# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS JOHN HELMUTH,

Defendant-Appellant.

UNPUBLISHED
March 18, 1997

No. 186028
Oscoda Circuit Court
LC No. 95-000492-FH

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Before: Young, P.J., and Markey and D.A. Teeple,* JJ.

PER CURIAM.

Defendant pleaded guilty to two counts of possession of marijuana, MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d), as a second controlled substance offender, MCL 333.7413(2); MSA 14.15(7413)(2), in exchange for the prosecutor's agreement to dismiss the original charge of possession with intent to deliver. The trial court sentenced defendant to one to two years' imprisonment on each of the possession convictions to be served concurrently to each other but consecutively to the sentence for which defendant was on parole when he committed the instant offense.[1] Defendant appeals as of right. We affirm.

First, upon reviewing the sentencing transcript, we find that the trial court recognized that it was within the court's discretion to enhance a controlled substances sentence because of a prior controlled substance conviction. Indeed, at the plea hearing and at sentencing, the court informed defendant that, due to enhancement, defendant *may* be or *could* be imprisoned for twice the maximum penalty, or two years, on each possession count. MCL 333.7413(2); MSA 14.15(7413)(2). Thus, the court did not believe that it had to sentence defendant to the enhanced maximum sentence.

Second, we find that the trial court did not err in sentencing defendant to serve his sentences for the instant offenses consecutively to the completion of any sentence he may be required to serve for violating his parole and to complete the minimum sentence for that prior offense.[2] MCL 768.7a(2); MSA 28.1030(1)(2) provides:

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

> If a person is convicted and sentenced to a term of imprisonment for a *felony*, committed while the person was on parole from a sentence for a previous offense, the term of imprisonment imposed for the later offense shall begin to run at the expiration of the remaining portion of the term of imprisonment imposed for the previous offense. [Emphasis added.]

Defendant argues that because his convictions were for misdemeanor possession,[3] this statute is inapplicable. We disagree.

In reviewing statutes, our primary goal is to ascertain and give effect to the Legislature's intent. *People v Nantelle*, 215 Mich App 77, 80; 544 NW2d 667 (1996). Where reasonable minds can differ concerning a statute's meaning and it is susceptible to more than one interpretation, only then is judicial construction appropriate. Otherwise, if the statute's plain and ordinary meaning is clear, judicial construction is neither necessary nor permitted, and we must apply the statute as written. *Id*.

A trial court may impose a consecutive sentence only if such a sentence is specifically authorized by statute. *Id.* at 79. The Code of Criminal Procedure, which contains the consecutive sentencing statute, defines the term "felony" as "a violation of a penal law of this state for which the offender, *upon conviction*, may be punished by death or *by imprisonment for more than 1 year*, or an offense expressly designed by law to be a felony" (emphasis added). MCL 761.1(g); MSA 28.843(g).[4] Our Supreme Court in *People v Smith*, 423 Mich 427, 433-434, 437-446 (Williams, C.J.), 460 (Boyle, J); 378 NW2d 384 (1985), determined that two-year misdemeanors or "high misdemeanors" are considered felonies for purposes of the Code of Criminal Procedure's habitual offender, probation, and consecutive sentencing statutes.[5] See also *People v Bewersdorf*, 438 Mich 55, 59, 70 n 26, 71-72; 475 NW2d 231 (1991) (misdemeanor OUIL enhanced to a felony for a third offense could also be subject to an enhanced sentence under the habitual offender statutes). Defendant cites no pertinent case authority to the contrary.

We agree with the trial court's conclusion that when a sentence is enhanced due to defendant's history of controlled substance offenses, thereby creating a two-year maximum sentence for a misdemeanor offense, the court may treat defendant as having been convicted and sentenced for a *felony* committed while defendant was on parole for purposes of consecutive sentencing under MCL 768.7a(2); MSA 28.1030(1)(2). The second controlled substance offender statute, MCL 333.7413(2); MSA 14.15(7413)(2), neither states that second offenders are automatically deemed guilty of a felony nor creates a separate substantive offense.[6] Yet, we find no situation under which the enhancement permitted and intended by the statute would result in a second offender receiving a new maximum sentence that is *less than* one year, thereby maintaining the misdemeanor status of an enhanced misdemeanor drug offense. Because the second offender statute, like other habitual offender statutes, is intended to punish recidivists, we find that first, defendant's enhanced sentence constitutes a felony sentence according to MCL 761.1(g); MSA 28.842(g), and second, neither this statute nor MCL 768.7a(2); MSA 28.1030(1)(2) preserves defendant's status as a misdemeanor offender when he also pleads guilty to being a second controlled substance offender. Thus, we find no error in the

court's treatment of defendant as having been convicted and sentenced for a felony under the consecutive sentencing statute.

Third, defendant asserts that his sentence is disproportionate. We disagree. A sentence must be proportionate to the seriousness of the crime and defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). *Milbourn* does not address the unique sentencing situation that arises, however, when a defendant pleads guilty to a charge in exchange for dismissal of other or greater charges. *People v Brzezinski (After Remand)*, 196 Mich App 253, 256; 492 NW2d 781 (1992). "Such pleas will invariably present the sentencing judge with important factors that may not be adequately embodied in the guideline variables," *People v Duprey*, 186 Mich App 313, 318; 463 NW2d 240 (1990). Moreover, the sentencing guidelines do not apply to habitual offender convictions. *People v Cervantes*, 448 Mich 620, 622, 625-630; 532 NW2d 831 (1995). Thus, when reviewing the sentences of habitual offenders, this Court should determine whether the trial court abused its discretion in imposing the sentence. *Id.* at 626-630, 636-637; *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

Here, in light of defendant's plea, his criminal activity while on parole, and his history of substance abuse, we find no abuse of discretion and believe that each of the sentences was proportionate to this offense and this offender. See *People v Broden*, 428 Mich 343, 350; 408 NW2d 789 (1987).

Finally, with respect to defendant's in pro per request for a new trial, we find that neither defendant nor his counsel moved to withdraw his guilty plea, as required under MCR 6.311(C). *People v Nowicki*, 213 Mich App 383, 385; 539 NW2d 590 (1995). Also, in the absence of a *Ginther*[7] hearing to preserve defendant's ineffective assistance of counsel claim, our review is limited to mistakes apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Upon review of the record, we find that counsel's performance did not fall below an objective standard of reasonableness under prevailing professional norms or prejudice defendant. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW 2d 557 (1994).

Affirmed.

/s/ Robert P. Young, Jr.
/s/ Jane E. Markey
/s/ Donald A. Teeple

[1] Because defendant committed the instant offenses in November 1994, this appeal as of right from his guilty plea is timely. See MCL 600.308(1); MSA 27A.308(1); MSA 7.203(A)(1)(b).

[2] See *People v Young (On Remand)*, ___ Mich App ___; ___ NW2d ___ (Docket Nos. 196590, 196591, 196592, issued December 13, 1996), slip op at 2 (MCL 768.7a(2); MSA 28.1030(1)(2)

requires the parole violator to serve at least the combined minimums of the sentence underlying the parole offense plus whatever portion of the earlier sentence the Parole Board may require the parolee to serve for violating parole).

[3] See MCL 333.7403(2)(d); MSA 14.15(7403)(2)(d).

[4] In contrast, MCL 761.1(h); MSA 28.843(h) defines "misdemeanor" as "*a violation of a penal law of this state that is not a felony*, or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or by a fine that is not a civil fine" (emphasis added).

[5] Notably, Chief Justice Williams reached the following conclusions in *Smith*, *supra* at 445:

> The label placed upon an offense in the Penal Code is just as irrelevant in determining statutorily mandated post-conviction procedures in the Code of Criminal Procedure as it is in determining constitutionally mandated post-conviction procedures. The three post-conviction statutes at issue here, the habitual-offender statute, the probation statute, and the consecutive sentencing statute, all have the same general purpose: *to enhance the punishment imposed upon those who have been found guilty of more serious crimes and who repeatedly engage in criminal acts.* In order to achieve the Legislature's intended purpose in the Code of Criminal Procedure, we find that the Legislature meant exactly what it said: *Offenses punishable by more than one year of imprisonment are "felonies" for purposes of the habitual offender, probation, and consecutive sentencing statutes.* [Emphasis added.]

[6] *People v Nolan*, 203 Mich App 628, 630-631; 513 NW2d 237 (1994).

[7] *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).