

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

LEO RAYMOND TERLISNER,

Defendant-Appellee.

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UNPUBLISHED

August 26, 2014

No. 315670

Van Buren Circuit Court

LC No. 1977-003053-FC

Before: FITZGERALD, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

The Van Buren County Prosecutor’s Office appeals by leave granted a March 21, 2013, order entered by Van Buren Circuit Judge Paul E. Hamre, granting defendant Leo Raymond Terlisner’s motion for relief from judgment pursuant to MCL 770.1, vacating his 1977 conviction for first-degree felony murder, entering a conviction for unarmed robbery, and ordering defendant to be resentenced. We reverse and remand.

Defendant was convicted in 1977 for first-degree felony murder under a theory of aiding and abetting an underlying robbery, which led to the murder of the victim. At the time of his conviction, the common-law felony-murder doctrine, which allowed the mental element of murder to be satisfied simply by proof of the intent to commit the underlying felony, was still in existence, and thus the issue of malice was not submitted to the jury. Defendant’s conviction was upheld by this Court on appeal, and our Supreme Court denied his application for leave to appeal. *People v Terlisner*, 96 Mich App 423; 292 NW2d 223 (1980), lv den 412 Mich 917 (1982). Between the time this Court affirmed defendant’s conviction and the time the Supreme Court denied his application for leave to appeal, the Supreme Court decided *People v Aaron*, 409 Mich 672, 733; 299 NW2d 304 (1980), which abolished the common-law felony-murder doctrine and held that “in order to convict a defendant of murder . . . it must be shown that he acted with [malice].” However, the Supreme Court specifically declined to make its holding retroactive, holding instead that it would apply only to “all trials in progress and those occurring after the date of this opinion.” *Id.* Defendant never raised the validity of the felony-murder doctrine in his appeal to this Court, likely because *Aaron* had not yet been decided. And, while it appears that the issue was raised in defendant’s application for leave to appeal to the Supreme Court, the majority declined to address it. *Terlisner*, 412 Mich at 917. Following his direct appeal, defendant filed a writ of habeas corpus in the federal district court for the Eastern District of Michigan, which was denied in 1984. The Sixth Circuit Court of Appeals affirmed. *Terlisner v Foltz*, 793 F2d 1293 (CA 6, 1986).

After more than 30 years in prison, defendant filed a motion for relief from judgment in the Van Buren Circuit Court. Among the grounds asserted in his motion was the argument that his conviction for first-degree felony murder was “unjust.” Specifically, defendant argued that the felony-murder doctrine, as later found by the Court in *Aaron*, was “repugnant” to the Michigan Constitution. And, while defendant acknowledged that *Aaron* applied only prospectively, he asserted that the felony-murder doctrine was nonetheless invalid at the time of his conviction because, pursuant to Const 1963, art 3, § 7, common laws “repugnant” to the Constitution did not remain in force beyond January 1, 1964, when the current constitution went into effect. Defendant requested that the trial court grant his request for relief pursuant to MCL 770.1 on the basis that “justice has not been done.” The trial court granted defendant’s motion. It reasoned that, while *Aaron* prospectively abolished the felony-murder doctrine, it “did not address whether or not the Michigan Constitution of 1963 allowed continuance of the common law felony murder doctrine after its adoption.” The trial court then concluded that, under Const 1963, art 3, § 7, the same felony-murder doctrine found repugnant by the *Aaron* Court in 1980 was also repugnant as of the adoption of that constitution, and therefore resulted in an “unjust conviction” of defendant. Relying on MCL 770.1, the trial court accordingly vacated defendant’s first-degree felony murder conviction, entered a conviction for unarmed robbery, and ordered defendant to be resentenced. The prosecution now appeals.

We review a trial court’s decision granting a defendant’s motion for relief from judgment for an abuse of discretion, but review the court’s findings of fact supporting the decision for clear error. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). “A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes . . . or [when it] makes an error of law.” *Id.* Moreover, “[w]here the reasons given by the trial court are inadequate or not legally recognized, the trial court abused its discretion.” *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997).

The prosecution first argues that the trial court erred in granting defendant’s motion for relief from judgment pursuant to MCL 770.1. We agree. That statute provides:

The judge of a court in which the trial of an offense is held may grant a new trial to the defendant, for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on the terms or conditions as the court directs.

As a threshold matter, the plain language of the statute clearly governs motions for a new trial, not motions for relief from judgment, and the statute was therefore not applicable to the motion filed by defendant. Moreover, this Court has previously held that MCL 770.1 was superseded by MCR 6.431. *People v McEwan*, 214 Mich App 690, 693 n 1; 543 NW2d 367 (1995). Under MCR 6.431, a defendant who has exhausted his appellate process is limited to seeking post-conviction relief pursuant to MCR 6.500 *et seq.*, the subchapter governing motions for relief from judgment. MCR 6.431(A)(4). See also *People v Watroba*, 193 Mich App 124, 126; 483 NW2d 441 (1992) (“Subchapter 6.500 of the Court Rules . . . is the exclusive means to challenge a conviction in Michigan once a defendant has exhausted the normal appellate process.”). Thus, under no set of circumstances was MCL 770.1 applicable to defendant’s motion for relief from judgment, and the trial court necessarily abused its discretion in relying on that statute to grant the relief requested.

The prosecution next argues that defendant has not established his entitlement to relief under MCR 6.508(D). Specifically, it argues that the ground upon which defendant requested relief from judgment—the invalidity of the felony-murder doctrine—could have been raised on appeal from his conviction, and therefore defendant was required to show “good cause” for not raising it and “actual prejudice.” MCR 6.508(D)(3). We need not address whether the ground upon which defendant based his motion could have been raised on direct appeal, or whether, assuming it could have, defendant has met the hurdles in MCR 6.508(D)(3), because we find in the first instance that the argument lacks merit. Therefore, defendant did not meet his “burden of establishing entitlement to the relief requested.” MCR 6.508(D).

In *Aaron*, 409 Mich at 733, our Supreme Court abrogated the felony-murder doctrine as “unnecessary and in many cases unjust” because “it violates the basic premise of individual moral culpability upon which our criminal law is based.” Consequently, the Court ruled that, in order to convict a defendant of murder, the prosecution would be required to show that the defendant acted with malice. *Id.* However, the *Aaron* Court expressly declined to make its holding retroactive, stating instead that the decision would only apply “to all trials in progress and those occurring after the date of this opinion.” *Id.* at 734. Because defendant was convicted of murder in 1977—approximately three years before *Aaron* was decided—that decision had no effect on his case.

Defendant successfully circumvented the prospective limitation of *Aaron* in the trial court by not expressly basing his motion on *Aaron* alone, but rather on the argument that the same felony-murder doctrine held “repugnant” to the Michigan Constitution by the *Aaron* Court in 1980 was actually “repugnant” at the time the Constitution was adopted in 1963 and therefore could not be used to support his 1977 conviction. We conclude that the trial court abused its discretion in granting the motion for relief from judgment on this ground.

“[T]he general rule is that the common law prevails except as abrogated by the Constitution, the Legislature, or this Court.” *Aaron*, 409 Mich at 722. Const 1963, art 3, § 7, the provision relied upon by defendant, states:

The common law and the statute laws now in force, not repugnant to this constitution, shall remain in force until they expire by their own limitations, or are changed, amended or repealed.

Only those common laws and statutes then in force and “not repugnant” to the constitution remained in force at the time the constitution went into effect on January 1, 1964. However, neither this provision of the constitution, nor any others, expressly declared that the common-law felony-murder doctrine was, in fact, “repugnant” to the constitution. Likewise, no legislative act so declared. The absence of any provision in the 1963 constitution or any legislation abrogating the felony-murder doctrine means that it was not “repugnant” at the time the constitution was adopted, but rather “remain[ed] the law in Michigan,” *Aaron*, 409 Mich at 723, until November 24, 1980, when the *Aaron* Court decided to “consider its continued existence[,]” *id.*, and ultimately to abrogate it. Accordingly, because, at time of defendant’s conviction, the felony-murder doctrine “remain[ed] in force,” Const 1963, art 3, § 7, his conviction could only be vacated if *Aaron*’s holding abolishing that doctrine applied retroactively. As noted, however, retroactive application was squarely foreclosed by the *Aaron* Court. *Aaron*, 409 Mich at 734.

Thus, defendant's argument, no matter how framed, does not establish his entitlement to relief under MCR 6.508. The circuit court abused its discretion in granting his motion for relief from judgment.

We reverse the circuit court's order vacating defendant's first-degree felony murder conviction and remand with instructions to reinstate that conviction. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer