

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JEFFREY ELWOOD HICKS,

Defendant-Appellant.

UNPUBLISHED

August 17, 2001

No. 219719

Oakland Circuit Court

LC No. 92-116658-FC

Before: K.F. Kelly, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals by leave granted from the trial court's denial of his motion for relief from judgment. Defendant was convicted by a jury of three counts of assault with intent to commit murder, MCL 750.83, two counts of felonious assault, MCL 750.82, one count of unlawfully driving away an automobile (UDAA), MCL 750.413, and six counts of possession of a firearm during the commission of a felony, MCL 750.227b. The trial court, applying a second-offense habitual offender enhancement under MCL 769.11,¹ sentenced him to a single enhanced sentence of twenty-five to fifty years' imprisonment for the assault with intent to commit murder and felonious assault convictions. This prison term was to be served concurrently with a four-month-to-five-year prison term for the UDAA conviction but consecutively to six concurrent two-year prison terms for the felony-firearm convictions. We affirm.

Defendant's convictions arose from his assaults on various individuals on October 14, 1991. Defendant does not now contest these convictions. Indeed, they have already been affirmed by this Court, see *People v Hicks*, unpublished opinion per curiam of the Court of Appeals, issued June 7, 1996 (Docket No. 175319), and the Supreme Court denied leave. 454 Mich 882 (1997).

Defendant's main argument on appeal is that the trial court erroneously sentenced him as a second-offense habitual offender – and therefore should have granted his post-appeal motion for relief from judgment – because the Alaska uttering and publishing conviction upon which the

¹ Defendant pleaded guilty to being a second-offense habitual offender.

sentencing enhancement stood had been set aside in Alaska.² A ruling on a motion for relief from judgment presents a mixed question of fact and law. MCR 6.508(E). We review a trial court's factual findings for clear error but review de novo the application of the law to the facts. *People v Beasley*, 239 Mich App 548, 552; 609 NW2d 581 (2000).

In relevant part, MCR 6.508(D)(3) states, with regard to motions for relief from judgment, that a court may not grant relief to the defendant if the motion

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief.

Defendant initially contends that he raised a jurisdictional defect in his motion for relief from judgment and that he therefore was not required to show good cause for failure to raise earlier his argument regarding the Alaska conviction. We disagree. Indeed, mere irregularities in a proceeding do not constitute jurisdictional defects. Instead, jurisdictional defects are those that

² The Alaska statute allowing for the setting aside of the conviction states, in relevant part:

(a) Except as provided in (f) of this section, if it appears that there are circumstances in mitigation of the punishment, or that the ends of justice will be served, the court may, in its discretion, suspend the imposition of sentence and may direct that the suspension continue for a period of time, not exceeding the maximum term of sentence that may be imposed or a period of one year, whichever is greater, and upon the terms and conditions that the court determines, and shall place the person on probation, under the charge and supervision of the probation officer of the court during the suspension.

* * *

(d) The court may at any time during the period of probation revoke or modify its order of suspension of imposition of sentence. It may at any time, when the ends of justice will be served, and when the good conduct and reform of the person held on probation warrant it, terminate the period of probation and discharge the person held. If the court has not revoked the order of probation and pronounced sentence, the defendant shall, at the end of the term of probation, be discharged by the court.

(e) Upon the discharge by the court without imposition of sentence, the court may set aside the conviction and issue to the person a certificate to that effect. [Alaska Stat § 12.55.085.]

question the very authority of the court to convict and sentence the defendant. As long as a court had jurisdiction over the defendant and the subject matter and could render a judgment upon a showing of any sufficient state of facts, any judgment that the court then rendered, however erroneous, irregular, or unsupported by evidence, does not constitute a jurisdictional defect. See *In re Joseph*, 206 Mich 659, 662; 173 NW 358 (1919).

Here, defendant is not challenging the validity of his Alaska conviction. Cf. *People v Carpentier*, 446 Mich 19, 25-30; 521 NW2d 195 (1994) (a defendant may collaterally attack the validity of prior juvenile adjudications secured without benefit of counsel or a valid waiver of same and such a claim raises a jurisdictional defect for purposes of MCR 6.508[D][3]). Instead, defendant merely argues that the court could not use the prior conviction to enhance his sentence. This alleged defect did not deprive the court of its jurisdiction to convict or sentence defendant. Indeed, defendant's conviction by a jury of the charged offenses in this case gave the court jurisdiction to sentence defendant. If the irregularity about which defendant complains occurred, the defect was akin to an evidentiary error, i.e., that the second-offense habitual offender enhancement was unsupported by the record evidence. Accordingly, the trial court correctly determined that defendant had not raised a jurisdictional defect.

Accordingly, MCR 6.508(D)(3)(a) required defendant to show "good cause" for failing to raise his argument earlier. The trial court concluded that defendant established good cause for his failure to raise the argument earlier, giving the following rationale:

Defendant claims that he had no factual proof to substantiate his claims until October of 1997. Defendant did attempt to inform the court that he had received a suspended sentence for the Alaska conviction, but his trial attorney had explained that it had no effect on the habitual supplementation. . . . Defendant establishes good cause for not having previously raised the issue.

The prosecutor argues that the trial court erred in making this finding of good cause. We agree. Initially, we note that the prosecutor was not obligated to file a cross-appeal to properly present this argument for appeal, since it constitutes an alternative basis for affirming the trial court's ruling. See *Middlebrooks v Wayne County*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994).

We cannot agree with the court's finding of good cause. Indeed, defendant presented no evidence demonstrating that he was unable earlier to obtain documentation regarding the setting aside of the Alaska conviction, which occurred in 1980. A failure to act, in this case defendant's apparent failure to request information earlier regarding the status of his conviction in Alaska, does not establish good cause for failing to raise an issue on appeal. Moreover, at his sentencing for the instant crimes, defendant's attorney stated as follows:

Your Honor, Mr. Hicks wishes to bring to the attention of the court that the conviction and sentence which he received in Fairbanks, Alaska, he received a suspended sentence on that case. I have explained to him, that has no effect with respect to the conviction and its use as a habitual supplementation.

The court then stated, "Right. That's correct. It's a conviction. Not what you were sentenced to." This interchange demonstrated that defendant knew his Alaska conviction and sentence had been modified in some manner, possibly allowing grounds for an appeal. Nevertheless,

defendant did not raise this issue on direct appeal and has not demonstrated that he was somehow prevented from doing so. There was simply no showing of good cause under MCR 6.508(D)(3)(a).

Nor was there a “significant possibility that the defendant is innocent of the crime” such that the good cause requirement could be waived under the last sentence of MCR 6.508(D)(3). Indeed, defendant’s instant convictions are undisputed, as is the fact that he was convicted of the Alaska offense. Even if we interpret the “crime” in MCR 6.508(D)(3) as being defendant’s commission of a second-felony offense under MCL 769.10(1), we would find no significant possibility of innocence. Indeed, although defendant contends in his appellate brief that the prosecutor failed to prove³ that defendant’s Alaska offense would have constituted a felony under Michigan law (and therefore alleges, in a roundabout fashion, that he may be innocent of being a second-offense habitual offender as delineated in MCL 769.10[1]), defendant provided no documentation below, nor does he make a reasoned, coherent argument on appeal, for this possible claim of innocence.⁴ See *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000) (a party may not leave it to this Court to rationalize the basis for a claim). By pleading guilty to being a second-offense habitual offender, defendant implicitly acknowledged at sentencing that his Alaska offense would have constituted a felony if committed in Michigan, and he has failed to prove otherwise below or on appeal. Moreover, in his application for leave to appeal, defendant did not contend that the Alaska offense would not have constituted a felony in Michigan. Instead, defendant solely argued that the Alaska offense could not be used to enhance his sentence because it had been set aside in Alaska. Issues not raised in the application for leave are waived. See *Swickard v Wayne County Medical Examiner*, 438 Mich 536, 558 n 16; 475 NW2d 304 (1991), and *Michigan Education Association Political Action Committee v Secretary of State*, 241 Mich App 432, 443 n 4; 616 NW2d 234 (2000).

We further note that merely because defendant’s set-aside conviction could not be used for enhancement purposes in Alaska, see *Larson v State*, 688 P2d 592, 597 (Alas App, 1984), does not mean that it could not be used for enhancement purposes in Michigan. We emphasize that this is not a case in which the earlier conviction was reversed or vacated. As stated in *Journey v Alaska*, 895 P2d 955, 961-962 (Alas, 1995), the statute used to set aside defendant’s earlier conviction in the instant case does not allow for expunction of the offense from a person’s

³ We note once again that defendant *pleaded guilty* to being a second-offense habitual offender.

⁴ Defendant did provide this Court with a complaint relating to an Alaska offense that might constitute a misdemeanor in Michigan. This bare complaint, without more, does not suggest that defendant was innocent of being a second-offense habitual offender in Michigan for purposes of the instant case. Indeed, there is no reliable indication that the offense described in the complaint was the same offense that formed the basis of defendant’s instant second-offense habitual offender enhancement. Moreover, we emphasize that defendant makes no reasoned argument regarding the significance of this complaint. Additionally, as noted *infra*, defendant’s application for leave to appeal did not raise the possibility that the Alaska offense would not have constituted a felony in Michigan, thereby waiving the issue for appeal. Finally, we note that in Michigan, a felony is defined as any crime punishable by more than one year in prison, see *People v Duenaz*, 148 Mich App 60, 69; 384 NW2d 79 (1985), and according to the presentence investigation report, defendant was sentenced to two years’ imprisonment for the Alaska conviction.

criminal record. Sentencing defendant as an habitual offender in Michigan is therefore consistent with the purpose of the Michigan habitual offender statutes, which are meant to provide for escalating penalties for persons repeatedly convicted of felonies. See *People v Stoudemire*, 429 Mich 262, 264; 414 NW2d 693 (1987), modified by *People v Preuss*, 436 Mich 714; 461 NW2d 703 (1990).

On these facts, we do not find a “significant possibility that . . . defendant is innocent of the crime” of being a second-offense habitual offender. See MCR 6.508(D)(3) (emphasis added). Accordingly, because defendant failed to meet the good cause requirement for granting a motion for relief from judgment, we affirm the trial court’s ruling in this case, even though the trial court’s ruling rested on alternative grounds (namely, that defendant failed to establish prejudice under MCR 6.508[D][3][b]). See *People v Brownridge (On Remand)*, 237 Mich App 210, 217; 602 NW2d 584 (this Court may affirm if the trial court reaches the right result for a different reason).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Michael R. Smolenski
/s/ Patrick M. Meter