

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 13, 2012

v

RICHARD ALLEN SIMMONS,

Defendant-Appellant.

No. 303201
Lake Circuit Court
LC No. 86-002451-FC

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

MEMORANDUM.

Richard Allen Simmons appeals as of right the trial court's February 18, 2011, second amended judgment of sentence. We vacate the sentence and remand to the trial court to issue an amended judgment of sentence comporting with this Court's October 3, 1989, opinion.

In 1987, after a bench trial, the trial court convicted Simmons of one count of first-degree murder committed in the perpetration of a larceny, and one count of first-degree murder committed in the perpetration of criminal sexual conduct. Simmons appealed as of right on various grounds. In 1989, this Court found in pertinent part as follows:

[A]lthough not raised by defendant on appeal, we vacate defendant's conviction for first degree murder committed in perpetration of a larceny, noting that the two first degree murder convictions for one murder violates double jeopardy.¹

The case was not remanded to the trial court, and the trial court did not issue an amended judgment of sentence comporting with this Court's opinion.

Simmons filed several requests for relief from judgment in the trial court, the most recent being on September 8, 2010, in which Simmons requested that the trial court issue an amended judgment of sentence. Acceptance of the September 2010, motion for relief from judgment was impermissible because "after August 1, 1995, one and only one motion for relief from judgment

¹ *People v Simmons*, unpublished opinion per curiam of the Court of Appeals, issued October 3, 1989 (Docket No. 104386), slip op, p 5.

may be filed with regard to a conviction.”² Thus, it appears that the trial court treated the motion as a letter request.

On February 18, 2011, the trial court issued a second amended judgment of sentence, which indicated that Simmons was convicted of “Felony Murder 1st Degree/ under 2 theories larceny and attempted criminal sexual conduct.” The second amended judgment of sentence did not comport with this Court’s 1989 instructions, which ordered that Simmons’s conviction of first-degree murder committed in the perpetration of a larceny be vacated. Had the trial court amended the judgment of sentence as instructed, the result would have been a mere ministerial act. By issuing a judgment of sentence that contained language that failed to comply with this Court’s 1989 opinion, the trial court’s order had the effect of resentencing Simmons, which gave him an appeal as of right.³

Accordingly, we vacate the February 18, 2011, second amended judgment of sentence and instruct the trial court to conduct the ministerial act of issuing an amended judgment of sentence comporting with this Court’s 1989 opinion. The resulting amended judgment of sentence will not be appealable as of right because Simmons is not being resentenced.⁴ Because the above finding is dispositive, we decline to address Simmons’s remaining issues on appeal.⁵

Vacated and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

² MCR 6.502(G)(1).

³ MCR 7.202(6)(b)(iii); MCR 7.203(A)(1).

⁴ *Id.*; MCR 7.202(6)(b)(iii).

⁵ We do not address the merits of any challenge that Simmons may have under *Miller v Alabama*, ___ US ___; 132 S Ct 2455; 183 L Ed 2d 407 (2012).