

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLIE LEE FLOYD,

Defendant-Appellant.

UNPUBLISHED

December 28, 2010

Nos. 286550; 293650

Macomb Circuit Court

LC No. 2005-001604-FC

Before: M.J. KELLY, P.J., and K.F. KELLY and BORRELLO, JJ.

PER CURIAM.

These consolidated appeals arise from resentencing proceedings following a prior appeal. We affirm defendant's sentences of 10 to 15 years for five counts of breaking and entering a coin-operated device, MCL 752.811(a), and felonious assault, MCL 750.82, but vacate his sentences of 47 to 90 years for first-degree criminal sexual conduct, MCL 750.520b(1)(c), second-degree criminal sexual conduct, 750.520c(1)(c), breaking and entering a building with intent to commit larceny, MCL 750.110, first-degree home invasion, MCL 750.110a(2), two counts of assault with intent to do great bodily harm, MCL 750.84, and kidnapping, MCL 750.349, and remand for resentencing on these counts in accordance with our Supreme Court's order in *People v Floyd*, 481 Mich 938; 751 NW2d 34 (2008), and consistent with this opinion.

I. RELEVANT FACTS AND PROCEDURAL HISTORY

This case has a lengthy and complicated procedural history. Defendant was convicted of the offenses specified above following a jury trial in March 2006. He was originally sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 62 to 80 years for each conviction. In a prior appeal, this Court affirmed defendant's convictions, but remanded for resentencing on defendant's convictions for felonious assault and breaking and entering a coin-operated device. *People v Floyd*, unpublished opinion per curiam of the Court of Appeals, issued January 15, 2008 (Docket No. 272425). This Court's prior opinion sets forth the facts underlying defendant's convictions as follows:

Defendant's convictions arise out of a string of criminal offenses occurring on Thanksgiving Day in 2004. "AP" was employed at Raybestos in Sterling Heights as a security guard. Shortly after 10:00 a.m., defendant charged toward her while she was sitting in a cafeteria and asked her "where the money was." He then pulled down her pants and underwear, and tied her hands and

ankles together with her bootlaces. She attempted to push him away, but he grabbed the back of her head and slammed her face onto a table. He then sexually assaulted her. Thereafter, AP heard defendant pounding on the vending machines in the cafeteria and heard coins from the machines spill onto the floor. She was able to untie her hands and ankles and run outside into traffic. She used the cell phone of a passing motorist to call the police.

Meanwhile, defendant had crossed the street and forced himself inside Constance Belcher's home. He repeatedly struck her with a hammer, which she was ultimately able to seize from his grasp. He then held her hostage in the home until she was able to run outside when he appeared to be asleep. While Belcher was inside the home, a police negotiator attempted to persuade defendant to surrender and allow Belcher to leave the home, but he refused. The jury convicted defendant as charged. [*Floyd*, unpub opn at 1-2.]

This Court vacated defendant's sentences for the breaking and entering a coin-operated device and felonious assault convictions only, explaining that "even considering defendant's status as a fourth habitual offender, the trial court could have properly sentenced defendant to a maximum term of only 15 years' imprisonment for these offenses." *Floyd*, unpub opn at 4.

Defendant, acting in propria persona, filed an application for leave to appeal this Court's decision with the Supreme Court. On May 8, 2008, the trial court, apparently unaware of the pending application in the Supreme Court, resentenced defendant in accordance with this Court's decision, reducing defendant's sentences for the felonious assault and breaking and entering a coin-operated device convictions to 10 to 15 years each, but maintaining the original sentences of 62 to 80 years each for the remaining convictions. Defendant now appeals these sentences in Docket No. 286550.

After defendant was resentenced, the Supreme Court decided defendant's pro se application for leave to appeal on June 27, 2008. Our Supreme Court was apparently unaware that defendant had been resentenced on May 8, 2008. The Supreme Court agreed with this Court that resentencing was required for the breaking and entering a coin-operated device and felonious assault counts, but further held that defendant's sentences of 62 to 80 years for the remaining convictions were also invalid because they violated the two-thirds rule of MCL 769.34(2)(b) and *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). The Supreme Court's order, which prescribed the appropriate remedy, states:

On order of the Court, the application for leave to appeal the January 15, 2008 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), in lieu of granting leave to appeal, we REVERSE in part the judgment of the Court of Appeals, we VACATE the sentence of the Macomb Circuit Court, and we REMAND this case to the trial court for resentencing. The 62-year minimum sentences imposed for first-degree criminal sexual conduct, second-degree criminal sexual conduct, breaking and entering a building with intent to commit larceny, first-degree home invasion, assault with intent to do great bodily harm, and kidnapping exceed two-thirds of the 80-year maximum sentences imposed, in violation of MCL 769.34(2)(b) and *People v Tanner*, 387 Mich 683 (1972). On remand, the trial court shall resentence the defendant on

these counts in accordance with *People v Thomas*, 447 Mich 390 (1994), which provides that the proper remedy for a *Tanner* violation is a reduction in the minimum sentence. The trial court shall also resentence the defendant as ordered by the Court of Appeals. In all other respects, leave to appeal is DENIED, because we are not persuaded that the remaining questions presented should be reviewed by this Court. [*Floyd*, 481 Mich at 938.]

After defendant's claim of appeal was filed in Docket No. 286550, his appointed appellate counsel filed a motion for resentencing in the trial court, arguing that resentencing was necessary because the trial court failed to appropriately respond to defendant's challenges to the accuracy of the presentence report at the May 2008 resentencing. The motion did not refer to the Supreme Court's order. The trial court granted defendant's request for resentencing and then resentedenced defendant on May 7, 2009. Neither the parties nor the trial court referred to the Supreme Court's June 2008 resentencing order at the May 2009 resentencing. The trial court resentedenced defendant to the same terms of 10 to 15 years for the breaking and entering a coin-operated device and felonious assault convictions, but changed defendant's sentences for the remaining convictions to 60 to 90 years. Defendant thereafter filed a claim of appeal from those sentences in Docket No. 293650, and new appellate counsel was appointed for defendant.

Defendant's appointed appellate counsel in Docket No. 293650 thereafter filed a motion for resentencing in the trial court in which he challenged the scoring of several of the sentencing guidelines offense variables, relying on the Supreme Court's recent decision in *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009). In *McGraw*, the Court held that "[o]ffense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise." *Id.* at 135. At a hearing on November 17, 2009, the prosecutor conceded that the sentencing guidelines should be reevaluated in light of *McGraw*. The trial court took the matter under advisement.

The trial court subsequently issued an opinion and order in January 2010 in which it concluded that the scoring of OV 1, OV 9, and OV 10 should be changed in light of *McGraw*, and that the scoring changes affected the appropriate guidelines range.¹ Instead of ordering resentencing, however, the court stated that it intended to issue an amended judgment of sentence in accordance with its opinion. The court thereafter issued an amended judgment that imposed the same sentences of 10 to 15 years for the breaking and entering a coin-operated device and felonious assault convictions, but changed the sentences for defendant's remaining convictions to 47 to 90 years.

II. DOCKET NO. 286550

In Docket No. 286550, defendant argues that he is entitled to resentencing because the trial court failed to appropriately respond to challenges to the accuracy of the presentence report.

¹ We note that in *People v Mushatt*, 486 Mich 934; 782 NW2d 202 (2010), the Court stated: "Further, we clarify that the retroactive effect of *McGraw* is limited to cases pending appeal when *McGraw* was decided and in which the scoring issue had been raised and preserved."

We conclude that this issue is moot. Defendant raised this issue in a motion to correct an invalid sentence in the trial court. The trial court granted defendant's motion and resentenced defendant in May 2009. At that resentencing, the trial court noted that it had resolved challenges to the accuracy of the presentence report. Defendant does not contend that the trial court mishandled any challenges to the accuracy of the presentence report at the May 2009 resentencing. Because defendant has already received the relief he requested, this issue is now moot.

III. DOCKET NO. 293650

In Docket No. 293650, defendant argues that he is entitled to be resentenced because the trial court did not comply with the Supreme Court's June 27, 2008, order directing that he be resentenced in accordance with *People v Thomas*, 447 Mich 390; 523 NW2d 215 (1994). We agree.

In *Floyd*, 481 Mich at 938, the Supreme Court determined that defendant's 62-year minimum sentences for first-degree criminal sexual conduct, second-degree criminal sexual conduct, breaking and entering a building with intent to commit larceny, first-degree home invasion, assault with intent to do great bodily harm, and kidnapping were invalid because they "exceed two-thirds of the 80-year maximum sentences imposed, in violation of MCL 769.34(2)(b) and *People v Tanner*, 387 Mich 683[; 199 NW2d 202] (1972)." As a remedy, the Supreme Court directed the trial court to "resentence" defendant on these counts "in accordance with *People v Thomas*, 447 Mich 390[; 523 NW2d 215] (1994), which provides that the proper remedy for a *Tanner* violation is a reduction in the minimum sentence." *Floyd*, 481 Mich at 938.

In *Thomas*, 447 Mich 390, the Supreme Court rejected a trial court's attempt to remedy a violation of the two-thirds rule by increasing the maximum sentence. The Court explained that with respect to a sentence that violates *Tanner*, the sentence is partially invalid, and because there is no legal flaw in the maximum sentence, it is not subject to correction. *Id.* at 393-394. In this case, by only finding that defendant's 62-year minimum sentences were invalid, and by directing that defendant be resentenced in accordance with *Thomas*, the Supreme Court effectively precluded the trial court from remedying the violation of the "two-thirds" rule by increasing defendant's maximum sentences. Thus, the trial court erred when, in resentencing defendant in May 2009, it increased the originally imposed maximum sentences from 80 to 90 years.

Further, the Supreme Court's order requires that defendant be resentenced, as opposed to the trial court merely adjusting defendant's minimum sentences to two-thirds of the 80-year maximum sentences. When an entire sentence is invalid, resentencing typically requires a new proceeding "where every aspect of the sentence is before the judge de novo unless the remand indicates otherwise." *People v Williams (After Second Remand)*, 208 Mich App 60, 65; 526 NW2d 614 (1994). But the Supreme Court has also remanded cases for "resentencing" where a sentence is only partially invalid. See, e.g., *People v Gross*, 483 Mich 951; 763 NW2d 911 (2009) (remanding "for resentencing on the maximum terms of the defendant's sentences only"). In other cases, the Supreme Court has directed that a violation of the two-thirds rule be corrected

without a full resentencing.² But regardless of how the Supreme Court has remedied a violation of the two-thirds rule in other cases, the Supreme Court's order in this case directed the trial court to "resentence" defendant. Thus, the trial court was required to follow the Supreme Court's mandate by conducting a full resentencing on defendant's convictions for first-degree criminal sexual conduct, second-degree criminal sexual conduct, breaking and entering a building with intent to commit larceny, first-degree home invasion, assault with intent to do great bodily harm, and kidnapping. Although the trial court did resentence defendant in May 2009, it did not do so in accordance with the Supreme Court's order. Accordingly, we again vacate defendant's sentences for these counts and remand for resentencing in accordance with the Supreme Court's order.

Defendant also challenges the trial court's modification of his sentences without a resentencing hearing. Whether the court can properly amend a defendant's sentences without a full resentencing is a question of law. This Court reviews questions of law de novo. See, generally, *People v Francisco*, 474 Mich 82, 85; 711 NW2d 44 (2006).

A trial court's authority to modify a sentence is vested in MCR 6.429(A), which provides that the court "may correct an invalid sentence" A sentence is invalid if it is based on inaccurate information. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). "[W]hen a court sentences a defendant in reliance on an inaccurate guidelines range, it does so in reliance on inaccurate information." *Francisco*, 474 Mich at 89 n 7. In this case, the trial court determined that an inaccurate guidelines range was used when defendant was resentenced in May 2009. Thus, the trial court had the authority to resentence defendant. However, we conclude that it was improper for the trial court to exercise that authority by merely administratively modifying defendant's judgment of sentence, without conducting a full resentencing hearing.

In *Miles*, 454 Mich at 98-99, the Supreme Court explained:

MCR 6.429(A) does not specify procedural safeguards that must be afforded a defendant when an invalid sentence is modified. Certain sentence modifications of invalid sentences are ministerial in nature and do not require a resentencing hearing; however, other modifications require the due process protections of a resentencing hearing.

For example, the majority of cases presume that the correction of a sentence found invalid because of inaccuracies in information relied on at sentencing will occur at a resentencing hearing. Such a conclusion is consistent with the fact that sentencing is a critical stage of the proceedings at which the

² See, e.g., *Thomas*, 447 Mich at 394; *People v Feliciano*, 485 Mich 1122, 1123; 780 NW2d 254 (2010), *People v Harrison*, 448 Mich 886; 533 NW2d 315 (1995), *People v Mays*, 449 Mich 857; 535 NW2d 792 (1995), *People v Irving*, 465 Mich 965; 641 NW2d 858 (2002), and *People v Vansickle*, 450 Mich 854; 538 NW2d 684 (1995). Cf. *People v Reid*, 465 Mich 969; 642 NW2d 678 (2001).

defendant has a Sixth Amendment right to be represented by counsel. [Citations omitted.]

The trial court's modification of defendant's sentences in this case did not involve a mere ministerial act. The trial court concluded that the sentences were based on inaccurate information, i.e., an inaccurate guidelines range. Just as a sentence modification based on inaccurate information in a presentence report is not ministerial and requires a resentencing hearing, *Miles*, 454 Mich at 100, a sentence modification necessitated by an inaccurate guidelines range also is not a ministerial act and requires a resentencing hearing.

We express no opinion regarding the accuracy of the trial court's scoring of the offense variables in its January 2010 opinion and order. Although defendant challenges the scoring of OV 8, he does so on the basis that he did not have an opportunity to appropriately challenge the court's scoring decision at a resentencing hearing. Because we are remanding this case for resentencing, the parties will have the opportunity to challenge any scoring decisions at that time.

In sum, we affirm defendant's sentences of 10 to 15 years for the breaking and entering a coin-operated device and felonious assault convictions, but vacate defendant's remaining sentences and remand for resentencing on those remaining counts in accordance with the Supreme Court's order in *Floyd*, 481 Mich at 938, and consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello