

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

EDWARD LEE WESTBROOK,
Defendant-Appellant.

UNPUBLISHED
February 7, 2012

No. 301928
Jackson Circuit Court
LC No. 08-005040-FH

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

PER CURIAM.

Defendant was convicted by a jury of possession with intent to deliver cocaine, less than 50 grams, MCL 333.7401(2)(a)(iv). Following remand for resentencing, defendant was sentenced under the double-penalty provision of the Controlled Substance Act, MCL 333.7413(2), to 6 to 20 years' imprisonment with credit for 852 days. Defendant appeals as of right the new sentence. We affirm.

This Court remanded for resentencing because the trial court erroneously imposed two sentence enhancements: one as an habitual offender, fourth offense, MCL 769.12, and one under the double-penalty enhancement of the Controlled Substance Act, MCL 333.7413(2). *People v Westbrook*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2010 (Docket No. 291145). When this Court reviewed defendant's original sentence, it noted that if the trial court had properly applied only the Controlled Substance Act enhancement, "defendant's sentence would provide a minimum range of 10 to 46 months, with a statutory maximum up to 40 years." *Id.* at 3. Further, because the trial court exceeded the statutory minimum sentence without articulating substantial and compelling reasons, a remand for resentencing was ordered. *Id.*

At resentencing, the prosecution argued for offense variable (OV) 12, MCL 777.42, and OV 14, MCL 777.44, to each be scored at ten points. The trial court agreed. This raised defendant's OV level and the minimum sentence guideline range, with the Controlled Substance Act double penalty imposed, was 38 to 76 months. The trial court sentenced defendant to 6 to 20 years' (72 to 240 months') imprisonment. On appeal, defendant argues the trial court erred when it scored OV 12 and OV 14 because it violated the law of the case doctrine.

Whether the law of the case doctrine applies is reviewed de novo. *Manske v Dep't of Treasury*, 282 Mich App 464, 497; 766 NW2d 300 (2009). This error was not, however,

preserved and is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The law of the case doctrine prevents a lower court on remand to take action inconsistent with the judgment of the appellate court, but does not apply where a case is remanded without directions to the lower court. *People v Fisher*, 449 Mich 441, 446-447; 537 NW2d 577 (1995). When this Court vacates a defendant's original sentence and remands for resentencing, the case is before the trial court in a presentence posture, allowing for objection to any part of the new sentence. *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007).

In this case, the matter was remanded without limitation. Simply because this Court noted what the minimum sentence range would have been if the sentence enhancements had been applied properly did not limit the trial court to imposing a sentence within that minimum on remand. When this case was remanded for resentencing, it was in presentence posture. *Rosenberg*, 477 Mich at 1076. The trial court did not take any action that was inconsistent with the judgment of this Court and did not violate the law of the case doctrine. *Fisher*, 449 Mich at 446-447. Defendant has not shown there was plain error affecting his substantial rights when the trial court scored OV 12 and OV 14 at resentencing. *Carines*, 460 Mich at 763-764.

Affirmed.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Michael J. Kelly