

Court of Appeals, State of Michigan

ORDER

People of MI v Richard Wershe Jr

Docket No. 329110

LC No. 87-004902-FC

Christopher M. Murray
Presiding Judge

Michael J. Talbot

Kirsten Frank Kelly
Judges

The Court orders that its September 11, 2015 order is VACATED to the extent that it held the application for leave to appeal in abeyance and stayed the order for resentencing.

The Court further orders that, pursuant to MCR 7.205(E)(2), the Wayne Circuit Court's September 4, 2015 order granting defendant's motion for relief from judgment and ordering resentencing is REVERSED. Because it is undisputed that defendant has filed prior motions for relief from judgment, the standards contained within MCR 6.502(G) apply, a fact defendant recognizes on appeal. However, the trial court failed to either cite or address these standards. Granting a motion for relief from judgment without addressing the required legal standards is an error of law and alone constitutes an abuse of discretion. See *People v Waterstone*, 296 Mich App 121, 132; 818 NW2d 432 (2012).

Additionally, MCR 6.502(G)(2) allows a defendant to file a second or subsequent motion only when "based on a retroactive change in law that occurred after the first motion for relief from judgment or a claim of new evidence that was not discovered before the first such motion." Defendant does not allege the existence of new evidence, so he can overcome the hurdle posed by MCR 6.502(G)(2) only by establishing that a retroactive change in law occurred since 2001, when his first motion was filed. *People v Swain*, 288 Mich App 609, 632; 794 NW2d 92 (2010). He failed to do so. Indeed, defendant concedes that neither case upon which he relies, *Graham v Florida*, 560 US 48; 130 S Ct 2011; 176 L Ed 2d 825 (2010) and *Miller v Alabama*, ___ US ___; 132 S Ct 2455; 183 L Ed2d 407 (2012), addresses his parolable life sentence. Moreover, *Miller* cannot be retroactively applied. *People v Carp*, 496 Mich 440, 495; 852 NW2d 801 (2014). Assuming that as a general principle *Graham* has retroactive application, it had no bearing on defendant's sentence because by the time *Graham* was decided, defendant was already eligible for parole. The trial court cannot set aside a valid sentence without a legal basis to do so, and as the trial court recognized, defendant's sentence is not unconstitutional. Any attempt to re-sentence a defendant with a valid sentence "may infringe upon the Governor's commutation powers and intrude upon the parole board's jurisdiction." *People v Wybrecht*, 222 Mich App 160, 167; 569 NW2d 903 (1997).

Because defendant failed to present any retroactive change in the law that governs his circumstances, the court rule required the trial court to deny his successive motion. *Swain*, 288 Mich App at 632-633. The policy considerations articulated by defendant and the trial

court are not a substitute for the court rule's mandate that defendant establish that a retroactive change in law has occurred.

This order has immediate effect. MCR 7.215(F)(2).



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

SEP 29 2015

Date

Chief Clerk