sentence based on convictions where he was denied the assistance of counsel." With respect to defendant's second complaint, he insisted that in light of the United States Supreme Court's recent decision in *Halbert v Michigan*, 545 US 605; 125 S Ct 2582; 162 L Ed 2d 552 (2005), the circuit court had violated his due process rights by utilizing a 1998 plea-based conviction² to enhance his 2005

¹ The judgment of sentence further noted that the possession with intent to deliver term of imprisonment also would follow the term for an unspecified "parole viol[ation]."

² In February 1998, defendant pleaded guilty of discharging a weapon at a building and assault
(continued...)

sentence because the circuit court in his prior case had denied his request for the appointment of counsel to pursue a first-tier appeal to this Court. The prosecution responded that “*Halbert* does not apply retroactively to collateral proceedings in cases already final as of the day *Halbert* was released . . . [in] June [2005], as Defendant’s 1998 conviction undeniably was.”

At a February 2006 motion hearing, the circuit court held as follows regarding the *Halbert*-based contention:

The Supreme Court has indicated that it’s appropriate through the *Halbert* case to appoint counsel for people who’ve plead [sic] guilty and ask for an attorney in connection with leave to appeal, which was denied.

The main question that I have still is is the decision retroactive or not. I understand that this has been remanded to the Sixth Circuit to determine whether it will be retroactive or not, so I’ll deny the motion without prejudice to renew it at such time there’s guidance from the Sixth Circuit on how to handle this.

At a March 2006 resentencing hearing, the circuit court found, as the parties agreed, that several prior record variables had been misscored, and resented defendant to an enhanced term of 8 to 30 years’ imprisonment for the possession with intent to deliver conviction, together with the consecutive two-year term for the felony-firearm conviction.³

On appeal, defendant reiterates his due process contention, which rests entirely on the question whether *Halbert* applies retroactively to the plea-based convictions that he incurred in 1998.⁴ Defendant concedes that the Sixth Circuit has rejected that federal principles of retroactivity require retrospective application of *Halbert*. See *Simmons v Kapture*, 516 F3d 450 (CA 6, 2008). Our Supreme Court has made a dispositive holding concerning the question of federal and state law retroactivity in *People v Maxson*, ___ Mich ___; ___ NW2d ___ (Docket No. 129693, decided December 22, 2008), which we will now summarize.

In *Maxson*, the Michigan Supreme Court squarely considered “whether the United States Supreme Court’s decision in *Halbert* . . . should be applied retroactively to cases in which a defendant’s conviction has become final.” *Id.*, slip op at 1. Our Supreme Court first considered potential retroactivity under federal law. *Id.* at 2-7. The Supreme Court set forth the governing principles that generally “new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced,” but that two exceptions existed: (1) “a new rule should be applied retroactively if it places ‘certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to

(...continued)

with intent to cause great bodily harm less than murder.

³ In August 2006, the circuit court entered an amended judgment of sentence, which added the clarification that defendant’s drug-related term of imprisonment also would be served consecutively to the penalty for his parole violation.

⁴ “The retroactivity of a court’s ruling presents an issue of law that [an appellate court] reviews de novo.” ___ Mich ___; ___ NW2d ___ (Docket No. 129693, decided December 22, 2008), slip op at 2.

proscribe,” and (2) “a new rule should be applied retroactively ‘if it requires the observance of those procedures that . . . are implicit in the concept of ordered liberty.’” *Id.*, slip op at 3, quoting *Teague v Lane*, 489 US 288, 307, 310; 109 S Ct 1060; 103 L Ed 2d 334 (1989). Our Supreme Court deemed *Halbert* a “new rule,” but concluded that neither *Teague* exception applied to the *Halbert* decision. *Id.* at 3-6. With respect to the first *Teague* exception, our Supreme Court characterized it as “clearly inapplicable, as the rule in *Halbert* does not concern a rule that forbid(s) criminal punishment of certain primary conduct . . . (or) prohibit(s) a certain category of punishment for a class of defendants because of their status or offense.” *Id.* at 5 (internal quotation omitted, emphasis in original). Regarding the second *Teague* exception, our Supreme Court ultimately found that “the provision of appointed counsel” to challenge a plea-based conviction on appeal “can hardly be said to be implicit in the concept of ordered liberty,” in part because “a state is not required to provide any appellate proceedings *at all* for defendants who plead guilty,” and because “*Halbert* is unlikely to apply to any situation other than Michigan’s unique legislative system of appeals from plea-based convictions.” *Id.* at 6-7 (emphasis in original, internal quotation omitted).

Turning to Michigan retroactivity principles, our Supreme Court initially observed that “the following three factors . . . determine whether a new rule of criminal procedure should be applied retroactively: (1) the purpose of the new rules; (2) the general reliance on the old rule; and (3) the effect of retroactive application of the new rule on the administration of justice.” *Maxson, supra* at 9 (internal quotation omitted). Concerning the first factor, the Supreme Court explained that this “prong counsels against retroactivity” because new procedural rules not affecting “the integrity of the fact-finding process should be given prospective effect,” and “the appointment of counsel on appeal does not concern the ascertainment of guilt or innocence,” given that “the defendant has already admitted substantive guilt while represented by counsel” during the plea proceedings. *Id.* at 9-10. The Supreme Court noted regarding factor two, general reliance on the former rule, that it did not “strongly counsel either way in this case.” *Id.* at 10. With respect to factor three, the Supreme Court opined that “affording counsel to defendants whose appeals became final before *Halbert* would have a markedly adverse effect on the administration of justice,” explaining that the “state’s strong interest in finality of the criminal justice process would be undermined as presumably significant numbers of the incarcerated population would be entitled to avail themselves of appointed counsel and new appeals, despite having knowingly and intelligently pleaded guilty to criminal conduct while represented by counsel.” *Id.* at 14. The Supreme Court summarized its state law holding as follows:

Thus, although retroactive application of *Halbert* would potentially provide a small number of defendants with some form of relief, this does not outweigh the certainty that by applying *Halbert* retroactively, many guilty-pleading defendants whose convictions have become final would inundate the appellate process with new appeals. In light of the limited judicial resources of the state, it is our judgment that those resources would be better preserved for defendants currently charged—some of whom may be innocent or otherwise entitled to relief—than for defendants who have knowingly pleaded guilty and presumably accepted the consequences of their decisions. Thus, the third prong weighs far more heavily against retroactive application than the second prong weighs for retroactive application. Considered together, all of the . . . factors,

therefore, strongly counsel against applying *Halbert* retroactively under state law to cases in which a defendant's conviction has become final. [*Id.* at 15.]

Because in this case defendant's 1998 conviction became final long before the United States Supreme Court's decision in *Halbert*, the Michigan Supreme Court's analysis in *Maxson* compels our conclusion that neither federal nor state law requires retrospective application of *Halbert*. Consequently, the circuit court properly rejected defendant's contention that its consideration of the 1998 conviction for sentencing purposes in 2006 violated due process principles.

Affirmed.

/s/ Jane E. Markey
/s/ William C. Whitbeck
/s/ Elizabeth L. Gleicher