

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY CLAY,

Defendant-Appellant.

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FOR PUBLICATION

August 31, 2001

9:15 a.m.

No. 211768

Kent Circuit Court

LC No. 94-000945-FH

ON REMAND

Updated Copy

November 9, 2001

Before: Hood, P.J., and Holbrook, Jr., and Fitzgerald, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court. On original submission, over a dissent by Judge Holbrook, we affirmed the trial court's denial of defendant's motion for relief from judgment, *People v Clay*, 239 Mich App 365; 608 NW2d 76 (2000), by concluding that the Legislature did not intend to require that the prosecution prove that a defendant was "lawfully imprisoned" when he was charged with assaulting a corrections officer while awaiting examination. The dissent concluded that this statutory construction was incorrect and that defendant's arrest was not authorized by law. The Supreme Court granted the defendant leave to appeal. 463 Mich 906 (2000). The prosecutor agreed with defendant that the majority's construction of the statute was incorrect. The Supreme Court agreed and remanded the case for a determination regarding lawful imprisonment. *People v Clay*, 463 Mich 971 (2001). Accepting lawful imprisonment as a requirement of the offense, we adopt the reasoning in Judge Holbrook's dissent that defendant was not lawfully imprisoned. Consequently, we reverse the trial court's denial of defendant's motion for relief from judgment.

The prosecution argues that defendant's incarceration was lawful because he had committed the crime of carrying a concealed weapon and there was an outstanding bench warrant for defendant's arrest when he was stopped. However, there is no evidence that police were aware of either fact at the time of the stop. The fact that the search of defendant's person led to evidence is irrelevant. A search, in law, is good or bad at the time of commencement, and its character does not change on the basis of its success. *People v LoCicero (After Remand)*, 453

Mich 496, 501; 556 NW2d 498 (1996). The prosecution also argues that defendant essentially failed to preserve entitlement to relief from judgment. However, this argument is outside the scope of the Supreme Court's remand. Nonetheless, we have reviewed the issue and conclude that it is without merit.

Reversed.

/s/ Harold Hood

/s/ Donald E. Holbrook, Jr.

/s/ E. Thomas Fitzgerald