

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
January 23, 2018

v

KENNETH LEE MURINE,

Defendant-Appellant.

No. 335273
Jackson Circuit Court
LC No. 10-005670-FC

Before: MURPHY, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Defendant Kenneth Lee Murine appeals as of right the trial court’s August 2016 order declining to resentence him for his conviction of first-degree criminal sexual conduct (CSC-I). Defendant contends in this appeal that the trial court lacked jurisdiction when it imposed its earlier sentence because his application for leave to appeal to the Michigan Supreme Court was pending. He also argues that his sentence for CSC-I was disproportionate. We agree that the trial court lacked jurisdiction when it sentenced him in June 2014 and therefore vacate his sentence and remand for resentencing.

On April 18, 2012, a jury convicted defendant of CSC-I, MCL 750.520b(2)(b) (sexual penetration with victim younger than 13 and defendant 17 or older), and second-degree criminal sexual conduct (CSC-II) MCL 750.520c(1)(a) (sexual contact with victim younger than 13). For his conviction of CSC-I, under MCL 750.520b(2)(b), defendant could have been sentenced to “imprisonment for life or any term of years, but not less than 25 years.” Under MCL 750.520b(3), the trial court could have ordered the term of imprisonment imposed for CSC-I to be served consecutively to his CSC-II prison term. On June 7, 2012, the trial court sentenced defendant to concurrent terms of imprisonment for 30 to 50 years for CSC-I and 10 to 15 years for CSC-II. Defendant then appealed as of right his convictions and his sentences.

On April 22, 2014, this Court affirmed defendant’s convictions but vacated his CSC-I sentence and remanded for resentencing because the minimum sentence was an upward departure from the guidelines and the trial court had not articulated substantial and compelling reasons for its sentencing departure. *People v Murine*, unpublished opinion per curiam of the Court of Appeals, issued April 22, 2014 (Docket No. 310962). On June 3, 2014, defendant filed an application for leave to appeal to the Michigan Supreme Court this Court’s April 22, 2014 judgment.

While his leave application was pending, on June 26, 2014, the trial court held a resentencing hearing and resentenced defendant to 29 years, 11 months to 50 years' imprisonment for his CSC-I conviction. On July 10, 2014, defendant appealed his new sentence. On November 25, 2014, the Michigan Supreme Court denied defendant's application for leave to appeal this Court's April 22, 2014 judgment. *People v Murine*, 497 Mich 904 (2014).

For his appeal of the trial court's June 2014 resentencing, defendant argued among other things that his new sentence was deficient in light of *People v Lockridge*, 498 Mich 358; 870 NW2d 502 (2015). In ruling on defendant's second appeal, the panel stated that, under *Lockridge*, upward departure sentences must be reviewed for reasonableness by applying the principle of proportionality delineated in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1991), and its progeny. *People v Murine (After Remand)*, unpublished opinion per curiam of the Court of Appeals, issued March 3, 2016 (Docket No. 322688), p 2. Consequently, we remanded the case for further consideration of defendant's sentence by the trial court under this Court's recently decided case, *People v Steanhouse*, 313 Mich App 1; 880 NW2d 297 (2015). *Murine*, unpub op at 2. The trial court then reconsidered its resentencing and concluded without expressly applying the *Milbourn* proportionality test that defendant's sentence was fair and appropriate. Consequently, it declined to resentence defendant for a second time. This appeal followed.

Defendant first argues that we must vacate his CSC-I sentence because the trial court lacked jurisdiction when it resentenced defendant in June 2014 since he had timely filed his application for leave to appeal this Court's April 22, 2014 judgment to the Michigan Supreme Court. We agree.

"Whether the trial court had subject-matter jurisdiction is a question of law that this Court reviews de novo." *Bank v Mich Ed Ass'n-NEA*, 315 Mich App 496, 499; 892 NW2d 1 (2016). The interpretation and application of court rules is a question of law reviewed de novo. *People v Buie*, 285 Mich App 401, 416; 775 NW2d 817 (2009).

"Subject matter jurisdiction concerns a court's abstract power to try a case of the kind or character of the one pending and is not dependent on the particular facts of the case." *People v Lown*, 488 Mich 242, 268; 794 NW2d 9 (2011) (citations and quotation marks omitted). Because subject-matter jurisdiction concerns the court's power to hear a case, the issue cannot be waived. *Id.* A court's subject-matter jurisdiction is an "absolute requirement" for a valid judicial proceeding. *In re AMB*, 248 Mich App 144, 166; 640 NW2d 262 (2001). The existence of subject-matter jurisdiction is a question of law. *W A Foote Mem Hosp v Dep't of Pub Health*, 210 Mich App 516, 522; 534 NW2d 206 (1995). Trial courts cannot acquire subject-matter jurisdiction by consent, conduct, waiver, or estoppel. *AMB*, 248 Mich App at 166. A trial court must always vigilantly consider the limits of its jurisdiction. *Straus v Governor*, 230 Mich App 222, 227; 583 NW2d 520 (1998).

MCR 7.215(E)(1) provides in relevant part: "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." Unless this Court orders otherwise, its judgment in a given case "is effective after the expiration of the time for filing a timely

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.” MCR 7.215(F)(1)(a).

Under MCR 7.305(C)(5)(a), if we remand a case to the trial court for further proceedings, an application for leave to appeal to the Michigan Supreme Court must be filed within 56 days in a criminal case after the date of this Court’s order or opinion regarding the case. The effect of filing an application for leave to appeal on a decision by this Court remanding the case to the trial court is governed by MCR 7.305(C)(6), which provides in relevant part as follows:

If a party appeals a decision that remands for further proceedings as provided in subrule (C)(5)(a), the following provisions apply:

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

If a party filed an application for leave to appeal, MCR 7.215(F)(1)(b) provides as follows:

execution on the Court of Appeals judgment is to be obtained or enforcement proceedings had in the trial court or tribunal after the record has been returned (by the clerk under MCR 7.210[H] or by the Supreme Court clerk under MCR 7.311[B]) with a certified copy of the court’s judgment or, if a record was not transmitted to the Court of Appeals, after the time specified for return of the record had it been transmitted.

In *People v Swafford*, 483 Mich 1, 6 n 5; 762 NW2d 902 (2009), the Michigan Supreme Court noted that the defendant’s timely application for leave to appeal this Court’s judgment to the Michigan Supreme Court stayed the proceedings on remand and divested the trial court of jurisdiction during the pendency of the appeal. “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) (citation and quotation marks omitted).

In this case, the trial court lacked jurisdiction to resentence defendant on the basis of this Court’s April 22, 2014 judgment that remanded defendant’s case for resentencing because defendant timely filed an application for leave to appeal this Court’s April 22, 2014 judgment to the Michigan Supreme Court. Consequently, the trial court’s proceedings were stayed by MCR 7.305(C)(6)(a). Neither we nor the Michigan Supreme Court ordered that our April 22, 2014 judgment took immediate effect. The trial court held its resentencing hearing and entered its judgment of sentence on June 26, 2014, while defendant’s leave application was pending. Our April 22, 2014 judgment did not go into effect until November 25, 2014, when the Michigan Supreme Court denied defendant’s application for leave to appeal in *People v Murine*, 497 Mich 904 (2014). Therefore, the trial court’s June 26, 2014 judgment of sentence was void and a nullity. See *People v Washington*, ___ Mich App ___; ___ NW2d ___ (No. 336050, issued 7/13/2017, published after release 9/12/2017). Consequently, we vacate the trial court’s judgment of sentence and remand for resentencing.

Because we are remanding for resentencing, we decline to rule on defendant's claim that the trial court abused its discretion by imposing a disproportionately long sentence upon him for his CSC-I conviction. Nevertheless, we direct that on remand the trial court apply the *Milbourn* proportionality test to determine whether defendant's sentence was proportionate to the seriousness of the circumstance surrounding the offense and the offender as required under *People v Steanhouse*, ___ Mich ___; ___ NW2d ___ (2017) (Docket Nos. 152671, 152849, 152871, 152872, 152873, 152946, 152947, and 152948), because the trial court's CSC-I sentence exceeded the 25-year statutory mandatory minimum sentence under MCL 750.520b(2)(b).

Under the reasoning articulated by the Michigan Supreme Court in *People v Wilcox*, 486 Mich 60, 67-70; 781 NW2d 784 (2010), the sentences that the trial court imposed both times constituted upward departures from the presumptively proportional statutory mandatory minimal sentence. Consequently, the trial court should have applied the *Milbourn* proportionality test and articulated its rationale justifying its upward departure.

We recognize that the Michigan Supreme Court explained in *Milbourn* that sentences that departed from the guidelines may be held proportionate in circumstances "where the guidelines do not adequately account for important factors legitimately considered at sentencing." *Milbourn*, 435 Mich at 657. When considering resentencing, the trial court must apply the *Milbourn* proportionality test recognizing that it requires that the extent of any departure must be proportionate. *Id.* at 660. The trial court may appropriately consider, however, that in *Milbourn* the Michigan Supreme Court expressly declined to overrule our prior cases that held that a trial court "may depart from the guidelines on the basis of a factor that is already included within the sentencing guidelines" because

there will be occasions when the conduct or the criminal record to be scored under the sentencing guidelines is extraordinary in its degree, and thus beyond the anticipated range of behavior treated in the guidelines. Nevertheless, we believe that the judge's right to depart in this fashion should be exercised with caution. [*Milbourn*, 435 Mich at 660 n 27.]

Accordingly, we vacate the trial court's judgment of sentence for defendant's conviction of CSC-I and remand for resentencing as directed herein. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane M. Beckering