

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 15, 2011

v

LACARO ROQUE, a/k/a LAZARO ROQUE,
Defendant-Appellant.

No. 296197
Wayne Circuit Court
LC No. 04-012683-FC

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v

LACARO ROQUE,
Defendant-Appellee.

No. 297082
Wayne Circuit Court
LC No. 04-012683-FC

Before: SAWYER, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

In Docket No. 296197, defendant appeals by leave granted from the trial court's order denying in part his motion for relief from judgment. In Docket No. 297082, the prosecutor appeals as of right from the trial court's amended judgment of sentence after the court granted defendant's motion for relief from judgment in part and resentenced defendant. Because the trial court erred in ruling that defendant was entitled to relief from the original judgment of sentence when defendant failed to establish, per MCR 6.502(G)(2), that he could pursue a successive motion for relief from judgment, and, because defendant has not established that he is otherwise entitled to relief from his original judgment, we affirm in part, reverse in part, vacate defendant's amended judgment of sentence, reinstate defendant's original sentences, and remand for entry of a corrected judgment of sentence in accordance with this opinion.

In 2005, defendant was convicted by a jury of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, third-degree fleeing or eluding a police officer, MCL 257.602a(3), carrying a concealed weapon (CCW), MCL 750.227, and

possession of a firearm during the commission of a felony, MCL 750.227b. In June 2005, he was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 25 to 50 years for the assault conviction and 3 to 5 years each for the felon-in-possession, fleeing or eluding, and CCW convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. This Court affirmed defendant's convictions and sentences in *People v Roque*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2007 (Docket No. 263855), lv den 478 Mich 870 (2007).

In May 2008, defendant filed a motion for relief from judgment that was denied. Defendant thereafter filed a second motion for relief from judgment in September 2009. The trial court granted that motion in part, concluding that defendant was entitled to resentencing because a second amended information charging him with being a fourth habitual offender was not timely filed. The trial court denied defendant's motion in all other respects. On February 12, 2010, the trial court resentenced defendant as a third habitual offender, MCL 769.11, to concurrent prison terms of 14 to 30 years for the assault conviction and 2 to 10 years each for the felon-in-possession, fleeing or eluding, and CCW convictions, and a consecutive two-year term of imprisonment for the felony-firearm conviction. These appeals followed.

I. DOCKET NO. 297082

In Docket No. 297082, the prosecutor argues that the trial court erred by accepting defendant's second motion for relief from judgment, and granting his request for resentencing pursuant to that motion, where the second motion was an improper successive motion that was not permitted by any applicable exception. MCR 6.502(G)(1) provides, in pertinent part:

Except as provided in subrule (G)(2), regardless of whether a defendant has previously filed a motion for relief from judgment, after August 1, 1995, one and only one motion for relief from judgment may be filed with regard to a conviction. The court shall return without filing any successive motions for relief from judgment.

MCR 6.502(G)(2) permits the filing of a successive motion under two circumstances:

A defendant may file a second or subsequent motion based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion. The clerk shall refer a successive motion that asserts that one of these exceptions is applicable to the judge to whom the case is assigned for a determination whether the motion is within one of the exceptions.

As this Court explained in *People v Swain*, 288 Mich App 609, 631; 794 NW2d 92 (2010), “[a]ny successive motion that does not assert one of these two exceptions is to be returned to the defendant without filing by the court.”

In this case, the trial court considered defendant's second motion for relief from judgment without finding that one of the exceptions in MCR 6.502(G)(2) was applicable. Although the court analyzed the “good cause” and “actual prejudice” requirements in MCR 6.508(D)(3), those requirements do not serve as a third exception to the general rule that a defendant may only file

one motion for relief from judgment. *Swain*, 288 Mich App at 632. Rather, those requirements “are not relevant until, and are only relevant if, the trial court determines that the successive motion falls within one of the two exceptions of MCR 6.502(G)(2).” *Id.* at 632-633.

Further, there is no basis for concluding that defendant’s request for resentencing in his second motion for relief from judgment fell within one of the two exceptions in MCR 6.502(G)(2). Defendant’s motion for relief from judgment alleged that he was improperly sentenced as a fourth habitual offender because the second amended information charging him with being a fourth habitual offender was not timely filed. The motion did not allege any entitlement to relief based on a retroactive change in the law. Further, the record does not support defendant’s claim that the motion was based on newly discovered evidence. On the contrary, the record indicates that at defendant’s original sentencing, defense counsel objected to second amended information on the ground that it was not timely filed, but the trial court overruled defense counsel’s objection. Defendant, who was aided by an interpreter at his trial and at sentencing, contends that a language barrier prevented him from personally discovering that the second amended information was not timely filed until after his first motion for relief from judgment was denied. However, defendant cannot properly invoke the newly discovered evidence exception where (1) the record clearly discloses that his attorney was aware at the original sentencing proceeding that the second amended information may not have been timely filed, and (2) defendant’s present claim is not based on any actual new evidence that had not been discovered previously.

Because none of the exceptions in MCR 6.502(G)(2) were applicable, the trial court should not have accepted defendant’s second motion for relief from judgment. Thus, the court erred in granting defendant’s request for resentencing pursuant to that motion. Accordingly, we vacate defendant’s amended judgment of sentence on resentencing and reinstate his original sentences imposed in June 2005.

II. DOCKET NO. 296197

In Docket No. 296917, defendant argues that the trial court erred by refusing to consider his remaining claims challenging the validity of his original sentences. The trial court ruled that defendant’s remaining claims “are meritless and are otherwise precluded by the court rules that limit a defendant’s right to file more than one post convictions [sic] motion absent certain exceptions. MCR 6.502(G).”

As we previously observed, a defendant cannot file a successive motion for relief from judgment that is not based on one of the two exceptions in MCR 6.502(G)(2). *Swain*, 288 Mich App at 631. Defendant failed to show that his remaining claims for relief were based on either (1) a retroactive change in the law, or (2) evidence that was not discovered before his first motion for relief from judgment was denied. Because defendant had previously filed a motion for relief from judgment, and he did not establish that the remaining claims in his second motion fell within one of the exceptions in MCR 6.502(G)(2), the trial court properly refused to consider them. MCR 6.502(G)(1). *Swain*, 288 Mich App at 631.

III. CONCLUSION

In Docket No. 296197, we affirm the trial court's decision to the extent that it denied in part defendant's motion for relief from judgment because the motion was an improper successive motion and none of the claims at issue fell within one of the two exceptions in MCR 6.502(G)(2). In Docket No. 297082, we reverse the trial court's decision to the extent that it granted in part defendant's motion for relief from judgment and ordered resentencing. Further, we vacate defendant's amended judgment of sentence and reinstate his original sentences.

Affirmed in part, reversed in part, vacated in part in accordance with this opinion, and remanded for entry of a corrected judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer

/s/ Pat M. Donofrio

/s/ Amy Ronayne Krause