

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

March 24, 1998

No. 198671

Washtenaw Circuit Court

LC No. 95-005286 FH

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of larceny over \$100, MCL 750.356; MSA 28.588. Defendant was sentenced as a fourth habitual offender to three to twenty years' imprisonment, a term that was to run consecutively to the term imposed for defendant's parole violation. We affirm.

I

Defendant first argues on appeal that he is entitled to resentencing because the trial court failed to consider that the three-year minimum sentence imposed in this case would begin only after he completed the twenty-year maximum sentence imposed for a 1982 crime for which he was on parole at the time he committed the present offense. Defendant's argument is without merit.

Notwithstanding the degree of attention or consideration the trial court may or may not have given to the length of defendant's previous sentence, we note that defendant's argument fails because it is based on the mistaken premise that he would in fact have to serve the remainder of his twenty-year sentence. Defendant argues that according to *People v Young*, 206 Mich App 144, 159; 521 NW2d 340 (1994),

when a parolee commits an offense while still on parole, the subsequent sentence must begin to run at the end of the maximum sentence of the prior offense. MCL 768.7a(2); MSA 28.1030(1)(2). Therefore, a reoffending parolee is not eligible for parole again

until he or she has served the remainder of the maximum sentence on the prior offense and the minimum sentence of the subsequent offense.

Young, supra, however, was overruled by *Wayne Co Prosecutor v Dep't of Corrections*, 451 Mich 569, 572, 587; 548 NW2d 900 (1996), before defendant was sentenced. When interpreting MCL 768.7a(2); MSA 28.1030(1)(2), which states:

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,

our Supreme Court held in *Wayne Co Prosecutor, supra* at 584, that the “remaining portion” clause requires only that the offender serve “at least the combined minimums of his sentences, plus whatever portion, between the minimum and the maximum, of the earlier sentence that the parole board may, because the parolee violated the terms of parole, require him to serve.”

Here, as defendant concedes on appeal, his parole term was due to expire just ten days after he committed the present offense, and for that reason, his supervising parole officer indicated that the parole board would not pursue the parole violation. Hence, defendant is not being required to serve any “remaining portion” of his 1982 sentence, and according to the record, his current sentence of three to twenty years began on August 22, 1996, the date of sentencing.

II

Defendant next argues that the statute requiring a parolee to serve the maximum sentence for which he was paroled, before beginning the minimum sentence he later received, violates the Equal Protection Clause because there is no rational basis for the disparate treatment between a reoffending parolee and a nonparolee offender. Defendant claims that because he was on parole at the time he committed the instant offense, he would consequently have to serve a combined sentence nearly fifteen years greater than a nonparolee who committed the same crime.

Although a reoffending parolee may be required to serve the maximum term for his prior offense under the language of MCL 768.7a(2); MSA 28.1030(1)(2), that is not the case here. As mentioned above, the Parole Board opted not to pursue defendant's parole violation. Therefore, contrary to what defendant alleges on appeal, he did not receive a sentence approximately fifteen years longer than a similarly situated nonparolee offender. Accordingly, the facts of this case do not raise an issue of equal protection.

Nevertheless, we note that the equal protection guarantee requires only that persons under similar circumstances be treated alike; it does not require that persons under different circumstances be treated the same. *El Souri v Dep't of Social Services*, 429 Mich 203, 207; 414 NW2d 679 (1987); *Yaldo v North Pointe Ins Co*, 217 Mich App 617, 623; 552 NW2d 657 (1996), lv gtd 455 Mich 867 (1997). Moreover, where the discrimination does not involve a suspect class or impinge on the

exercise of a fundamental right, the test is whether the classification is rationally related to a legitimate governmental purpose, and the legislation is presumed to be constitutional. *People v Martinez*, 211 Mich App 147, 150; 535 NW2d 236 (1995). Under this standard, even if defendant had been required to serve the maximum term of his previous sentence, in addition to the minimum sentence imposed in this case, his right to equal protection would not have been violated.

It stands to reason that defendant, a reoffending parolee, is not in the same class as an offender who is not on parole, and as defendant concedes on appeal, there is “obviously a government interest in curtailing the parole reoffender.” The government has a legitimate interest in rehabilitating reoffenders, in deterring future criminal behavior, and in protecting society, all of which are rationally related to the disparate treatment allowed by the statute. Accordingly, we hold that the statute in question does not violate the Equal Protection Clause.

III

Third, defendant argues that his current sentence, when coupled with the enhancement of his previous twenty-year maximum sentence, violates the constitutional prohibition against cruel or unusual punishment. We conclude that because defendant was never charged with the parole violation, and in fact is serving only a three- to twenty-year sentence as an habitual offender, a sentence that we find to be proportionate to the seriousness of the present crime and to his lengthy prior record, *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990), his argument is without merit.

IV

Finally, defendant argues in propria persona that his sentence must be vacated because the sentencing court violated the procedural requirements of MCL 769.13; MSA 28.1085, when it failed to hold a hearing concerning his habitual offender status. Specifically, defendant states that the court never made a determination with respect to the existence of his prior convictions, and he was never afforded the opportunity to refute the habitual offender charge. We disagree.

First, with respect to notice, the statute, as amended in 1994, requires the prosecuting attorney to file written notice of his intent to seek an habitual offender sentence enhancement within twenty-one days after defendant’s arraignment on the information charging the underlying offense, within twenty-one days after the filing of the information should defendant waive his arraignment, or after defendant has been convicted of the underlying offense or pleads guilty or nolo contendere at the arraignment. MCL 769.13(1) and (3); MSA 28.1085(1) and (3).

In the present case, defendant was arraigned on the charge of larceny on November 15, 1995, and on November 29, 1995, just fourteen days later, the prosecution filed written notice of its intent to charge defendant as an habitual offender after personally informing defendant and his attorney of that intent at the conclusion of defendant’s preliminary examination held earlier that day. Defense counsel acknowledged notice, waived a formal reading of the information, and stood mute on the charge. Hence, there is no question that defendant in fact received notice in accordance with the statute.

Second, concerning defendant's opportunity to be heard and refute the habitual offender charge filed against him, the language of the statute no longer requires the sentencing court to bring defendant before it to inform him of the allegations, or hold a hearing should defendant remain silent or plead not guilty to the charge. Instead, under subsections (4) and (6), "[a] defendant who has been given notice that the prosecuting attorney will seek to enhance his sentence . . . may challenge the accuracy or constitutional validity of 1 or more of the prior convictions . . . by filing a written motion with the court . . .," and only after such motion is filed shall the court "resolve any challenges . . . at sentencing or at a separate hearing . . ." wherein defendant or his attorney "shall be given an opportunity to deny, explain, or refute any evidence or information pertaining to the defendant's prior conviction or convictions before sentence is imposed . . ." Here, because defendant did not file such a motion after receiving notice of the prosecution's intent to proceed against him as a fourth habitual offender, the sentencing court was under no duty to hold a hearing. Accordingly, defendant forfeited any opportunity he had to refute or challenge the supplemental charge.

Finally, MCL 769.13(5); MSA 28.1085(5) states:

The existence of defendant's prior conviction or convictions shall be determined by the court, without a jury, at sentencing, or at a separate hearing . . . by any evidence that is relevant for that purpose, including, but not limited to, 1 or more of the following:

- (a) A copy of a judgment of conviction.
- (b) A transcript of a prior trial or a plea-taking or sentencing proceeding.
- (c) Information contained in a presentence report.
- (d) A statement of the defendant.

At defendant's sentencing hearing, the court, after hearing defense counsel admit that defendant had a "long criminal history," reviewed defendant's presentence investigation report, which contained a detailed list of defendant's previous convictions and criminal violations. The court then went on to sentence defendant to three to twenty years in prison, enhancing the statutory maximum for the crime by fifteen years. Thus, the existence of defendant's previous convictions was determined by the court and taken into account in the imposition of his sentence. In sum, defendant was not denied procedural due process and his sentence must stand.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Harold Hood

/s/ David H. Sawyer