

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LYLE ROBERT TRAVIOLI,

Defendant-Appellant.

UNPUBLISHED
February 28, 1997

Lenawee Circuit Court
Nos. 177156 & 185777
LC No. 94-006083 FC

Before: Saad, P.J., and Corrigan and R.A. Benson,* JJ.

PER CURIAM.

Defendant appeals by right the sentences that resulted from his probation violations. We *sua sponte* vacate defendant's erroneous sentences on Count II and Count III and direct defendant's discharge from probation.

As a result of a plea bargain, defendant pleaded guilty to carrying a weapon with unlawful intent, MCL 750.226; MSA 28.423 (Count II); discharge of a firearm at an occupied dwelling, MCL 750.234b; MSA 28.431(2) (Count III); and malicious destruction of a building, MCL 750.380; MSA 28.612 (Count IV). Under the agreement, the prosecutor dropped charges of assault with intent to murder, MCL 750.83; MSA 28.278 (Count I); and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2) (Count V). On May 12, 1994, the court sentenced defendant to a term of probation, with the first year to be spent in the county jail on Count II only. Among the conditions of defendant's probation was the following:

Defendant must surrender any and all firearms he owns or has in his possession to the Lenawee County Sheriff's Department for disposition. This includes a Marlin 30/30 caliber rifle, a Remington 22 caliber rifle, a Marlin 22 caliber rifle and a 7.7 Japanese rifle.

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

Defendant never lodged any objection to this condition. Indeed, on his application for leave to appeal the guilty plea conviction, he challenged only the proportionality of his sentence. This Court rejected defendant's claim in an order denying his delayed application for leave to appeal (Docket No. 183573, issued July 25, 1995).

After a hearing in October 1994, the sentencing court revoked defendant's probation because he failed to surrender his firearms, apart from the gun used in the underlying crime. The court subsequently sentenced defendant to six months in jail and continued his probation on Count III only. In no. 177156, defendant appeals by right the November 1, 1994, judgment of sentence.

Four months later, the prosecutor again charged defendant with violating his probation because he still had not surrendered the remaining firearms. After a hearing, the sentencing court once more revoked defendant's probation. The court sentenced defendant to a term of imprisonment of forty to sixty months for carrying a weapon with unlawful intent (Count II), with credit for 366 days served; 32 to 48 months for discharge of a firearm at an occupied dwelling (Count III), with credit for 191 days served; and 32 to 48 months for malicious destruction of a building (Count IV). In no. 185777, defendant appeals by right the March 29, 1995, judgment of sentence.

In both appeals, defendant contests his sentences. We agree that the court erred in sentencing defendant. The court sentenced defendant on Count II to twelve months on May 12, 1994, and to forty to sixty months on March 29, 1995. The court sentenced defendant on Count III to six months on November 1, 1994 and to 32 to 48 months on March 29, 1995. These sentences amount to multiple punishments for the same offense. *People v Price*, 214 Mich App 538, 541; 543 NW2d 49 (1995). To avoid placing defendant in double jeopardy, this Court, on its own motion, vacates defendant's erroneous sentences on Counts II and III.

Further, under *People v Alvarado*, 192 Mich App 718, 721-723; 481 NW2d 822 (1992), when sentencing a probation violator, a court may impose upon the defendant any lawful sentence, other than probation, for such offense. Under *Alvarado*, the court here did not have the authority to reinstate defendant's probation on Count III in November 1994. Thus, defendant's sentence on Count IV likewise is invalid. In light of our resolution of this issue, defendant's remaining issue is moot.

Defendant's sentences are vacated. We direct his discharge from probation.

/s/ Henry William Saad
/s/ Maura D. Corrigan
/s/ Robert A. Benson