STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2011
v	No. 299173 Ingham Circuit Court
MARTIN DAVID DAUGHENBAUGH, Defendant-Appellant.	LC No. 89-058934-FC

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Defendant Martin David Daughenbaugh, appeals by right the trial court's decision to modify the sentence imposed after a jury convicted defendant of armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, in 1989. At that time, the trial court sentenced defendant as a third habitual offender, MCL 769.11, to consecutive prison terms of 35 to 60 years for armed robbery and two years for felony-firearm. Because we conclude that the trial court erred when it modified defendant's sentence without conducting a sentencing hearing, we vacate and remand for resentencing.

In 1983, the trial court sentenced defendant to serve four to six years in prison for armed robbery. In 1988, when defendant was on parole for the 1983 armed-robbery conviction, he committed a series of armed robberies in the Lansing area. See *People v Daughenbaugh*, 193 Mich App 506, 508; 484 NW2d 690 (1992). After his conviction for the 1988 robbery, the trial court sentenced defendant as a third habitual offender to consecutive prison terms of 35 to 60 years for armed robbery and two years for felony-firearm. The trial court departed upward ten years from the recommended minimum sentencing range of five to 25 years, because it concluded that defendant was a career criminal who had no intention of reforming. However, the trial court neglected to order that the sentence for the robbery committed in 1988 was to run consecutive to his sentence for the 1983 robbery, as required under MCL 768.7a(2).

Defendant has improved his life significantly while in prison. He earned an associate's degree from Montcalm Community College, and he has participated in Alcoholics Anonymous, Narcotics Anonymous, and an "Opportunities to Change" program. He has remained violation-free for the past 13 years, has excellent work reports, and participates in community service projects and a program training former racing dogs for service in the community. He has an

ongoing, supportive relationship with his family. Defendant has acknowledged his wrongdoing and has expressed remorse for his actions.

In early 2010, the Michigan Department of Corrections notified the trial court that the original sentencing court[1] had mistakenly failed to sentence defendant to a term of imprisonment in this case that was consecutive to the sentence for his 1983 conviction. On the basis of this notice, the trial court decided to correct the judgment of sentence on its own motion.[2] The trial court held a resentencing hearing and stated that it would not conduct a full resentencing or otherwise modify defendant's sentence, except to make it consecutive to the sentence for his 1983 conviction. The court resentenced defendant to consecutive prison terms of 35 to 60 years for armed robbery and two years for felony-firearm, with 7,787 days' credit for time served; the sentence was to be served consecutive to the sentence for defendant's 1983 conviction.

On appeal, the parties do not dispute that this Court held in *People v Thomas*, 223 Mich App 9; 566 NW2d 13 (1997), that resentencing is required in order to convert a sentence that runs concurrently to one that runs consecutively. However, defendant argues that he did not receive a proper resentencing, because the trial court judge simply treated the correction of his sentence as a ministerial action. In contrast, the prosecution contends that defendant received a proper resentencing because the trial court fulfilled the procedural requirements of a sentencing hearing.

Under MCR 6.425(E)(1), a trial court must ensure that a defendant's sentencing meets certain procedural requirements; it must:

> (a) determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report,
>
> (b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges [to the presentence report] . . . ,

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[1] The original trial judge retired; the notice went to the successor judge.

[2] There are strict time limits on the prosecutor's or a defendant's ability to correct an invalid sentence by motion before the trial court. See MCR 6.429(B). Further, because the time for an appeal has long since passed, the prosecutor could not invoke this Court's authority to correct the error. See MCR 7.205. Nevertheless, although it might seem inequitable to permit it years—even decades—after the time for an appeal to this Court has passed, this Court has held that, under MCR 6.429(A), a trial court has the authority to correct an invalid sentence on its own motion and may do so at *any* time. See *People v Harris*, 224 Mich App 597, 601; 569 NW2d 525 (1997).

> (c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence,
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> (d) state the sentence being imposed, including the minimum and maximum sentence if applicable, together with any credit for time served to which the defendant is entitled,
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> (e) if the sentence imposed is not within the guidelines range, articulate the substantial and compelling reasons justifying that specific departure, and
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> (f) order that the defendant make full restitution as required by law to any victim of the defendant's course of conduct that gives rise to the conviction, or to that victim's estate.

At the resentencing hearing, the trial court determined that the parties had received the updated presentence investigation report and asked the parties if they had any additions or corrections, and gave defendant, his attorney, the prosecutor, and the victim the opportunity to advise the court of any circumstances it should consider in imposing sentence, including whether defendant was entitled to a full resentencing. The court noted defendant's sentence on the record, and explained that defendant's new sentence continued to depart upward from the guidelines because it did not believe he had the authority or discretion to modify the previous sentence, except to make it consecutive to the sentence for defendant's 1983 conviction.

The trial court's view of its role in resentencing defendant does not comport with the stated purpose of requiring resentencing when correcting a judgment of sentence to replace a concurrent sentence with a consecutive one. The *Thomas* Court recognized that resentencing was necessary if a trial court mistakenly implemented a concurrent sentence instead of a consecutive sentence, especially if it was unclear whether the sentencing judge would have imposed the same sentence if he had been aware that a consecutive, not concurrent, sentence was required. *Thomas*, 223 Mich App at 12-13. That is the situation in this case. It is unclear from the record whether the previous judge's decision at the 1989 sentencing hearing to depart upward from the guideline range by ten years was based, at least in part, on the mistaken belief that defendant's sentence was to be served concurrently with the sentence for his 1983 conviction. In such a circumstance, resentencing is necessary. See *People v Brown*, 184 Mich App 567, 572-573; 459 NW2d 19 (1990).

Resentencing requires more than simply following the procedural requirements of a sentencing hearing:

> In re-sentencing, the judge shall impose sentence after due and careful consideration of all of the factors which are proper to be taken into consideration upon imposing sentence, such as defendant's previous record, if any, the probation officer's report to the circuit judge, the nature and circumstances of the offense of which defendant is guilty, need of imprisonment as punishment or as a rehabilitative factor, etc. He shall give defendant credit for the time he has already served. Otherwise he shall not—either one way or the other—take into

> consideration the erroneous sentence which is hereby vacated. [*People v Earegood*, 383 Mich 82, 86; 173 NW2d 205 (1970).]

More recently, our Supreme Court clarified that a case on remand to a trial court for resentencing is in a "presentence posture." *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007), citing *People v Ezell*, 446 Mich 869; 522 NW2d 632 (1994). And, at resentencing, "every aspect of the sentence is before the judge de novo . . . ." *People v Williams* (*After Second Remand*), 208 Mich App 60, 65; 526 NW2d 614 (1994).

Here, the trial court did not make the independent determination of an appropriate sentence. As the court made clear on the record, it simply altered defendant's judgment of sentence to indicate that his sentence was consecutive to the sentence for his 1983 conviction and otherwise adopted his predecessor's sentencing decision and rationale. The trial court repeatedly stated that in so doing, it was exercising no discretion, but was simply "addressing a clerical error." However, defendant is entitled to an independent determination of an appropriate sentence by a trial court that recognizes that his sentence will be served consecutively to his 1983 conviction. See *Thomas*, 223 Mich App at 17.

For these reasons we vacate defendant's sentences and remand the matter to the trial court. On remand, the trial court shall conduct a full sentencing hearing and, considering the totality of the circumstances, sentence defendant accordingly.

We do not, however, agree with defendant's contention that the judge who modified his sentence should be disqualified from conducting the resentencing. Under MCR 2.003(C)(1)(a), a judge may be disqualified if "[t]he judge is biased or prejudiced for or against a party or attorney." In *Cain v Mich Dep't of Corrections*, 451 Mich 470, 495-496; 548 NW2d 210 (1996), our Supreme Court specified that in order to establish disqualification under this subsection, both actual and personal bias must be established, and "the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding."

Defendant acknowledges that he has no evidence of an event or source of information arising outside the judicial proceeding that caused the judge's alleged bias against him. Instead, defendant contends that the judge is actually biased against him, as indicated by certain comments made during the resentencing hearing:

> I am simply addressing a clerical error on [the previous judge's] part on not making these consecutive to a parole term which the statute requires. I am exercising no discretion of my own at all . . . . Let me make that clear. *And I want to tell you something. I want to tell you something. We all lived through the Blue Bandit. We all lived through that. All right. So let me explain to you, I remember it all. You may not want me giving any other sentence. So let's just be clear.* I want you to understand something. I am doing an administrative duty. I can't increase this sentence and I cannot decrease it. If you think that's wrong, the court of appeals will address it. But in my opinion, filing all this stuff for a resentencing on something that I merely asked to have a clerical error corrected on, that's all I was doing and that's all I am doing today. If you want to address

> that, that's fine. You know, that's the issue, and I am not going to argue it with you any further.
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> * * *
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> All right. My position is, is I am doing nothing but an administrative duty that a statute requires me to do. I am not the sentencing judge. I exercised no discretion in setting a sentence in this case. I do not believe it is appropriate for me to replace my judgment for that of [the previous judge] either higher or lower. *I don't intend to reduce his sentence by ten years.* I intend to simply say the sentence exactly what it was. *And I am quite surprised that you come in and take this position, because I don't agree with it. This is nothing but correcting a clerical error.* And because of some rulings that came down years ago on other issues I chose to do it this way. [emphasis added.]

In *Cain*, our Supreme Court noted, "The Due Process Clause requires an unbiased and impartial decisionmaker. Thus, where the requirement of showing actual bias or prejudice under [MCR 2.003(C)(1)] has not been met, or where the court rule is otherwise inapplicable, parties have pursued disqualification on the basis of the due process impartiality requirement." *Id.* at 497. Our Supreme Court has indicated that disqualification of a judge without a showing of actual bias is appropriate "in situations where 'experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.'" *Crampton v Mich Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975), quoting *Withrow v Larkin*, 421 US 35, 47; 95 S Ct 1456; 43 L Ed 2d 712 (1975). These situations include those where the judge has a pecuniary interest in the outcome, has been the target of personal abuse or criticism from the party before him, is enmeshed in other matters involving the petitioner, or might have prejudged the case because of prior participation as an accuser, investigator, fact finder or initial decisionmaker. *Id.*

Defendant has not indicated that the judge here had a pecuniary interest in the outcome, was involved in other matters involving defendant, or was the target of abuse or criticism. Although the judge's comment that "you may not want me giving any other sentence" could be viewed as some sort of prejudgment of the case, defendant does not indicate that this view arose out of any prior participation. Instead, defendant claims that the challenged statements, in and of themselves, exhibited the judge's actual bias and prejudice and necessitate disqualification. Yet intemperate remarks do not normally constitute a basis for disqualification:

> "[J]udicial remarks . . . that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge. . . . [Further], [n]ot establishing bias or partiality . . . are expressions of impatience, dissatisfaction, annoyance, and even anger, that are within the bounds of what imperfect men and women . . . sometimes display." [*Cain*, 451 Mich at 497 n 30, quoting *Liteky v United States*, 510 US 540, 555-556; 114 S Ct 1147; 127 L Ed 2d 474 (1994).]

Further, disqualification for bias or prejudice under the due process clause is only constitutionally required in the most extreme cases. *Id.* at 498.

We do not believe that the trial court's comments were so extreme or indicate such a high probability of actual bias that due process necessitates reassignment to a different judge. Although the trial court indicated that it remembered defendant's 1988 crime spree, it also acknowledged that defendant had made tremendous improvements in his life in the years since. Further, the court indicated that its decision to implement a minimum sentence that exceeded the recommended guidelines by ten years did not arise from any personal exercise of discretion, but from the belief that it was required to correct a clerical error and otherwise re-implement its predecessor's sentence. And while some of the court's comments to defendant's attorney regarding the argument that a full resentencing was necessary might be read in a manner indicating some level of annoyance, the court also noted that it would willingly conduct a full resentencing, if directed to by this Court.

Defendant notes that in *People v Evans*, 156 Mich App 68; 401 NW2d 312 (1986), this Court adopted a three-part test to determine whether, on remand, a resentencing hearing should be held before a different judge. However, we conclude that, consistent with *Evans*, it is unnecessary to remand this case to a different judge. Under *Evans*, this Court should consider:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. [*Evans*, 156 Mich App at 72 (quotation marks and citation omitted).]

We do not believe that the trial court would have substantial difficulty in putting out of its mind previously-expressed views or findings determined to be erroneous. Further, the court stated that its decision to re-implement his predecessor's sentence was premised on its belief that it was required to simply correct a clerical error in defendant's judgment of sentence, and it indicated that it would follow this Court's instructions on remand if told to resentence defendant. We do not believe that the court's statements, when considered as a whole, were so egregious that reassignment is advisable to preserve the appearance of justice.

For the reasons stated, we vacate defendant's sentences and remand for resentencing.

Vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck