

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
March 26, 2013

v

ANTHONY JUAN ALLEN,
Defendant-Appellant.

No. 306796
Kalamazoo Circuit Court
LC No. 2008-000570-FC

Before: STEPHENS, P.J., and HOEKSTRA and RONAYNE KRAUSE, JJ.

MEMORANDUM.

Defendant appeals by leave granted¹ the trial court's order denying his motion for relief from judgment. We dismiss defendant's appeal as moot.

Defendant was convicted by a jury of perjury in a trial on a capital crime, MCL 750.422, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. In the instant appeal, brought under the Postappeal Relief subchapter of our court rules, MCR 6.500 *et seq.*, defendant argues that the trial court erred at sentencing when it assigned 50 points under Offense Variable (OV) 3 for his felon in possession conviction, and that his appellate counsel was ineffective for failing to raise the issue on his direct appeal.

"Whether a case is moot is a threshold issue that a court addresses before it reaches the substantive issues of the case itself." *People v Richmond*, 486 Mich 29, 35; 782 NW2d 187 (2010) (citations omitted). "[A]ppellate courts will sua sponte refuse to hear cases that they do not have the power to decide, including cases that are moot." *Id.* "[A] case is moot when it presents nothing but abstract questions of law which do not rest upon existing facts or rights." *Id.* (citations and quotations omitted).

Defendant's appeal is moot because the trial court was not required to score defendant's felon in possession offense at all. In *People v Mack*, 265 Mich App 122, 128; 695 NW2d 342

¹ *People v Allen*, unpublished order of the Court of Appeal, entered January 19, 2012 (Docket No. 306796).

(2005), this Court held that in cases involving multiple concurrent convictions, the sentencing guidelines only apply to the highest crime class conviction, and therefore trial courts are required to score only the highest class offense.² The highest class offense for which defendant was convicted was perjury—a class B offense. See MCL 777.16v. Felon in possession is a class E offense. See MCL 777.16m. The 50 point score for OV 3, which forms the basis of the entire instant appeal, pertains exclusively to defendant’s felon in possession conviction. Indeed, the trial court assigned no points under OV 3 for the perjury conviction. Accordingly, the trial court was not required to score defendant’s felon in possession offense at all. Defendant’s entire OV 3 argument is therefore moot because whether OV 3 was properly scored for defendant’s felon in possession conviction is an “abstract question[] of law which do[es] not rest upon existing facts or rights.” *Richmond*, 486 Mich at 35. Simply put, it cannot be reversible error for the trial court to do incorrectly that which it was not required to do in the first instance.

Appeal dismissed as moot.

/s/ Cynthia Diane Stephens

/s/ Joel P. Hoekstra

/s/ Amy Ronayne Krause

² We note that in *People v Johnigan*, 265 Mich App 463, 472; 696 NW2d 724 (2005), a separate panel of this Court determined that although the *probation* department is required to score the guidelines only for the highest crime class, the *trial court* was still required by statute to score all offenses. The *Johnigan* Court expressly declined to declare a conflict with *Mack*. *Id.* We are required to follow *Mack* and not *Johnigan* because *Mack* has not been reversed by the Supreme Court or a special panel of this Court. MCR 7.215(J)(1). Moreover, the *Johnigan* Court’s criticism of *Mack* was dicta and accordingly not binding.