

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 21, 2014

v

KOREY BERNELL SHAW,
Defendant-Appellant.

No. 314865
Oakland Circuit Court
LC No. 2011-235401-FH

Before: RIORDAN, P.J., and DONOFRIO and, BOONSTRA JJ.

PER CURIAM.

On remand following this Court’s decision in *People v Shaw*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2012 (Docket No. 306273), defendant appeals as of right the sentences imposed on him at resentencing. At resentencing, the trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to consecutive sentences of two to five years’ imprisonment for felon in possession of a firearm, MCL 750.224f, and five years’ imprisonment for felony-firearm, second offense, MCL 750.227b(1). Because the sentencing court lacked jurisdiction, we vacate the sentences and remand for resentencing.

In our prior opinion, we affirmed defendant’s convictions but remanded for resentencing because the trial court erred by scoring points for offense variable 19. On January 25, 2013, defendant, acting in propria persona, applied for leave to appeal to the Supreme Court our November 29, 2012 judgment. The record supports that neither the trial court nor the respective attorneys were aware of defendant’s application for leave to appeal. Thus, the trial court held a resentencing hearing on January 28, 2013, and imposed the same sentences it had originally imposed. Subsequently, on May 28, 2013, the Supreme Court denied defendant’s January 25, 2013 application for leave to appeal because the Supreme Court was not persuaded that it should review defendant’s questions presented. *People v Shaw*, 494 Mich 856; 830 NW2d 389 (2013).

Defendant first argues that we should vacate his sentences because the trial court did not have the necessary jurisdiction to resentence him while his application to the Supreme Court was pending. We are compelled to agree, but we note that but for the lack of jurisdiction, we would affirm the sentence as given.

“Issues of subject-matter jurisdiction are reviewed de novo.” *People v Gonzalez*, 256 Mich App 212, 234; 663 NW2d 499 (2003). MCR 7.302(C)(5) provides, in part, the following:

If a party appeals a decision which remands for further proceedings as provided in subrule (C)(4)(a), the following provisions apply:

(a) If the Court of Appeals decision is a judgment under MCR 7.215(E)(1),^[1] an application for leave to appeal stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise.

MCR 7.215(F)(1)(a) further provides that “the Court of Appeals judgment is effective after the expiration of the time for filing an application for leave to appeal to the Supreme Court, or, if such an application is filed, after the disposition of the case by the Supreme Court.”

In this case, the prosecution agrees that defendant’s application for leave to appeal was timely and should have stayed the proceedings on remand. The prosecution nonetheless argues that we should not vacate defendant’s January 2013 sentence and remand for resentencing because defendant was not prejudiced “by the oversight in this case.” However, the prosecution does not cite to any case in which we have affirmed a sentence that the trial court lacked jurisdiction to impose, and we have found no such case. Rather, case law supports that under the circumstances presented in this case, we should vacate defendant’s sentences and remand for resentencing. In *People v Swafford*, 483 Mich 1, 6 n 5; 762 NW2d 902 (2009), our Supreme Court noted that the defendant’s timely application for leave to appeal this Court’s judgment to the Supreme Court stayed the proceedings on remand and divested the trial court of jurisdiction during the pendency of the appeal to the Supreme Court. “When a court is without jurisdiction of the subject matter, its acts and proceedings are of no force and validity; they are a mere nullity and are void.” *People v Clement*, 254 Mich App 387, 394; 657 NW2d 172 (2002) (quotation marks omitted). Thus, we vacate defendant’s sentences and remand to the trial court for resentencing consistent with our previous November 29, 2012 opinion.

Defendant also argues that he is entitled to resentencing because he was not physically present in the courtroom for the January 28, 2013 resentencing hearing, but merely appeared by video conference from his location in prison. Because the trial court’s lack of jurisdiction requires remand for resentencing, we need not consider whether defendant’s physical absence from the resentencing hearing also entitles him to resentencing. But, because the issue may arise again on remand, we review the issue for purposes of providing instruction to the trial court.

“The Due Process Clause and the Confrontation Clause of the Sixth Amendment, as applied to the States via the Fourteenth Amendment, both guarantee to a criminal defendant . . . the right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings.” *Tennessee v Lane*, 541 US 509, 523; 124 S Ct 1978; 158 L Ed 2d 820 (2004) (quotation marks omitted). This right applies to the sentencing hearing, as well as the trial itself. *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984); *People v Palmerton*, 200 Mich

¹ “When the Court of Appeals disposes of an original action or an appeal, whether taken as of right, by leave granted, or by order in lieu of leave being granted, its opinion or order is its judgment.” MCR 7.215(E)(1).

App 302, 304; 503 NW2d 663 (1993). The Michigan Court Rules further provide that a trial court

may use two-way interactive video technology to conduct the following proceedings between a courtroom and a prison, jail, or other location: initial arraignments on the warrant or complaint, arraignments on the information, pretrial conferences, pleas, *sentencings for misdemeanor offenses*, show cause hearings, waivers and adjournments of extradition, referrals for forensic determination of competency, and waivers and adjournments of preliminary examinations. [MCR 6.006(A) (emphasis added).]

“[W]e interpret court rules using the same principles that govern the interpretation of statutes.” *People v Buie*, 491 Mich 294, 304; 817 NW2d 33 (2012) (quotation marks omitted). “It is a basic principle of statutory construction that the express mention of one thing implies the exclusion of other similar things.” *People v Oswald*, 208 Mich App 444, 446; 528 NW2d 782 (1995); see also *People v Carruthers*, 301 Mich App 590, 604; 837 NW2d 16 (2013). Thus, the plain language of MCR 6.006(A) indicates that a trial court may not use a video conference to secure a defendant’s appearance when sentencing him for felony offenses rather than misdemeanor offenses. Here, defendant was being sentenced for his felony convictions. MCL 750.224f(5); MCL 750.227b(1). Therefore, absent a defendant’s express agreement to appear via video, see *People v Carter*, 462 Mich 206, 217-218; 612 NW2d 144 (2000) (noting that a party can waive a “broad array of constitutional and statutory provisions”), a trial court must secure the defendant’s physical appearance at sentencing.

We vacate defendant’s sentences and remand for resentencing consistent with this opinion and our previous November 29, 2012 opinion. We do not retain jurisdiction.

/s/ Michael J. Riordan
/s/ Pat M. Donofrio
/s/ Mark T. Boonstra