

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 23, 2014

v

TROY LaVAUGHN JONES, JR.,
Defendant-Appellant.

No. 315582
Allegan Circuit Court
LC No. 08-015991-FH

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

TROY LaVAUGHN JONES, JR.,
Defendant-Appellant.

No. 315713
Allegan Circuit Court
LC No. 08-016032-FH

Before: SHAPIRO, P.J., and WHITBECK and STEPHENS, JJ.

PER CURIAM.

In these consolidated appeals, defendant, Troy LaVaughn Jones, Jr., appeals as of right the trial court's orders after remand for resentencing. In Docket No. 315582, the trial court sentenced Jones to serve 8 to 18 years' imprisonment for assault with intent to do great bodily harm less than murder (assault).¹ In Docket No. 315713, the trial court sentenced Jones to serve 28 to 72 months' imprisonment for bribery.² We affirm in both appeals.

¹ MCL 750.84.

² MCL 750.122(7)(b).

I. FACTS

A. BACKGROUND FACTS

On October 18, 2008, Jones was involved in an altercation with his sister, Debra Jones, and Tanya Rogers. The prosecutor charged Jones with assaulting both Rogers and Debra Jones. After police arrested Jones for assault, he wrote a letter to a friend, directing the friend to tell Rogers that Jones would pay her \$1,000 if she refused to testify or falsified her testimony. The prosecutor separately charged Jones with bribery. The trial court consolidated the cases for trial.

On May 7, 2009, a jury found Jones guilty of bribery and assaulting Rogers, and it acquitted Jones of assaulting Debra Jones. On June 17, 2009, the trial court sentenced Jones as a fourth-offense habitual offender to serve consecutive sentences 10 to 20 years' imprisonment for assault and 28 to 72 months' imprisonment for bribery.

B. JONES'S FIRST APPEAL OF RIGHT

Jones raised several issues in his first appeal of right. This Court rejected the majority of Jones's challenges on appeal.³ Regarding Jones's assertion that the trial court improperly scored the Legislative sentencing guidelines⁴ when sentencing him, this Court concluded that the trial court did not err by assessing Jones 10 points for OV 9 (two victims placed in danger) and OV 19 (interference with the administration of justice). This Court reasoned in part that the Michigan Supreme Court's decision in *People v McGraw*⁵ did not apply in Jones's case because *McGraw* only applied to cases pending on direct appeal in which the defendant had preserved the scoring issue,⁶ but Jones had not challenged OV 9 or OV 19 during his sentencing hearing. However, this Court concluded that the trial court erroneously scored other offense variables. This Court concluded that the trial court's errors required resentencing and remanded for resentencing.

C. RESENTENCING

On July 27, 2012, Jones moved the trial court for a *Ginther*⁷ hearing in order to determine whether he was denied the effective assistance of counsel. Jones asserted that trial counsel (1) failed to challenge the trial court's decision to score OV 9, OV 13, and OV 19, (2) failed to challenge the trial court's assessment under prior record variable (PRV) 5, and (3) was unable to prepare for trial or sentencing because the prosecutor was reading Jones's legal mail.

³ *People v Jones*, unpublished opinion of the Court of Appeals, issued September 27, 2011 (Docket Nos. 292793 & 292794).

⁴ MCL 777.1 *et seq.*

⁵ *People v McGraw*, 484 Mich 120, 133; 771 NW2d 655 (2009).

⁶ See *People v Mushatt*, 486 Mich 934; 782 NW2d 202 (2010).

⁷ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

On November 26, 2012, the trial court held a resentencing hearing in both of Jones's cases. At the resentencing hearing, appellate counsel represented Jones. Appellate counsel did not challenge the trial court's decision to assess OV 3 (physical injury to a victim), OV 9, OV 12 (contemporaneous felony acts), and OV 19 on the basis of this Court's holding that the trial court had properly scored those variables. However, appellate counsel asked the trial court to allow Jones to advance his position in light of his pending motion, which concerned scoring of OV 9 and OV 19. Appellate counsel contended that Jones was "entitled to challenge anything at this sentencing hearing . . . regardless of whether he had previously objected to it or not."

Acting in propria persona, Jones contended that trial counsel denied him effective assistance when counsel failed to challenge the trial court's ten-point assessments for OVs 9 and 19 at the original sentencing hearing. Jones also contended that scoring OV 19 in his assault case, on the basis of the bribery letter, constituted double jeopardy when he had also been convicted of bribery. Finally, Jones contended that assessing him under OVs 9 and 19 constituted "an ex-post-facto matter" because the trial court was punishing him more severely on the basis of conduct that did not form the basis of the sentencing offense.

The trial court rejected appellate counsel's and Jones's arguments, concluding that it was proper to assess 10 points for OVs 9 and 19. The trial court assessed Jones as follows: ten points for OV 3, ten points for OV 9, five points for OV 12, and ten points for OV 19.

II. SCOPE OF REMAND

A. STANDARD OF REVIEW

This Court reviews de novo issues of law.⁸

B. LEGAL STANDARDS

"When a case is remanded by an appellate court, proceedings on remand are limited to the scope of the remand order."⁹ This Court has jurisdiction over an appeal of right of any final judgment or order of the circuit court.¹⁰ A sentence imposed by the trial court following a remand for resentencing from this Court is a final judgment or order.¹¹ When this Court remands a case for resentencing, the trial court determines the defendant's sentence de novo and the parties may challenge any part of the new sentence.¹²

⁸ *People v Smith*, 488 Mich 193, 198; 793 NW2d 666 (2010).

⁹ *People v Davis*, 300 Mich App 502, 508; 834 NW2d 897 (2013) (quotation omitted). See also *People v Jones*, 394 Mich 434, 435-436; 231 NW2d 649 (1975).

¹⁰ MCR 7.203(A)(1).

¹¹ MCL 7.202(6)(b)(iv).

¹² *Davis*, 300 Mich App at 509; *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007).

C. APPLYING THE STANDARDS

On appeal, Jones raises several issues that are beyond the scope of this Court's remand order. In our remand order, this Court remanded for resentencing. Therefore, proceedings on remand were limited to resentencing. While Jones is entitled to raise any issues as they relate to his new sentence, he is not entitled to raise issues pertaining to his original sentence or trial, from which Jones has already taken an appeal of right concerning those issues.

Accordingly, we decline to address the following issues: (1) whether initial trial counsel was ineffective for failing to challenge OVs 9 and 19; (2) whether initial trial counsel and initial appellate counsel were ineffective for failing to challenge OV 13; and (3) whether initial trial counsel was rendered ineffective because the prosecutor intercepted Jones's mail. We conclude that these issues are beyond the scope of this appeal because they concern alleged errors that were not part of the resentencing proceedings.

III. ASSAULT OF DEBRA JONES

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

To preserve an issue, the appellant must challenge it before the trial court on the same grounds as he challenges it on appeal.¹³ At the resentencing hearing, Jones did not challenge the trial court's assessment of OVs 9 and 19 on the basis that it was improper for the trial court to consider the assault charge against Debra Jones when the jury had acquitted him of that charge. Accordingly, this issue is not preserved.

We review unpreserved issues for plain error affecting a party's substantial rights.¹⁴ An error is plain if it is clear or obvious.¹⁵ The error affected the defendant's substantial rights if it affected the outcome of the lower court proceedings.¹⁶

B. LEGAL STANDARDS

The jury must find, or the defendant must admit, any facts that enhance a defendant's maximum sentence beyond a statutory maximum.¹⁷ Further, "any fact that increases the *mandatory* minimum" sentence of a given offense is an element of fact that the jury must

¹³ *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2011).

¹⁴ *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

¹⁵ *Id.* at 763.

¹⁶ *Id.*

¹⁷ *Blakely v Washington*, 542 US 296, 303-304; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

decide.¹⁸ However, Michigan's indeterminate sentencing system only concerns the defendant's indeterminate minimum sentence.¹⁹ The trial court may increase the defendant's indeterminate minimum sentence on the basis of judicial fact-finding.²⁰

A jury must find the elements of a crime beyond a reasonable doubt, but the sentencing court must find only that a preponderance of the evidence supports a sentencing guidelines assessment.²¹ The jury's determination does not bind the trial court as long as the record evidence adequately supports its decision.²² The trial court may consider all the record evidence when sentencing, including the contents of a presentence investigation report.²³

C. JUDICIAL FACT-FINDING

Jones, through appellate counsel and in his in propria persona brief filed pursuant to Michigan Supreme Court Administrative Order No. 2004-6, Standard 4, contends that the trial court violated his right to a jury trial by assessing him under OV 9 for assaulting Debra Jones when the jury acquitted him of that charge. We disagree.

Here, evidence at trial included that Jones assaulted Debra Jones separately, and that Debra Jones was present when Jones assaulted Rogers. The jury acquitted Jones of assaulting Debra Jones. The trial court assessed Jones ten points under OV 9 for assaulting two victims. However, at the resentencing hearing, the trial court found that a preponderance of the evidence supported that Jones assaulted Debra Jones. The trial court's finding did not increase a statutory maximum sentence or a mandatory minimum sentence. Accordingly, we conclude that the trial court's finding did not violate Jones's rights to due process or a jury trial.

D. DOUBLE JEOPARDY

Jones, through appellate counsel and in his Standard 4 brief, contends that the trial court violated his right against double jeopardy when it scored OVs 9 and 19 on the basis of conduct for which the jury acquitted him. We disagree.

¹⁸ *Alleyne v United States*, ___ US ___, ___; 133 S Ct 2151, 2153; 186 L Ed 2d 314 (2013) (emphasis added).

¹⁹ *People v Drohan*, 475 Mich 140, 159-164; 715 NW2d 778 (2006); *People v Herron*, 303 Mich App 392, 403-404; 845 NW2d 533 (2013).

²⁰ *Drohan*, 475 Mich at 164.

²¹ *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008); *People v Williams*, 191 Mich App 269, 276; 477 NW2d 877 (1991).

²² *Williams*, 191 Mich App at 276.

²³ *People v Walker*, 428 Mich 261, 267-268; 407 NW2d 367 (1987).

The federal and Michigan constitutions provide that a criminal defendant may not be placed twice in jeopardy for the same offense.²⁴ These clauses also protect the defendant from multiple punishments for the same offense.²⁵ However, the trial court's assessment of a sentencing guidelines variable "is not a form of punishment" for the purposes of double jeopardy.²⁶ Accordingly, the trial court's assessment of sentencing guidelines variables does not implicate the defendant's rights against double jeopardy.²⁷

Jones bases his assertion on the trial court's finding that he assaulted Debra Jones when the jury acquitted him of assault. The trial court's assessment of a sentencing guidelines variable is not a "punishment" and does not subject the defendant to multiple punishments for the same offense. The trial court's finding did not implicate Jones's right against double jeopardy. Accordingly, we reject Jones's assertion that the trial court's decision to score OVs 9 and 19 violated his right against double jeopardy.

IV. THE BRIBERY LETTER

A. STANDARD OF REVIEW

This Court reviews de novo preserved issues of constitutional error.²⁸

B. LEGAL STANDARDS

As previously discussed, the trial court's assessment of a sentencing guidelines variable "is not a form of punishment" for the purposes of the double jeopardy clause.²⁹

C. APPLYING THE STANDARDS

Jones, through appellate counsel and in his Standard 4 brief, contends that the trial court erred when it assessed ten points under OV 19 on the basis that Jones interfered with the administration of justice when he sent the bribery letter because Jones was separately convicted and sentenced for the same conduct. As stated above, the trial court's assessment of a sentencing guidelines variable is not a "punishment" and does not subject the defendant to multiple punishments for the same offense. Accordingly, while the trial court considered the same conduct in two separate proceedings, it did not violate his right against double jeopardy because Jones was not punished for his bribery conduct in his assault proceeding.

²⁴ US Const, Am V; Const 1963, art 1, § 15.

²⁵ *People v Meshell*, 265 Mich App 616, 628; 696 NW2d 754 (2005).

²⁶ *People v Gibson*, 219 Mich App 530, 535; 557 NW2d 141 (1996).

²⁷ *Id.*

²⁸ *People v Dendel*, 289 Mich App 445, 475; 797 NW2d 645 (2010).

²⁹ *Gibson*, 219 Mich App at 535.

V. EX POST FACTO

A. STANDARD OF REVIEW

This Court reviews de novo an ex post facto challenge, because the interpretation of a constitutional provision is a question of law.³⁰

B. LEGAL STANDARDS

The United States Constitution provides that “no state shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts.”³¹ A statute violates the Ex Post Facto Clause if it is (1) retrospective, and (2) disadvantages the offender.³² A statute disadvantages the offender if it “(1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecutor to convict on less evidence.”

The ex post facto clause does not apply directly to the judiciary, but it does apply indirectly through the Due Process Clause.³³ The retroactive application of a judicial decision may violate a defendant’s right to due process if it “operates as an ex post facto law, i.e., criminalizes conduct that was innocent at the time performed.”³⁴

C. APPLYING THE STANDARDS

In his Standard 4 brief, Jones contends that the trial court’s assessment of OV 19 subjected him to greater punishment than he would have been subject to when he committed the crime because the Michigan Supreme Court in *McGraw* changed the law.

Here, the Michigan Supreme Court’s decision in *McGraw* did not criminalize conduct that was innocent at the time that Jones performed it. To the contrary, the prosecutor charged Jones with bribery for the conduct. And changes to the sentencing guidelines do not change a defendant’s punishment because the sentencing guidelines are procedural, not substantive.³⁵ The ex post facto clause does not apply to “modes of procedure that do not affect matters of

³⁰ *People v Callon*, 256 Mich App 312, 315; 662 NW2d 501 (2003). See *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007).

³¹ US Const, art I, § 10.

³² *Weaver v Graham*, 450 US 24, 29; 101 S Ct 960; 67 L Ed 2d 17 (1981); *People v Stevenson*, 416 Mich 383, 397; 331 NW2d 143 (1982).

³³ *People v Stevenson*, 416 Mich 383, 395; 331 NW2d 143 (1982); *Bowie v City of Columbia*, 378 US 347, 353-354; 84 S Ct 1697; 12 L Ed 2d 894 (1964).

³⁴ *People v Johnson*, 302 Mich App 450, 464-465; 838 NW2d 889 (2013).

³⁵ *People v Potts*, 436 Mich 295, 303; 461 NW2d 647 (1990).

substance.”³⁶ The *McGraw* decision affected the procedure of scoring the sentencing guidelines; it did not criminalize any substantive conduct. Finally, *McGraw* resulted in a more lenient rule, not a harsher rule. Thus, the *McGraw* decision did not disadvantage Jones.

We conclude that the Michigan Supreme Court’s decision in *McGraw* did not violate the ex post facto prohibition.

VI. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

A. STANDARD OF REVIEW

A criminal defendant has the fundamental right to effective assistance of counsel.³⁷ But a defendant must move the trial court for a new trial or evidentiary hearing to preserve the defendant’s claim that his counsel was ineffective.³⁸ When the trial court has not conducted a hearing to determine whether a defendant’s counsel was ineffective, our review is limited to mistakes apparent from the record.³⁹

B. LEGAL STANDARDS

In order to establish that appellate counsel was ineffective, the defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for appellate counsel’s error, the result of the proceedings would have been different.⁴⁰ We presume that appellate counsel’s decision was sound strategy.⁴¹ When considering an unpreserved claim of ineffective assistance of counsel, we must consider the possible reasons for counsel’s actions.⁴² A defendant was prejudiced if, but for defense counsel’s errors, the result of the proceeding would have been different.⁴³

C. APPLYING THE STANDARDS

In his Standard 4 brief, Jones argues that appellate counsel was ineffective because counsel encouraged him not to attend his resentencing hearing, failed to challenge the trial

³⁶ *People v Slocum*, 213 Mich App 239, 243; 539 NW2d 572 (1995).

³⁷ US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

³⁸ *Ginther*, 390 Mich at 443; *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

³⁹ *People v Riley (After Remand)*, 468 Mich 135, 139; 659 NW2d 611 (2003).

⁴⁰ *People v Uphaus (On Remand)*, 278 Mich App 174, 185-186; 748 NW2d 899 (2008).

⁴¹ *Id.* at 186.

⁴² *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012); *Cullen v Pinholster*, 563 US ___, ___; 131 S Ct 1388, 1407; 179 L Ed 2d 557, 578 (2011).

⁴³ *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994).

court's assessments under OVs 9 and 19, failed to challenge the trial court's assessment of PRV 5 (prior misdemeanor convictions), and failed to challenge the prosecutor's practice of reading Jones's mail.

To the extent that Jones contends that appellate counsel was ineffective for failing to challenge the prosecutor's practice of reading Jones's mail, Jones's assertions all pertain to events that occurred before Jones's resentencing hearing. There is no indication in the record that this issue persisted through resentencing. This Court addressed the same assertion in Jones's original appeal of right and concluded that Jones had not been prejudiced by the prosecutor's improper action.⁴⁴ We did not remand for further development on that issue. Accordingly, we conclude that this assertion is outside of the scope of this appeal, for reasons that we have previously stated.

Appellate counsel's decision not to challenge the trial court's assessments under OVs 9 and 19 was neither unreasonable nor prejudicial. Counsel is not ineffective for making futile challenges.⁴⁵ As discussed previously in this opinion, the trial court was not bound by the jury's determination when finding by a preponderance of the evidence that Jones also assaulted Debra Jones. Accordingly, had counsel challenged the trial court's decision to score OV 9, counsel's challenge would have been futile.

Further, "the circumstances described in OV 19 expressly include events occurring after the completion of the sentencing offense . . ."⁴⁶ Therefore, the trial court may consider events occurring after the sentencing offense when assessing points under OV 19.⁴⁷ Accordingly, appellate counsel was not ineffective for not challenging the trial court's assessment of OV 19. Such a challenge would not have had merit.

Appellate counsel's decision not to challenge PRV 5 was also not unreasonable or prejudicial. Counsel need not raise every potentially meritorious issue.⁴⁸ The trial court assesses 20 points under PRV 5 if the defendant "has 7 or more prior convictions or prior misdemeanor juvenile adjudications."⁴⁹ The record indicates that Jones had twelve prior misdemeanor convictions. Jones challenged three convictions of retail fraud on the basis that they were obtained without counsel present. First, even had the trial court refused to consider those convictions, Jones still had nine misdemeanor convictions. The trial court's assessment of 20 points under PRV 5 was still appropriate. Second, even had the trial court assessed Jones 0 points under PRV 5, Jones would have had 50 PRV points and the change would not have

⁴⁴ *Jones*, slip op at 4.

⁴⁵ *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010).

⁴⁶ *Id.*

⁴⁷ *Smith*, 488 Mich at 195.

⁴⁸ *People v Reed*, 449 Mich 375, 387; 535 NW2d 496 (1995).

⁴⁹ MCL 777.55(1).

changed Jones's sentencing grid for either offense.⁵⁰ Accordingly, counsel was not objectively unreasonable for failing to raise this argument because it would have no practical effect on the trial court's decision. For the same reason, counsel's decision did not prejudice Jones.

Jones also contends that counsel was ineffective when counsel encouraged him not to attend his resentencing hearing because "he was likely to get more time based on several misconducts he had received in prison." The record does not support Jones's assertion. Further, Jones was not prejudiced because he did not rely on appellate counsel's advice. It is clear from the record that Jones did attend his resentencing hearing. We conclude that Jones has not demonstrated that counsel's advice was unreasonable or prejudicial.

Finally, Jones contends that counsel rendered ineffective assistance by acting "more as an advocate for the state." Counsel has many responsibilities, including the responsibilities to "fulfill ethical obligations to the court, zealously advocate the client's best interests (which includes establishing that they, and not the client, are in charge of making the professional decisions), and protect themselves against grievances and claims of malpractice."⁵¹

Here, at the resentencing hearing, appellate counsel explained that she did not believe that Jones's arguments regarding OV 9 and OV 19 were meritorious, but counsel argued that the trial court should allow him to state his own arguments against scoring those variables. Appellate counsel stated that it was her ethical obligation under her duty of candor to the court to present case law contrary to Jones's position to the trial court. The trial court allowed Jones to argue in propria persona.

There are several reasons why appellate counsel may have stated to the court that she did not believe that Jones's position was meritorious, including the reasons that appellate counsel stated on the record: the position was not, in fact, meritorious, appellate counsel felt ethically obligated not to mislead the court, and appellate counsel was explaining for the record why she was not making the arguments herself. We are not convinced that appellate counsel's decision was unreasonable. Further, Jones was not prejudiced because any error would not have affected the outcome of his resentencing.

VII. CONCLUSION

We conclude that Jones's constitutional challenges to his new sentence are without merit. Neither the trial court's judicial fact-finding nor its decision to consider Jones's obstruction of justice when assessing the sentencing variables for Jones's assault conviction violated the double jeopardy, due process, jury trial, or ex post facto provisions of the federal and Michigan constitutions. We also conclude that appellate counsel did not provide Jones ineffective assistance at Jones's resentencing hearing. The remainder of Jones's issues are outside the scope of this appeal.

⁵⁰ See MCL 777.65; MCL 777.16d; MCL 777.16f.

⁵¹ *People v Mitchell*, 454 Mich 145, 170; 560 NW2d 600 (1997).

We affirm.

/s/ William C. Whitbeck
/s/ Cynthia Diane Stephens