STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 2013
v	No. 310380 Wayne Circuit Court
BERNARD ANTONIO IVORY, Defendant-Appellant.	LC No. 10-000515-FC

Before: MURPHY, C.J., and CAVANAGH and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his sentences imposed by the trial court following a remand from this Court. We reverse and remand for entry of a new judgment of sentence consistent with this opinion.

In the first appeal, this Court in *People v Ivory*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2011 (Docket No. 300861), slip op at 2, recited the underlying facts:

> On October 27, 2009, defendant was involved in a shooting on Detroit's west side that resulted in injuries to two people. Earlier in the day, a landlord had attempted to evict his renter. "Angie," a female friend of the renter, slapped one of the landlord's cousins. The police arrived on the scene and told the renter to vacate the rental unit by 8:00 p.m. that evening. The landlord and several of his relatives later returned to change the locks. A fight then ensued between Angie and the girlfriend of the landlord's cousin. The girlfriend was ultimately stabbed several times. Thereafter, several shots were fired at the landlord's relatives, two of whom were injured. Several of the landlord's relatives and the girlfriend of the landlord's cousin testified that defendant was the shooter. Defendant and Toryanno Griffin, defendant's friend who witnessed the shooting, testified that defendant was unarmed and had been beaten up and shot at by the landlord's relatives. Defendant waived his right to a jury trial and was ultimately convicted.

Defendant was convicted in a bench trial of two counts of assault with intent to commit murder (AWIM), MCL 750.83, possession of a firearm by a felon, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. As reflected in the original judgment of sentence, defendant was sentenced to 225 months to 20 years'

imprisonment for the AWIM convictions, 2 to 5 years' imprisonment for the felon-in-possession conviction, and to 2 years' imprisonment for the felony-firearm conviction. Although the judgment of sentence set forth a maximum sentence of 20 years' imprisonment for the AWIM convictions, the following was stated on the record at the sentencing hearing during the imposition of the sentences:

> *The Court.* Count one and two, the [AWIM conviction], those are a 225 month to a 20 year sentence. . . .
>
> *Prosecutor.* And I'm sorry, you said it was a 225 to 20 year?
>
> *The Court.* Yes, 225 to 25. I do have to be two-thirds of the minimum. So it's 225, 225 months, which is - - to 25 years.

The original judgment of sentence also required defendant to pay $278 in state costs and $60 as an assessment for crime victims' rights.

The original judgment of sentence did not indicate that defendant had been sentenced as an habitual offender, even though the felony information provided that he was being charged as a third habitual offender, MCL 769.11. The presentence investigation report (PSIR), although referencing six prior felony convictions, provided that defendant was not being sentenced as an habitual offender, and the sentencing guidelines were scored accordingly. However, at the sentencing hearing, the trial court made a correction on the guidelines scoring sheet regarding offense variable 6 (OV 6), MCL 777.36, increasing it from zero points to 25 points, which increased the low end of the guidelines range from 171 to 225 months. And the trial court also corrected the top end of the guidelines range, increasing it from 285 months, which would have been the applicable number of months absent the OV change and an habitual enhancement, to 562 months, which was the applicable number of months for a *third habitual enhancement* with the OV change. MCL 777.16d (AWIM is a class A offense); MCL 777.21(3)(b) (increase upper limit of minimum sentence range by 50% if offender sentenced for a third felony); MCL 777.62 (sentencing grid for class A offenses – OV level V, PRV level F). Defendant and the prosecution agreed with the minimum sentence range of 225 to 562 months.[1] Therefore, while not reflected in the original judgment of sentence, the parties and the trial court all clearly operated on the basis that defendant was being sentenced as a third habitual offender.

On appeal to this Court, defendant did not raise any sentencing issues nor did the prosecutor mention any problems with the sentences. However, this Court, acting *sua sponte*, held:

> At the sentencing hearing, the trial judge initially set defendant's maximum sentence for the AWIM convictions at 20 years, but then observed that

[1] Defense counsel prefaced the agreement by noting its objections to some of the variable scores; counsel agreed that based on the scores determined by the trial court, the guidelines range would be 225 to 562 months.

> he would raise the maximum sentence to 25 years in order to comply with the two-thirds rule of *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972), and MCL 769.34(2)(b). However, the judgment of sentence contained in the lower court file continues to provide for a maximum sentence of only 20 years with regard to the AWIM convictions. Thus, there is a discrepancy between the trial judge's oral ruling and the judgment of sentence. Moreover, even overlooking this discrepancy, defendant's minimum sentence of 225 months is still greater than two-thirds of 25 years. In other words, even a sentence of 225 months to 25 years violates . . . the two-thirds rule of *Tanner* and MCL 769.34(2)(b). Although it is unclear from the lower court file whether defendant was actually sentenced as an habitual offender, we note that the two-thirds rule "applies to a person sentenced as an habitual offender." *People v Thomas*, 447 Mich 390, 392; 523 NW2d 215 (1994). For these reasons, and despite the fact that this issue has not been raised by defendant on appeal, we must vacate the concurrent sentences of 225 months to 25 years imposed for defendant's AWIM convictions and remand to the trial court for resentencing with regard to these convictions only. After resentencing, the trial court shall prepare a new judgment of sentence that accurately reflects all of defendant's sentences, including those imposed for the AWIM convictions. The trial court shall also specify on the new judgment of sentence whether defendant has been sentenced under the habitual offender statutes. The new judgment of sentence shall be forwarded to the Department of Corrections. [*Ivory*, slip op at 1-2, n 1.]

This Court also affirmed defendant's convictions. *Id.* at 2. Our Supreme Court denied defendant's application for leave. *People v Ivory*, 491 Mich 945; 815 NW2d 474 (2012). On remand, the trial court imposed new sentences for the AWIM convictions. The court left in place the minimum sentences of 225 months' imprisonment, but, in order to comply with this Court's two-thirds remand directive, it increased the maximum sentences to 338 months' imprisonment (28 years and 2 months). The felon-in-possession and felony-firearm sentences remained unchanged. The new judgment of sentence also indicated that defendant had been sentenced as a fourth habitual offender, MCL 769.12. Additionally, the new judgment of sentence decreased the state costs from $278 to $272, but increased the assessment for crime victims' rights from $60 to $130. Defendant then filed a motion for resentencing, arguing that OV 3, MCL 777.33 (physical injury to victim), was misscored at 25 points instead of 10 points. Defendant further contended that the trial court acted vindictively by increasing defendant's maximum sentences for AWIM on remand, by increasing the assessment for crime victims' rights, and by sentencing defendant as an habitual offender, fourth or otherwise, where the original judgment of sentence, through its silence, indicated that the court had chosen not to sentence him as an habitual offender. Additionally, defendant maintained that this Court in the first appeal erred by finding a *Tanner* violation, given that AWIM is a life offense and the two-thirds rule does not apply to life offenses. Finally, defendant argued that counsel had been ineffective at the sentencing following remand for not raising the above issues and arguments.

At the hearing on defendant's motion for resentencing, the trial court first ruled that OV 3 had properly been scored at 25 points. The trial court next found that it had not acted vindictively with respect to the sentences imposed following remand, considering that the court was simply abiding by this Court's opinion and that, if it had truly been vindictive, the trial court

would have increased the minimum sentences, which were at the aboslute bottom end of the guidelines range. In regard to defendant's habitual offender status, the trial court noted, consistent with our discussion above, that the guidelines range reflected that defendant had been sentenced as a third habitual offender, although the habitual status had mistakenly been omitted from the judgment of sentence. The trial court, however, did acknoweldge that the judgment of sentence that was entered following remand was in error in showing defendant as a *fourth* habitual offender. The court also stated that it had been required to revisit defendant's habitual offender status by this Court's opinion. With respect to the *Tanner* violation, the parties and the trial court appeared to agree that this Court was wrong when it found a *Tanner* violation given that AWIM is a life offense. But the trial court did not alter the new sentences because it determined that the law of the case doctrine precluded it from ruling contrary to this Court's remand directive. The trial court did modify the judgment of sentence by deleting the fourth habitual offender reference, changing it to reflect that defendant had been sentenced as a third habitual offender.

On appeal, defendant raises the same exact arguments that he presented in the motion for resentencing. We first address the *Tanner* two-thirds argument. MCL 769.34(2)(b) provides that "[t]he court shall not impose a minimum sentence, including a departure, that exceeds 2/3 of the *statutory maximum sentence*." (Emphasis added.) In *People v Drohan*, 475 Mich 140, 162 n 14; 715 NW2d 778 (2006), our Supreme Court ruled:

> We recently held that MCL 769.34 does not apply when a defendant is convicted of a crime punishable with imprisonment for "life or any term of years" because the minimum will never exceed two-thirds of the statutory maximum sentence of life. *People v Powe*, 469 Mich 1032, 679 NW2d 67 (2004). Because a jury's verdict in such cases authorizes a life sentence, the imposition of *any* sentence is within the range authorized by that verdict.

The Supreme Court reiterated the holding in *People v Floyd*, 490 Mich 901, 901-902; 804 NW2d 564 (2011), stating:

> Pursuant to MCR 7.302(H)(1), in lieu of granting appeal, we vacate that part of our order dated June 27, 2008, 481 Mich 938–939, which found a violation of *People v Tanner*, 387 Mich 683 (1973). The decision in *Tanner* does not apply to sentences where the statutory maximum is "life or any term of years." See *People v Powe*, 469 Mich 1032 (2004); *People v Drohan*, 475 Mich 140, 162 n 14 (2006); *People v Harper*, 479 Mich 599, 617 n 31 (2007), and *People v Washington*, 489 Mich 871 (2011). We therefore vacate that part of the judgment of the Court of Appeals that remanded for resentencing based on a violation of *Tanner*. In all other respects, leave to appeal is denied. [2]

[2] *Floyd* involved original sentences of 62 to 80 years' imprisonment for various offenses. *People v Floyd*, 481 Mich 938 (2008).

In *Powe*, 469 Mich at 1032, the Supreme Court reversed this Court's ruling that had incorrectly vacated, based on *Tanner* and MCL 769.34(2)(b), the trial court's imposition of sentences of 18 years and 9 months to 25 years' imprisonment for carjacking and armed robbery. *People v Powe*, unpublished opinion per curiam of the Court of Appeals, issued September 16, 2003 (Docket No. 240584).

Relevant here, MCL 750.83 provides that "[a]ny person who shall assault another with intent to commit the crime of murder, shall be guilty of a felony, punishable by imprisonment in the state prison for *life or any number of years*." (Emphasis added.) Accordingly, this Court's ruling in the first appeal regarding a supposed *Tanner* violation constitued a clear legal error; the trial court's original AWIM sentences were legally sound.

With respect to the law of the case doctrine, the Michigan Supreme Court in *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000), observed:

> Under the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. Thus, as a *general rule*, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. [Citations omitted; emphasis added.]

Despite this general rule, the law of the case doctrine "'merely expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power.'" *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991) (citations omitted). "[T]he law of the case doctrine applies without regard to the correctness of the prior determination, so that a conclusion that a prior appellate decision was erroneous is not sufficient in itself to justify ignoring the law of the case doctrine." *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002). However, in *People v Phillips (After Second Remand)*, 227 Mich App 28, 33; 575 NW2d 784 (1997), this Court noted:

> *Particularly in criminal cases*, the law of the case doctrine is not inflexible and need not be applied if it will create an injustice. At least one panel has stated that the law of the case need not be applied where the prior opinion was clearly erroneous. . . .
>
> Even in civil cases, the law of the case doctrine has sometimes been described as discretionary rather than mandatory. The doctrine has been described as a general practice and not a limit on a court's power. Finally, there are times where the law of the case must yield to a competing interest. [Citations omitted; emphasis added.]

Here, as a result of this Court's earlier legal error, the length of defendant's maximum sentences for AWIM was increased. Affirming the newly-imposed sentences for AWIM on the

basis of the law of the case doctrine would effectuate an injustice. Therefore, exercising our discretionary authority, and embracing the flexibility of the law of the case doctrine in criminal cases, we decline to invoke the doctrine in regard to the AWIM sentences. A question that necessarily arises is whether the maximum sentences for the AWIM convictions should be 20 or 25 years, considering the trial court's ruling at the original sentencing hearing suggesting a 25-year maximum and the 20-year maximum actually set forth in the original judgment of sentence. We initially note that, as to the first appeal, the prosecutor did not challenge in a cross-appeal, nor argue in its appellee brief, that remand was necessary to correct the judgment of sentence. And "[a] court speaks through written judgments and orders rather than through oral statements[.]" *People v Jones*, 203 Mich App 74, 82; 512 NW2d 26 (1993). More importantly, however, the trial court adjusted the maximum sentences for AWIM at the first sentencing hearing on its own mistaken belief that the two-thirds rule applied. Absent contemplation of the two-thirds rule, the trial court was prepared to impose maximum sentences of 20 years on the two AWIM counts. For these reasons, we direct that a new judgment of sentence be entered reflecting 20-year maximum sentences for the AWIM convictions. Of course, the 225 month minimums shall remain intact. And the firearm-related sentences also remain intact.

Regarding defendant's habitual offender status, we disagree with this Court's earlier opinion that it was unclear whether defendant was actually being sentenced as an habitual offender. The guidelines range, as corrected by the trial court and agreed to by the parties, clearly indicated that defendant was being sentenced as a third habitual offender, consistent with the felony information. Due to clerical error or otherwise, the habitual offender status was simply omitted in the judgment of sentence. There is no basis in the record for defendant's claim that the trial court had decided against sentencing defendant as an habitual offender. And we note that, given the actual minimum sentences imposed, defendant's habitual status had no impact on the sentences. The trial court abided by the remand directive to specify whether defendant was being sentenced as an habitual offender, and while it made an initial mistake by issuing a judgment of sentence showing defendant as a fourth habitual offender, the court corrected the error. In the new judgment of sentence, it is to again reflect that defendant was sentenced as a third habitual offender.

With respect to the assessment for the crime victims' rights, the original assessment of $60 is to be reinstated, as this Court's directive on remand provided no authority to revisit that issue. See *People v Davis*, 300 Mich App 502, 508; 834 NW2d 897 (2013) ("'When a case is remanded by an appellate court, proceedings on remand are limited to the scope of the remand order.'") (citations omitted). The same is true as to state costs.

In light of our rulings above, there is no need to address defendant's assertion that the sentences imposed by the trial court following remand revealed vindictiveness by the court. Furthermore, it is abundantly clear to us from the record that the court did not impose the sentences vindictively.

Finally, with respect to OV 3, which defendant argues should have been scored at 10 points instead of 25 points, we note the principle that "where an appellate court remands for some limited purpose following an appeal as of right in a criminal case, a second appeal as of right, limited to the scope of the remand, lies from the decision on remand." *People v Kincade*, 206 Mich App 477, 481; 522 NW2d 880 (1994). Defendant never challenged the score of OV 3

in the initial appeal, and this Court's earlier opinion did not include within the scope of its remand directive that defendant could explore scoring challenges. The trial court did, however, address the scoring of OV 3 after remand. Assuming that we must address the issue under such circumstances, we find no error. A score of 25 points for OV 3 is proper where "[l]ife threatening or permanent incapacitating injury occurred to a victim." MCL 777.33(1)(c). One of the victims here was shot in his chest a couple of inches from his heart, and the other victim was hospitalized for nearly three months, underwent five or six surgeries, including skin grafts, and lost the mobility of his fingers on one hand. There was thus a preponderance of the evidence supporting the score of 25 points for OV 3, and there was certainly no clear error in the trial court's findings on OV 3. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).[3]

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens

[3] In light of our rulings, it is unnecessary to address defendant's associated claims of ineffective assistance of counsel.