

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RHONDA HILL,

Defendant-Appellant.

UNPUBLISHED

December 27, 1996

No. 189867

Recorder's Court

LC No. 89-6991-01

Before: Griffin, P.J. and T.G. Kavanagh* and D.B. Leiber,** JJ.

PER CURIAM.

This case is before us for the second time. Defendant pleaded guilty of possession with intent to deliver cocaine over 225 but less than 650 grams, MCL 333.7401(2)(a)(ii); MSA 14.15(7401)(2)(a)(ii). Defendant was sentenced to fifteen to thirty years' imprisonment pursuant to a sentencing agreement. Defendant appealed, arguing that she was entitled to resentencing and that her sentence was disproportionate. A panel of this Court disagreed, but remanded:

Defendant argues that she is entitled to resentencing because the trial court was not aware that it could depart from both the statutory minimum sentence and from the parties' sentencing agreement. As noted by the prosecutor, defendant's fifteen-year sentence was intended to be a five-year deviation from the twenty-year mandatory minimum sentence. If the trial court had deviated from the parties' sentencing agreement after having accepted it, the prosecutor could have withdrawn from the agreement and reinstated the original charges. *People v Siebert*, 201 Mich App 402; 507 NW2d 211 (1993). Further, to the extent that defendant argues that the sentence is not proportionate, that argument is precluded by her failure to seek plea withdrawal

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

** Circuit judge, sitting on the Court of Appeals by assignment.

below. *People v Cobbs*, 443 Mich 276, 285; 505 NW2d 208 (1993); *People v Blount*, 197 Mich App 174, 175-176; 494 NW2d 829 (1992).

However, a remand is required because both the parties and the court were under the erroneous impression that the applicable statutory minimum sentence was twenty years. At the time the offense was committed in June of 1989, the applicable minimum was ten years. Applying the increased penalty retroactively would be a violation of the ex post facto clause. *People v Russo*, 439 Mich 584, 592-593; 487 NW2d 698 (1992). Because the bargain was not what the parties intended, the case must be remanded to give defendant an opportunity to withdraw her plea or the prosecutor an opportunity to rescind the plea agreement. If the plea is withdrawn or the agreement is rescinded, the prosecutor may reinstate the original charges against defendant.

Remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. [*People v Rhonda Hill*, unpublished opinion per curiam of the Court of Appeals, issued August 25, 1995 (Docket No. 173887).]

On remand, defendant moved for resentencing in lieu of plea withdrawal. The trial court denied the motion on the basis that this Court's remand order permitted only that defendant withdraw her plea or that the prosecutor rescind the plea agreement.

Defendant once again appeals to this Court, arguing that she should be resentenced and that the prosecutor should not be entitled to withdraw the plea because the trial court was acting under a misperception of the law when it sentenced defendant and therefore did not recognize its sentencing discretion. We disagree.

Proceedings on remand are limited to the scope of the remand order. *People v Canter*, 197 Mich App 550, 567-568; 496 NW2d 336 (1992). Moreover, this Court, having rejected defendant's argument for resentencing on her initial appeal cannot determine the legal question regarding resentencing differently in defendant's subsequent appeal where the facts remain materially the same. *People v Goliday*, 153 Mich App 29, 32-33; 394 NW2d 476 (1986).

Affirmed.

/s/ Richard A. Griffin
/s/ Thomas G. Kavanagh
/s/ Dennis B. Leiber