

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HARRY JACOB WALTON,

Defendant-Appellant.

UNPUBLISHED

June 3, 2008

No. 276161

Oakland Circuit Court

LC No. 2001-178581-FC

Before: Davis, P.J., and Murray and Beckering, JJ.

PER CURIAM.

Defendant appeals as on leave granted an order denying his postappeal motion for relief from judgment. We vacate the denial and remand for further consideration in accordance with this opinion. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f). The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent terms of 40 years to 60 years for each conviction.¹ Relevant to the instant appeal, the trial court imposed that sentence after concluding that the legislative sentencing guidelines did not apply. Defendant appealed as of right,² and this Court affirmed. *People v Walton*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2003 (Docket No. 241760). Defendant thereafter filed a postjudgment motion for relief from judgment, arguing in part that trial counsel was ineffective for failing to object when the trial court did not use the legislative sentencing guidelines at sentencing, and that appellate counsel was ineffective for not raising this issue on appeal. The trial court denied defendant's motion.

This Court denied defendant's subsequent application for leave to appeal. Our Supreme Court, in lieu of granting leave to appeal, remanded to this Court for consideration as on leave granted. *People v Walton*, 480 Mich 949; 741 NW2d 320 (2007). Our Supreme Court specifically directed this Court consider "(1) whether the defendant was denied the effective

¹ We note that the prosecutor had also included in the information that defendant was subject to sentencing under MCL 750.520f (requiring a mandatory minimum sentence of five years).

² Defendant's prior appeal did not raise any issue relating to sentencing.

assistance of counsel due to his attorney's failure to object when the Oakland Circuit Court did not sentence the defendant pursuant to the legislative sentencing guidelines, MCL 777.1 *et seq.*, and (2) whether the defendant is entitled to postappeal relief under MCR 6.501 *et seq.*" *Walton, supra* at 949. We conclude that defendant's trial counsel was not ineffective, but that defendant is entitled to postappeal relief.

Trial counsel is presumed to have been effective, and defendant bears a heavy burden of proving otherwise. *People v Eloby (After Remand)*, 215 Mich App 472, 476; 547 NW2d 48 (1996). Defendant must show that counsel's representation was unreasonable and counsel's error affected the outcome of the proceedings. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff'd* 468 Mich 233 (2003). Defendant must also overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, trial counsel actually did advise the trial court at sentencing that he believed that the legislative sentencing guidelines applied. The probation officer then advised the trial court that the legislative sentencing guidelines did not apply because "it's a second offense criminal sexual conduct" subject to a life sentence. The trial court accepted that explanation. Because defense counsel raised the issue at sentencing, albeit unsuccessfully, we do not believe counsel was ineffective for subsequently objecting when the trial court immediately thereafter reached the opposite conclusion.

Under MCR 6.500 *et seq.*, a defendant may seek relief from a conviction and sentence no longer subject to appellate review. MCR 6.501. Ordinarily, relief is barred "if the criminal defendant's motion alleges a ground for relief, other than jurisdictional defects, that could have been raised on appeal from the conviction and sentence" MCR 6.508(D)(3). However, that bar may be avoided if the defendant demonstrates both good cause for the failure to raise the issue on appeal, and actual prejudice. MCR 6.508(D)(3)(a) and (b); *People v McSwain*, 259 Mich App 654, 686-687; 676 NW2d 236 (2003). The trial court's factual findings are reviewed for clear error while its ultimate decision on the motion is reviewed for an abuse of discretion. *McSwain, supra* at 682-685. Ineffective assistance of appellate counsel, i.e., appellate counsel's failure to raise a meritorious issue on direct appeal, can satisfy the good-cause requirement, *People v Reed*, 449 Mich 375, 382; 535 NW2d 496 (1995), and imposition of an invalid sentence can satisfy the actual prejudice requirement. MCR 6.508(D)(3)(b)(iv).

The significant issue is therefore whether the legislative sentencing guidelines applied to defendant's sentence and, as a result, whether defendant's sentence deviated from those guidelines. The former judicial sentencing guidelines did not apply to habitual offenders, *People v Gonzalez*, 256 Mich App 212, 230; 663 NW2d 499 (2003), but because defendant's offense took place after January 1, 1999, the legislative sentencing guidelines were in effect.³ MCL

³ The trial court relied on *People v Colon*, 250 Mich App 59, 65; 644 NW2d 790 (2002), where this Court stated that the "sentencing guidelines do not apply to [the defendant in that case] because he is an habitual offender." However, although the *Colon* Court did not *explicitly* state as much, it was unambiguously considering the former judicial sentencing guidelines and an offense that took place before January 1, 1999. Furthermore, the *Colon* Court relied for its statement on *People v Hansford (After Remand)*, 454 Mich 320, 324; 562 NW2d 469 (1997), which did explicitly consider only the judicial sentencing guidelines. *Colon* did not.

769.34; *People v Martin*, 257 Mich App 457, 459; 668 NW2d 397 (2003). The legislative sentencing guidelines only apply to “felonies enumerated in part 2 of chapter XVII” of the Code of Criminal Procedure. *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). First-degree criminal sexual conduct, MCL 750.520b, is enumerated. MCL 777.16y.

The people point out, however, that defendant was sentenced under MCL 750.520f, which is not enumerated. However, that section does not specify an actual felony; rather, it specifies a mandatory minimum sentence for persons convicted “of a second or subsequent offense under section 520b, 520c, or 520d.” In other words, MCL 750.520f does not define a completely independent felony, but rather provides for a sentencing enhancement where a defendant has repeatedly committed certain *other* felonies. Furthermore, as the trial court did here, the sentencing enhancement provision in MCL 750.520f – imposing a mandatory minimum sentence – may be combined with the habitual offender sentencing provision in MCL 769.10 – which enhances both the minimum and the maximum sentences. *People v James*, 191 Mich App 480, 481-482; 479 NW2d 16 (1991). Neither statute constitutes a felony unto itself that would be amenable to enumeration. The actual offense defendant committed was first-degree criminal sexual conduct under MCL 750.520b; MCL 750.520f and MCL 769.10 are the provisions under which defendant was sentenced.

Pursuant to MCL 777.16y, first-degree criminal sexual conduct is enumerated as a Class A felony against a person with a statutory maximum sentence of life. The minimum sentence range for a Class A felony is determined according to MCL 777.62, although in this case that range would be modified by the mandatory minimum sentence of five years. MCL 750.520f. In addition, because defendant was sentenced as an habitual offender, second offense, the upper ranges set forth in MCL 777.62 would be increased by 25 percent. MCL 769.10; MCL 777.21(3)(a). Even with the 25 percent enhancement, the upper range of all but the F-VI cell in MCL 777.62 is less than 480 months, or 40 years. However, we have not been provided with a record sufficient to determine how defendant’s offense variable (OV) and prior record variables (PRV) were, or should have been, scored. At defendant’s sentencing hearing, trial counsel indicated that the guidelines would have recommended a minimum sentence range of 25 to 50 years, which is suggestive of placement in the F-VI cell. But we consider this an insufficient basis for ascertaining defendant’s guidelines range, so we cannot determine whether defendant’s sentence was within that range. If it was not, the trial court was required to articulate “substantial and compelling reasons” on the record for departing therefrom, *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), which the trial court did not do.

Presuming defendant’s minimum sentence range under the legislative sentencing guidelines would place the upper end at less than 40 years, then defendant has established prejudice and good cause because the trial court failed to apply the legislative sentencing guidelines, defendant’s appellate counsel failed to raise the issue on direct appeal, and defendant’s minimum sentence would have exceeded the guidelines range and the trial court failed to articulate substantial and compelling reasons for the departure. Alternatively, if the upper limit of defendant’s minimum sentence range is 40 years or more – as the record suggests but does not clearly establish – then defendant’s sentence is appropriate notwithstanding the trial court’s failure to apply the guidelines, defendant will have suffered no prejudice, and defendant’s appellate counsel would have engaged in futility by raising the issue previously. Because we lack a sufficient record to determine whether defendant’s sentence is *actually* outside the

guidelines range, we remand for the trial court to make that determination and, if so, resentence defendant accordingly.

The trial court's denial of defendant's motion for relief from judgment is vacated, and the matter is remanded for further consideration in accordance with this opinion, including, if appropriate, resentencing. We do not retain jurisdiction.

/s/ Alton T. Davis

/s/ Christopher M. Murray

/s/ Jane M. Beckering