

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VENSON LEWIS GIVHAN,

Defendant-Appellant.

UNPUBLISHED

June 14, 2007

No. 269500

Wayne Circuit Court

LC No. 01-011848-01

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as a second habitual offender, MCL 769.10, to 47 to 90 months' imprisonment for the felon-in-possession conviction, to be served consecutive to two years' imprisonment for the felony-firearm conviction. He appeals as of right. Because the trial court's reasoning for increasing defendant's sentence on the felon in possession of a firearm conviction after his second trial did not overcome the presumption of vindictiveness, we vacate defendant's sentence imposed for his felon-in-possession conviction and remand for resentencing.

Defendant was originally convicted of first-degree premeditated murder, MCL 750.316(1)(a), felon-in-possession, and felony-firearm, arising out of the shooting death of John Brazier outside Green's Barbeque in the city of Detroit in the early morning hours of September 22, 2001. In a prior appeal, this Court determined that Joseph Moore's account of the shooting constituted newly discovered evidence warranting a new trial. This Court thus reversed defendant's convictions and remanded for a new trial. *People v Givhan*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2005 (Docket No. 245107), vacated in part 472 Mich 907 (2005).

Thereafter, the prosecutor sought leave to appeal from the Supreme Court. In lieu of granting leave, the Supreme Court vacated that portion of this Court's opinion ordering a new trial based on newly discovered evidence and remanded to the trial court to determine whether Moore's account of the shooting was newly discovered evidence warranting a new trial. *People v Givhan*, 472 Mich 907; 696 NW2d 710 (2005). On remand, the trial court granted a new trial based on newly discovered evidence.

Essentially the same evidence presented at defendant's first trial was presented at his second trial, with the addition of Moore's testimony. The evidence established that defendant was a friend of John Brazier, the victim, and that defendant rented the upper flat of a home that Brazier owned, located across the street from Brazier's sister's residence. On August 18, 2001, Brazier's sister, Diane Brazier ("Diane"), and other persons at her home saw defendant arguing with Brazier on the front porch of the rental property about defendant's failure to pay his rent. Ultimately, Brazier struck defendant, who fell down onto the porch. Thereafter, defendant went upstairs to his flat, reappeared on his front porch with a rifle, and fired shots at Diane's house across the street.

The following day, defendant again fired shots at Diane's house. The first time that he appeared in front of the house that day, he argued with Brazier, who was on Diane's porch. Defendant then left and returned to the house shortly thereafter in the passenger's seat of a vehicle. He fired shots toward the house from the vehicle.

In the early morning hours of September 22, 2001, Lucky Winters was with Brazier at Green's Barbeque, an after-hours club, when Brazier was shot. While in the restroom, Winters heard gunshots and left the restroom to look for Brazier. Winters ran downstairs and saw Brazier, who had been shot, entering through the doors from the parking lot. Winters grabbed Brazier and then saw defendant pointing a gun at him through the glass doors. Defendant pulled the trigger, but nothing happened. Defendant and two other individuals then ran away. Brazier later died from his gunshot wounds. The jury acquitted defendant of first-degree premeditated murder, but convicted him of the felon-in-possession and felony-firearm charges.

Defendant argues that his sentence for his felon-in-possession conviction is an invalid and vindictive sentence because it is longer than the sentence imposed for the same conviction following his first trial. He also contends that this sentence violates his right to be sentenced on the basis of accurate information and his right to notice of the charges against him. The validity of a sentence is a question of law that this Court reviews de novo. *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003), disapproved of on other grounds on denial of leave 469 Mich 967-968.

Resentencing is appropriate only if a reviewing court determines that a sentence is invalid. *People v Mutchie*, 251 Mich App 273, 274; 650 NW2d 733 (2002), aff'd 468 Mich 50 (2003). A sentence is invalid if it is based on constitutionally impermissible grounds, improper assumptions of guilt, or inaccurate information. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997).

In *Alabama v Smith*, 490 US 794, 798; 109 S Ct 2201; 104 L Ed 2d 865 (1989), the United States Supreme Court recognized that a vindictive sentence violates a defendant's due process rights. There, the Court stated, "[d]ue process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." *Id.* (citation omitted). A presumption of vindictiveness arises when a defendant is resentenced by the same judge and the second sentence imposed is longer than the first. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002), lv den 467 Mich 900 (2002). This presumption may be overcome if the trial court articulates reasons for imposing a longer sentence at resentencing. *Id.* "Therefore trial judges, when resentencing defendants, must state on the record upon what new information they are basing any increase in

the length of the sentence.” *People v Mazzie*, 429 Mich 29, 37 n 2; 413 NW2d 1 (1987). Further, “the presumption of vindictiveness may be overcome only when the extent of the increase in the sentence bears a reasonable relationship to the new information.” *Id.* at 36.

Here, the trial court imposed a longer sentence after defendant’s second trial than it imposed after his first trial for his felon-in-possession conviction. After defendant’s first trial, the trial court sentenced him to one year and eight months to five years’ imprisonment for his felon-in-possession conviction. Following defendant’s second trial, however, the court sentenced him to 47 to 90 months’ imprisonment for that conviction, thus giving rise to a presumption of vindictiveness. *Colon, supra* at 66. To overcome this presumption, the court was required to articulate its reasons for imposing the longer sentence and state on the record the new information on which it relied to increase the length of the sentence. *Mazzie, supra* at 37 n 2; *Colon, supra* at 66. Thus, the trial court was required to rely on *new* information unavailable at the initial sentencing. *Mazzie, supra* at 35-36, 37 n 2. In addition, the extent of the increase was required to be reasonably related to the new information. *Id.* at 36.

The record establishes that the trial court increased defendant’s sentence because of its concern regarding defendant’s criminal history involving firearms. In fact, during sentencing, the court stated to defendant, “I am hopeful that this case and this sentence will make you think about that and put your guns away.” Defendant’s firearms history, however, was not new information unavailable to the court at its initial sentencing. Thus, the trial court’s reliance on this factor did not overcome the presumption of vindictiveness. *Mazzie, supra* at 35-36, 37 n 2.

At the hearing on defendant’s motion for resentencing, the trial court identified a different reason for increasing defendant’s sentence. The trial court erroneously stated that at defendant’s second trial, he admitted firing shots at Diane’s house. The court relied on this erroneous belief as constituting new information justifying the increased sentence. Defendant did not testify at his second trial, however, and made no such admission. In addition, the trial court determined that because the jury acquitted defendant of the murder charge, the felon-in-possession conviction must have stemmed from one of the instances in which defendant fired shots at Diane’s house. The court stated:

But they obviously believed that -- no. They obviously believed the testimony. There was testimony that there were shots fired at the house by the defendant. The car in the street, there was that incident, and there was a second incident. And so my position is that this same testimony was put on the record in this case and it was the only thing on which he was convicted. Whereas in the other case they convicted him of everything which could have meant that he was convicted of the FIP FF [felon-in-possession and felony-firearm charges] because of the murder conviction.

In this trial he wasn’t convicted of the murder. So th[e] FIP FF he was convicted of in this case didn’t occur at the time of the murder. It’s the FIP FF that occurred at the time of the shooting at the house to which there was no contradictory evidence.

So that’s the reason and, if that’s not good enough for the Court of Appeals, they may so rule. But that is the reason it is not vindictive at all.

The prosecutor concedes that no new information was available to the trial court at defendant's sentencing following his second trial than was available following his first trial. The trial court's assertion that defendant admitted firing shots at Diane's house during his second trial was erroneous and therefore could not constitute new information justifying an increased sentence. Accordingly, the trial court's reasoning did not overcome the presumption of vindictiveness. *Mazzie, supra* at 35-36, 37 n 2.

Moreover, defendant is entitled to resentencing because his sentence is invalid. *Mutchie, supra* at 274. To justify the increased sentence, the trial court opined that the jury's verdict on the felon-in-possession charge must have resulted from defendant firing shots at Diane's house on two occasions. The prosecutor concedes, however, that defendant was not charged with such conduct and that the information charged defendant only for conduct committed on the day on the murder, September 22, 2001. Thus, the allegations that defendant fired shots at Diane's house could not have given rise to his felon-in-possession conviction. Because the trial court relied on this erroneous reason to justify increasing defendant's sentence, the sentence is invalid and resentencing is required. *Miles, supra* at 96; *Mutchie, supra* at 274.

Defendant's sentence for his felon in possession of a firearm conviction is vacated and this case is remanded for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Kathleen Jansen
/s/ Bill Schuette