

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDDIE B. PORTER,

Defendant-Appellant.

UNPUBLISHED

April 11, 1997

No. 179107

Oakland Circuit Court

LC No. 94-131665-FC

Before: Saad, P.J., and Neff and Jansen, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm at the time of commission or attempted commission of a felony, MCL 750.227b; MSA 28.424(2). Found to be a second habitual offender, MCL 769.10; MSA 28.1082, defendant was sentenced to five and one-half years' imprisonment. Defendant now appeals his conviction and sentence as of right. We affirm his conviction, but vacate his sentence and remand for resentencing.¹

I

Defendant first argues that the trial court abused its discretion by denying his request for a continuance. Defendant claims that a short continuance would have allowed him to locate a missing witness, and that the trial court's denial of his request deprived him of his constitutional right to call witnesses in his behalf. We disagree.

This Court reviews the denial of a motion for continuance for an abuse of discretion. *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992). In determining whether the trial court abused its discretion, this Court considers the following factors: (1) Was defendant asserting a constitutional right? (2) Did defendant have a legitimate reason for asserting that right? (3) Was defendant negligent in asserting that right? (4) Had defendant requested previous adjournments? (5) On appeal, has defendant demonstrated prejudice resulting from the trial court's denial? *Id.*

In the present case, defendant was not negligent in asserting his constitutional right to call witnesses. Nonetheless, we conclude that the trial court did not abuse its discretion by denying

defendant's request. Defendant had already been granted a continuance for the express purpose of locating this witness, and defense counsel had assured the trial court that he would not seek any further continuances if the witness was not available when the trial resumed. Further, when the witness again failed to appear, defendant could not offer the court any assurance that she could be located in a timely manner. Finally, defendant did not name the missing witness or suggest how her testimony would be favorable to his defense. Therefore, defendant has failed to demonstrate that he was prejudiced by the trial court's ruling.

Under these circumstances, we cannot conclude that the trial court abused its discretion in denying defendant's motion for a continuance.

II

Defendant next argues that the trial court failed to exercise its discretion when it set defendant's maximum sentence. We agree.

Sentence enhancement pursuant to the habitual offender statutes is discretionary rather than mandatory. *People v Turski*, 436 Mich 878; 461 NW2d 366 (1990). Accordingly, a defendant is entitled to resentencing where the trial court sentenced him under the mistaken belief that sentencing enhancement was mandatory. *Id.* at 878; *see People v Green*, 205 Mich App 342, 346-347; 517 NW2d 782 (1994).

The maximum sentence for assault with intent to do great bodily harm less than murder is ten years. MCL 750.84; MSA 28.279. As a second habitual offender, defendant could have received a maximum sentence of up to 1 1/2 times this term; that is, fifteen years. MCL 769.10; MSA 28.1082. Here, the trial court apparently believed that the statutory sentencing enhancement was mandatory:

The Court: Two years for the Felony Firearm. Now it will have to be fifteen (15) years on the Habitual Second, but with the Exhibit you have to do a new Judgment of sentencing.

As noted above, this belief was erroneous. Therefore, we must vacate defendant's sentence and remand for resentencing. *Turski, supra* at 878; *Green, supra* at 346-347.

Defendant's conviction is affirmed. We vacate his sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Janet T. Neff

/s/ Kathleen Jansen

¹ We also note two clerical errors in the judgment of sentence which should be corrected on remand. First, the judgment erroneously indicates he was convicted of assault with intent to murder, MCL 750.83; MSA 28.278, rather than assault with intent to do great bodily harm less than murder. The judgment also indicates that defendant was found guilty of being an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, when he was actually convicted of being an habitual offender, second offense.