

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK CONWAY,

Defendant-Appellant.

UNPUBLISHED

August 2, 2005

No. 252852

Saginaw Circuit Court

LC No. 01-019930-FC

Before: Zahra, P.J., and Gage and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his resentencing for his conviction of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1). We remand for clarification of the judgment of sentence, and for preparation of an updated presentence investigation report, but otherwise affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Following a jury trial in 2001, defendant was convicted of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(a), along with assault with intent to commit CSC involving sexual penetration. The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve terms of imprisonment of 240 to 480 months for CSC I and 108 to 240 months for assault. However, we reversed the conviction of CSC I, and remanded for resentencing of the assault conviction. *People v Conway*, unpublished opinion per curiam of the Court of Appeals, issued February 11, 2003 (Docket No. 237763). On remand, defendant was sentenced to forty-six months to twenty years in prison.

Appealing from his resentencing, defendant, through appellate counsel, argues that his amended judgment of sentence should be corrected to show a conviction and sentence for assault only, and not a conviction of and sentence for CSC I, that a presentence investigation report (PSIR) reflecting no conviction of CSC I should be prepared and transmitted to the Department of Corrections (DOC), and that the DOC should be ordered to correct certain information on its website. Defendant, in propria persona, additionally argues that his amended judgment of sentence should reflect an earlier beginning date.

Appellate counsel's objections concerning the judgment of sentence are simply a matter of housekeeping. The lower court record includes an amended judgment of sentence, dated December 11, 2003, reflecting that defendant is a habitual offender, and that his CSC I

conviction stands vacated. Two other amended judgments of sentence appear in the record as well. Those judgments bear the same date as the one just described, but one fails to note that the CSC I conviction was vacated, and the other fails to note that defendant was sentenced as a habitual offender. To avoid any confusion, we hereby remand this case to the trial court with instructions to retain the single amended judgment of sentence that reflects all the correct information, to remove the incomplete judgments of sentence from the record, and to ensure that the correct one has been transmitted to the DOC.

Concerning defendant's PSIR, no updated version appears in the lower court record, and apparently none was prepared. "Critical decisions are made by the Department of Corrections regarding a defendant's status based on the information contained in the presentence investigation report." *People v Norman*, 148 Mich App 273, 275; 384 NW2d 147 (1986). Accordingly, the PSIR "should accurately reflect any determination the sentencing judge has made concerning the accuracy or relevancy of the information contained in the report." *Id.* Where this is not the case, remand is appropriate so that the trial court can correct the report and transmit a corrected copy to the DOC. *Id.* at 276. For these reasons, we direct the trial court on remand to have a new PSIR prepared and transmitted to the DOC. The new PSIR may acknowledge that defendant was charged with CSC I, but must not suggest that his conviction of that crime stands.

Concerning the DOC's website, appellate counsel provides an exhibit indicating that the general information available on the DOC's website twice listed for defendant convictions and sentences for both assault with intent to commit penetration and CSC I, once as active sentences, and once as inactive sentences. A more recent check of this website reveals that the incorrect inactive sentences have been deleted, but that erroneous information by way of an invalid conviction and sentence for CSC I remains.

However, appellate counsel fails to show that the trial court, as part of its sentencing authority, can order the DOC to include or exclude certain information from its website. Moreover, appellate counsel states that "defendant believes that, once the Department of Corrections is informed of its error, they will voluntarily correct their records," thus admitting that no one has informed the DOC of its error. Given the lack of any indication that any party has attempted to persuade the DOC to update the information in question, we decline to consider whether a sentencing court may direct that agency to make such changes. See MCR 2.605(1) (declaratory judgments require "a case of actual controversy").

Defendant, in his brief in propria persona, argues that the trial court erred in denying his request to have his amended judgment of sentence modified to show a start date for his sentence relating to his original sentencing, October 4, 2001, instead of his resentencing, December 11, 2003. Defendant misapprehends the applicable rules.

MCL 768.7(a)(2) provides that where a person is sentenced for a felony committed while serving parole from an earlier 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." In this case, at both the original sentencing and the resentencing, the trial court noted that defendant committed the instant offense while on parole, and thus was not entitled to credit for time served. In the latter instance, defense counsel

conceded that defendant was still serving a sentence predating the instant offense. Defendant's sentence for assault thus will not begin to run until he has completed his earlier sentence.

The beginning date for the sentence on the judgment of sentence commences when the sentence comes legally into existence, not necessarily when it begins to run. Because defendant's posture follows from a misunderstanding of how consecutive sentences operate, he has failed to identify an error of law or a constitutional violation. Defense counsel did not render ineffective assistance by failing to raise this issue. Counsel is "not required to argue a frivolous or meritless motion." *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Affirmed in part, but remanded for the ministerial tasks of retaining the correct judgment of sentence while deleting incorrect judgments from the record, and for preparation of an updated PSIR that acknowledges that defendant's first-degree criminal sexual assault conviction was vacated, and for transmittal of both to the DOC. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Hilda R. Gage

/s/ Christopher M. Murray