

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 25, 2011

v

JASON TEARELL SLATER,

Defendant-Appellant.

No. 298934
Chippewa Circuit Court
LC No. 07-008529-FH

Before: STEPHENS, P.J., and SAWYER and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the trial court's order denying his motion for relief from judgment. We reverse.

I. FACTS

Charge and Plea Agreement

The prosecutor charged defendant with being a prisoner in possession of contraband, MCL 800.281(4), and habitual offender-second offense notice, MCL 769.10, for possessing a cellular telephone. On July 9, 2007, defendant pleaded guilty to being a prisoner in possession of contraband, MCL 800.281(4), and acknowledged that he possessed a cellular telephone while he was a prisoner committed to the jurisdiction of the Department of Corrections. In return for defendant's guilty plea and pursuant to the plea agreement, the prosecutor agreed not to seek habitual offender sentence enhancement. On August 28, 2007, the trial court sentenced defendant to serve one to five years, consecutive to his current sentence.

Subsequent Appeal

An appellate attorney was appointed to represent defendant on appeal. On March 13, 2008, she filed a motion to amend the judgment of sentence to reflect a different statutory basis for defendant's plea. The motion explained that "the statute Defendant was charged with and pleaded to (MCL 800.281[4]) prohibits a prisoner from possessing liquor, drugs, etc., and not cell phones" and that "the correct statute is MCL 800.283a; which prohibits a prisoner from possessing a cell phone." Counsel asserted that defendant "did provide an adequate factual basis for violation of MCL 800.283a." According to defendant, this motion was filed without his consent and without advance notice to him.

The trial court granted defendant's motion and ordered "that the Judgment of Sentence in this matter be Amended by deleting MCL 800.281(4) and replacing it with MCL 800.283a." An amended judgment of sentence was entered on March 19, 2008.

Motion for Relief from Judgment

Thereafter, defendant filed a pro per motion requesting relief from judgment pursuant to MCR 6.500 *et seq.* Defendant complained that his appellate attorney failed to file an application for leave to appeal and moved without his consent to amend the judgment of sentence. Defendant also claimed that he was innocent, and that the factual basis of his plea, possession of a cellular telephone, did not satisfy either MCL 800.281(4) or MCL 800.283a. The trial court denied the motion. Defendant now appeals.

II. STANDARD OF REVIEW

This Court reviews a trial court's decision on a motion for relief from judgment for abuse of discretion and its findings of facts for clear error. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *Id.* at 628-629. A court necessarily abuses its discretion when it makes a decision based on an error of law. *Id.* at 629. This Court reviews questions of law, such as the proper interpretation and application of a court rule or statute, de novo. *People v Kimble*, 470 Mich 305, 308-309; 684 NW2d 669 (2004).

III. ANALYSIS

MCL 800.281(4)

MCL 800.281(4) states, as follows:

Except as provided in section 2, a prisoner shall not possess any alcoholic liquor, prescription drug, poison, or controlled substance.

Section 2, found at MCL 800.282, lists exceptions that are not applicable. Controlled substance is defined as "a drug, substance, or immediate precursor in schedules 1 to 5 of part 72 of 1978 PA 368, MCL 333.7201 to 333.7231." MCL 800.281a(c).

There is no evidence to support a guilty plea under MCL 800.281(4). The statute is wholly inapplicable to a prisoner possessing a cellular telephone.

MCL 800.283a

MCL 800.283a provides:

A person shall not sell, give, or furnish, or aid in the selling, giving, or furnishing of, a cellular telephone or other wireless communication device to a prisoner in a correctional facility, or dispose of a cellular telephone or other wireless communication device in or on the grounds of a correctional facility.

There is no evidence that defendant admitted to “selling, giving, furnishing, or aiding in the selling, giving or furnishing of” a cellular telephone to a prisoner. There is no evidence that defendant disposed of a cellular telephone in or on the grounds of the prison. As such, defendant’s admitted possession of a cellular telephone does not support a guilty plea under MCL 800.281(4).

Motion for Relief from Judgment

Under MCR 6.508, the trial court may not grant post-appeal relief regarding a claim that “alleges grounds for relief, *other than jurisdictional defects*, which could have been raised on appeal from the conviction and sentence or in a prior motion” unless the defendant can show both good cause for failing to raise the grounds for relief earlier and that the alleged irregularity resulted in actual prejudice. MCR 6.508(D)(3) (emphasis added); see also *People v McSwain*, 259 Mich App 654, 680-681; 676 NW2d 236 (2003). A court may waive the good cause requirement “if it concludes that there is a significant possibility that the defendant is innocent of the crime.” MCR 6.508(D)(3).

Because defendant pleaded guilty, for actual prejudice defendant must show “the defect in the proceedings was such that it renders the plea an involuntary one to a degree that it would be manifestly unjust to allow the conviction to stand.” MCR 6.508(D)(3)(b)(ii). Alternatively, defendant can also show actual prejudice if “the irregularity was so offensive to the maintenance of a sound judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case.” MCR 6.508(D)(3)(b)(iii).

Defendant argues that he need not show good cause and actual prejudice because his claim involves a jurisdictional defect, that he has shown good cause and prejudice, and that the trial court should have waived the good cause requirement because he is innocent under MCL 800.281(4) and MCL 800.283a.

Jurisdictional Defect

In *People v Carpentier*, 446 Mich 19; 521 NW2d 195 (1994), our Supreme Court noted that a defendant “may always challenge whether the state had a right to bring the prosecution in the first place.” *Id.* at 27, quoting *People v Alvin Johnson*, 396 Mich 424, 442; 240 NW2d 729 (1976), unrelated dicta disapproved of in *People v New*, 427 Mich 482; 398 NW2d 358 (1986). “Such rights and defenses ‘reach beyond the factual determination of defendant’s guilt and implicate the very authority of the state to bring a defendant to trial’” *New*, 427 Mich at 491, quoting *People v White*, 411 Mich 366, 398; 308 NW2d 128 (1981) (MOODY, J., concurring in part and dissenting in part). A jurisdictional defect or its equivalent has been found where the defendant asserts improper personal jurisdiction, improper subject matter jurisdiction, double jeopardy, or imprisonment where the trial court had no authority to sentence the defendant to the institution in question, or when the defendant was convicted for no crime at all. *Carpentier*, 446 Mich at 47-48 (RILEY, J., concurring). Our Supreme Court has also held that an example of a defect “similar” to a jurisdictional defect, in that it involves the right of the government to prosecute the defendant in the first place, is when the defendant is charged under an unconstitutional or inapplicable statute. *New*, 427 Mich at 492. See also *People v Beckner*, 92 Mich App 166, 169; 285 NW2d 52 (1979).

Here, we conclude that defendant's basic argument, i.e., that he could not be convicted under MCL 800.281(4) or MCL 800.283a, because neither statute criminalizes the possession of a cellular telephone by a prisoner, presents a claim of a jurisdictional defect for which he need not demonstrate good cause or prejudice. Defendant's argument could be alternatively read as an assertion that he was charged under an inapplicable statute, or that the conduct as charged did not constitute an offense. Given that defendant is correct that he was charged under an inapplicable statute or that the conduct as charged did not constitute an offense, the trial court erred in denying his motion for relief from judgment on that basis.

Reversed.

/s/ Cynthia Diane Stephens

/s/ David H. Sawyer

/s/ Kirsten Frank Kelly