STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2011
v	No. 299299 Macomb Circuit Court
LONNIE JOE MCLAVEY, Defendant-Appellant.	LC No. 2010-000381-FH

Before: MURPHY, C.J., and TALBOT and MURRAY, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his plea-based conviction of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). He was sentenced to 1 to 4 years' imprisonment on the conviction. We affirm the conviction, but vacate the sentence and remand for resentencing.

Defendant agreed to plead guilty to the charge of possession of less than 25 grams of heroin in exchange for dismissal of a second-habitual charge and for a sentence that would run concurrently with a prison sentence already being served by defendant on a previous drug conviction. The prosecutor also indicated that the estimated guidelines minimum sentence range was 0 to 11 months and that the agreement was that "the sentence . . . handed down . . . would be in between the 0 to 11." The prosecutor further stated that "should the guidelines come back differently, . . . [defendant] would have the right to withdraw his plea and proceed accordingly." Later in the hearing, the trial court expressed that the court itself was promising to stay within the guidelines if the guidelines were 0 to 11 months, with the court additionally noting, "and if I can't do that, then I'll let . . . you [with]draw your plea." While it appears slightly confusing regarding whether the agreement by the prosecutor and the court pertained solely to imposing a *minimum* sentence within the estimated range, with the statutory maximum of four years still remaining part of the sentence, we find that the only legally conceivable interpretation of the agreement was that a jail sentence of 11 months or less would be imposed. First, the comments expressed at the plea hearing support this conclusion. Also, a minimum sentence range that tops out at 11 months constitutes an intermediate sanction cell; therefore, a county jail term with a cap of 11 months could be imposed but not prison time absent articulation of substantial and compelling reasons for a departure. MCL 769.34(4)(a); MCL 769.31(b); *People v Harper*, 479 Mich 599, 617-618; 739 NW2d 523 (2007). And the plea agreement certainly did not

contemplate a possible departure from the estimated minimum sentence range. Furthermore, a term of 11 months or less (jail time) to four years (prison time) is not permissible.

The presentence investigation report (PSIR) that was prepared included a scoring of the guidelines, and the minimum sentence range was set at 2 to 17 months. At sentencing, the following colloquy occurred:

> *Defense Counsel*: Your Honor, I've had an opportunity to review the [PSIR] with my client. He informs me that for his juvenile convictions that are noted in the report that he was not represented by counsel when he was convicted of those offenses.
>
> *The Court*: All right.
>
> *Defense Counsel*: Other than that, your Honor, we don't have anything to add or delete or any other corrections to this [PSIR].
>
> *The Court*: On behalf of your client.
>
> *Defense Counsel*: Your Honor, I don't have anything further to say.
>
> *The Court*: Mr. McLavey, anything you want to tell me, sir?
>
> *Defendant*: No.

The trial court proceeded to impose a sentence of 1 to 4 years' imprisonment. After this sentence was imposed, defense counsel responded, "Thank you, your Honor," and the hearing concluded. Defendant did not file any motion to withdraw his plea or to challenge the sentence on the basis of failure to comply with the plea agreement.

On appeal, defendant claims that he is entitled to an order of specific performance, requiring imposition of a sentence between 0 to 11 months, or withdrawal of his plea. Defendant further contends that, minimally, he is entitled to resentencing because the sentence constituted a departure from the guidelines and the trial court did not articulate a substantial and compelling reason for departure.

We hold that defendant does not have a right to specific performance or withdrawal of his plea, given that the issue of compliance with the plea agreement was waived and because he never filed a motion in the trial court to withdraw his plea. The PSIR included a calculation of the minimum sentence range, and it was not 0 to 11 months; rather, it was 2 to 17 months.[1]

[1] We note that a minimum sentence range of 2 to 17 months would also constitute an intermediate sanction cell, MCL 769.34(4)(a), such that prison time could not be imposed absent substantial and compelling reasons for departure. The only relevant difference between a range of 0 to 11 months and a range of 2 to 17 months is that a jail term could be no more than 11

Despite this inconsistency with the plea discussions and agreement, defendant affirmatively voiced that he had no issues with the PSIR, except as to the matter concerning juvenile convictions. An appellate challenge based on the discrepancy between the plea agreement and the minimum sentence range was thus waived. See *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000). To the extent and assuming that there could be no full expression of a waiver until *after* the trial court imposed the sentence that did not fall between 0 and 11 months, defendant is still not entitled to relief because he never moved to withdraw the plea or otherwise seek enforcement of the plea below.

MCR 6.310(C) provides that a "defendant may file a motion to withdraw [a] plea within 6 months after sentence[,]" and "[t]hereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500." MCR 6.310(D), which addresses preservation, provides:

> A defendant convicted on the basis of a plea may not raise on appeal any claim of noncompliance with the requirements of the rules in this subchapter,[2] or any other claim that the plea was not an understanding, voluntary, or accurate one, unless the defendant has moved to withdraw the plea in the trial court, raising as a basis for withdrawal the claim sought to be raised on appeal. [See also *People v Kaczorowski*, 190 Mich App 165, 172; 475 NW2d 861 (1991).]

Accordingly, we reject the specific performance and plea-withdrawal arguments raised on appeal because they relate to compliance with the plea agreement and were not raised in the trial court. However, defendant is entitled to resentencing. MCL 769.34 provides in pertinent part:

> (4) Intermediate sanctions shall be imposed under this chapter as follows:
>
> (a) If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

Here, the upper limit of the recommended minimum sentence range was 17 months; therefore, as noted above, an intermediate sanction was required absent articulation of a substantial and compelling reason for departure. It does not appear from the record that the trial court even realized that it was departing from the guidelines, let alone that it articulated a substantial and compelling reason for departure. Accordingly, remand for resentencing is

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months as to application of the lower range and the jail term could be no more than 12 months as to application of the higher range. MCL 769.34(4)(a).

[2] Subchapter 6.300 – Pleas.

required.[3] The trial court, of course, has the discretion on remand to decline any upward departure and to impose an intermediate sanction, such as a jail term not exceeding 12 months, which would be more consistent with what defendant, the prosecutor, and the court apparently contemplated from the very beginning.

We affirm the conviction, but vacate the sentence and remand for resentencing. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Michael J. Talbot
/s/ Christopher M. Murray

[3] The error was not harmless because, despite the concurrent nature of the sentences being served by defendant, the first sentence on the earlier drug conviction, which was a sentence of 2 to 4 years' imprisonment, commenced running before the sentence at issue and will thus elapse prior to the end of the current 1 to 4 year prison term.