

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Peter D. O'Connell, PJ, Joel P. Hoekstra and Kirsten Frank Kelly, JJ.

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

TYKEITH L. TURNER,

Defendant-Appellant.

Supreme Court No. 158068

Court of Appeals No. 336406

Circuit Court No. 95-10246-01

WAYNE COUNTY PROSECUTOR

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Defendant-Appellant's Reply Brief

Oral Argument Requested

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Reply

Tykeith Turner acknowledges receipt of Plaintiff-Appellee's Brief on Appeal and, in addition to the arguments presented in his Brief on Appeal, specifically replies as follows:

I. As a matter of due process, a legal misconception or inaccurate information concerning a defendant's sentence on one count renders the lesser concurrent sentences arising out of the same transaction invalid.

Mr. Turner's constitutional rights to be free from cruel and/or unusual punishment were violated when the original sentencing court sentenced him to life without the possibility for parole because Mr. Turner was a juvenile. The remedy for a constitutional violation should reflect the magnitude of the error and make a defendant whole again. *United States v Morrison*, 449 US 361, 364; 101 S Ct 665 (1981). Where the trial court's exercise of discretion in imposing Mr. Turner's sentence for assault was necessarily informed by the mandatory life without parole sentence, the remedy must include resentencing for assault.

A. That a sentence was considered to be valid when it was imposed does not foreclose resentencing when it is later revealed the sentence was imposed based on a misconception of law or inaccurate information.

The prosecution asserts repeatedly, without any support, that a mistake of fact or misconception of law only renders a sentence invalid if the mistake or misconception exists at the time of the original sentencing. E.g. Plaintiff-Appellee's Brief on Appeal, 10/10/2019 at 26, 27, 28. This reasoning fails to comport with the well-established concept of retroactivity, which recognizes that certain legal decisions must be applied to individuals whose convictions and sentences are final, even if those convictions and sentences were valid under the law as it was understood at the time. See, generally *Teague v Lane*, 489 US 288; 109 S Ct 1060 (1989). The prosecution's assertions that a sentence must be invalid when it was imposed to warrant resentencing would also preclude resentencing for the

murder conviction, under *Miller v Alabama*, 567 US 460; 132 S Ct 2455 (2012), because Mr. Turner's original mandatory life sentence was considered to be a legally valid sentence at the time it was imposed, despite *Miller* being retroactive. See *Montgomery v Louisiana*, __ US __; 136 S Ct 718 (2016).

Similarly, trial courts' reliance upon factual information that appears to be true at the time of the original sentencing (such as facts about a defendant's criminal record) may still require resentencing when it later becomes clear that the factual information is no longer accurate because of constitutional violations only recognized after the original sentencing. See *United States v Tucker*, 404 US 443, 447; 92 S Ct 589 (1972); see also *People v Moore*, 391 Mich 426, 436-437; 216 NW2d 770 (1974). In *Tucker*, the Court observed:

For we deal here, not with a sentence imposed in the informed discretion of a trial judge, but with a sentence founded at least in part upon misinformation of constitutional magnitude...The record in the present case makes evident that the sentencing judge gave specific consideration to the respondent's previous convictions before imposing sentence upon him. *Yet it is now clear* that two of those convictions were wholly unconstitutional under *Gideon*.

Id. (emphasis added). Like in *Tucker*, in this case, the original assault sentence was not imposed in the "informed discretion" of a trial judge. *Id.* Rather it was "a sentence founded at least in part upon misinformation of constitutional magnitude." *Id.* In the process of sentencing Mr. Turner for murder and assault,¹ the original sentencing judge gave specific and lengthy consideration to the mandatory life without parole sentence it was required to impose, even though that sentence was wholly unconstitutional under *Miller*.

¹ While the murder sentence was a concurrent conviction, the guidelines treat concurrent convictions as part of a defendant's "record" in the same manner as prior convictions are used as a basis to increase a defendant's guidelines range. E.g. MCL 777.57 (Prior Record Variable 7).

- B. Mr. Turner is entitled to resentencing for murder and assault because of a constitutional violation, not simply because the trial court failed to accurately predict when he might be considered for parole; authorities prohibiting resentencing in the latter situation do not apply in cases where the claimed error is a constitutional violation.**

The prosecution has attempted to frame Mr. Turner's arguments in this case as a matter of the original sentencing judge misapprehending or underestimating when Mr. Turner might become eligible for parole or be granted parole. See Plaintiff-Appellee's Brief on Appeal, 10/10/2019 at 27. If that were the case then, consistent with the well-established authorities of this Court and the Court of Appeals, Mr. Turner would not be entitled to resentencing for murder. See *People v Moore*, 468 Mich 573, 580-581; 664 NW2d 700 (2003). But this is not a situation like the one in *Moore*, where the original sentencing court "fail[ed] to accurately predict the actions of the Parole Board." *Id.* at 580. This is a situation where the original sentencing court was required to impose a sentence that would make it *legally impossible* for Mr. Turner to ever be eligible for parole at all. In other words, the court's error requiring resentencing was not underestimating when the Parole Board might grant Mr. Turner parole, rather it was the imposition of an unconstitutional sentence that foreclosed the possibility of parole altogether. This is the very same distinction the United States Supreme Court made in limiting its ruling in *Addonizio*, a case relied upon by the prosecution in its brief:

The claimed error here - that the judge was incorrect in his assumptions about the future course of parole proceedings—does not meet any of the established standards of collateral attack. *There is no claim of a constitutional violation...*

United States v Addonizio, 442 US 178, 186; 99 S Ct 2235 (1979) (emphasis added). Because the circumstances here involved a constitutional violation that made it legally impossible for

Mr. Turner to even be considered for parole, and because that legal impossibility was a certainty when the original sentencing court also sentenced Mr. Turner for assault, *Moore* is distinguishable and its reasoning inapplicable. See *Moore*, 468 Mich at 580-581 (expressing concern that, “[i]f a judge’s conclusion that the Parole Board’s later action renders the sentence subject to change, virtually any sentence could be revised at the whim of the sentencing judge”).

C. The prosecution overstates the significance of silence in MCL 769.25 and MCL 769.25a and also overstates the significance of this Court’s orders in other juvenile lifer cases; neither the statutory framework, nor this Court’s orders speak to the scope of resentencings pursuant to *Miller v Alabama*.

The prosecution repeatedly asserts that the plain language of MCL 769.25 and MCL 769.25a “mandate” that resentencings pursuant to *Miller*, are limited in scope so that juvenile lifers may only be resentenced for their murder convictions, even when they have lesser concurrent sentences arising from the same transaction. See Plaintiff-Appellee’s Brief on Appeal, 10/10/2019 at 11-14. The prosecution asserts that the statutory scheme “by its terms” limits a resentencing to “solely” or “only” a defendant’s murder conviction. See *Id.* at 12, 13. However, no such language actually appears in MCL 769.25 or MCL 769.25a.

Further, the prosecution asserts that MCL 769.25(2) provides a list of offenses and that if a sentence is not for one of those offenses, “then MCL 769.25a does not convey the authority to resentence.” *Id.* at 13. However, this subsection is clearly intended to *limit* the kinds of cases in which “the prosecuting attorney may file a motion under this section...” MCL 769.25(2). To the extent this section includes limiting language, it is specifically, by its plain terms, intended to limit the kinds of cases in which prosecutors may seek life without the

possibility of parole for juveniles, and not to limit the relief to which those juveniles would be entitled.

If anything, MCL 769.25 and MCL 769.25a are silent as to the scope of a resentencing pursuant to *Miller*. The statutes, by their plain terms, do not refer to lesser concurrent sentences at all. That silence should not be interpreted as a limitation. *People v Gardner*, 482 Mich 41, 58-59; 753 NW2d 78 (1999) (“[S]ound principles of statutory construction require that Michigan courts determine the Legislature’s intent from its *words*, not from its silence.”) (emphasis in original) (citations and quotations omitted). Rather, as the prosecution recognizes, Plaintiff-Appellee’s Brief on Appeal, 10/10/2019 at 11, the general rule in Michigan is that a resentencing is a full resentencing in the absence of some express limitation. If anything, this Court should presume the legislature was familiar with that aspect of Michigan’s sentencing law when it opted not to include language in MCL 769.25 and MCL 769.25a expressly limiting the scope of the resentencing. *People v Cash*, 419 Mich 230, 241; 351 NW2d 822 (1984) (“[A] general rule of statutory construction is that the Legislature is ‘presumed to know of and legislate in harmony with existing laws.’”) (citations and quotations omitted). This Court should reject the prosecution’s efforts to read limiting language into the statutes. *People v Lowe*, 484 Mich 718, 722; 773 NW2d 1 (2009) (“The statute’s words are the most reliable indicator of the Legislature’s intent...Once the Court discerns the Legislature’s intent, no further judicial construction is required or permitted...”) (citations omitted).

While the prosecution asserts the only authority providing the circuit court with the power to hold a resentencing hearing is MCL 769.25a, see Plaintiff-Appellee’s Brief on Appeal, 10/10/2019 at 11, this is not the case. The prosecution’s position is that if Michigan’s

legislature had not enacted MCL 769.25 and MCL 769.25a, trial courts would not have the authority to resentence juvenile lifers, notwithstanding their unconstitutional life without parole sentences. That is not the case. Courts routinely award relief to remedy constitutional violations in many situations where there is no statutory scheme establishing a procedure for that relief. E.g. *People v Moore*, 391 Mich 426; 216 NW2d 770 (1974) (remanding for resentencing on the basis of a constitutional violation in the absence of a statutory scheme authorizing resentencing). The resentencing court had the authority to resentence Mr. Turner pursuant to *Montgomery*, 136 S Ct 718, which held that *Miller* applied retroactively to Mr. Turner's case. While our legislature enacted a statutory scheme establishing procedures for how those resentencings should go and additional procedural obligations for prosecutors like those contained in MCL 769.25(2), it did not purport to and could not have constitutionally limited the relief to which Mr. Turner and other juvenile lifers would be entitled. See US Const, art VI, cl 2. The United States Supreme Court's decisions in *Miller* and *Montgomery* established a constitutional floor. As such, no remedial statute enacted by our legislature can properly afford defendants a lesser remedy than is required by the constitutional violation. *Id.*

Plaintiff-Appellee also overstates the significance of this Court's orders remanding some juvenile lifer cases for resentencing pursuant to *Miller*, asserting they represent a "mandate limiting the resentencing court....to conduct a resentencing hearing solely on the vacated First-Degree Murder sentence." Plaintiff-Appellee's Brief on Appeal, 10/10/2019 at 13-14. However, this Court's orders only constitute binding precedent when they include an understandable rationale. *People v Crall*, 444 Mich 463, 464 FN 8; 510 NW2d 182 (1993); *People v Giovanni*, 271 Mich App 409; 722 NW2d 237 (2006). The orders referenced by the

prosecution in its brief do not include any statement of the facts or reason for the decision, nor do they make any reference at all to concurrent sentences. E.g. *People v Wines*, 499 Mich 908; 878 NW2d 285 (2016). As a result, they cannot be said to “affirm” or “mandate” anything with respect to the questions the Court has posed in this case.

D. The Prosecution acknowledges that in general a resentencing includes all concurrent counts; this general rule follows from sentencing practice in Michigan.

In its brief, the prosecution properly acknowledges that, “Generally, when resentencing is authorized, a full resentencing is permitted allowing the resentencing court to address all the sentences imposed on the defendant in that case.” Plaintiff-Appellee’s Brief on Appeal, 10/10/2019 at 11. In other words, most sentences in Michigan are imposed as a package and an error in one part of a sentencing package requires resentencing on all parts of the package. As discussed at length in Defendant-Appellant’s Brief on Appeal, the notion that sentences in Michigan are imposed as a package follows from:

- Concurrent sentencing is the norm in Michigan, *People v Morris*, 450 Mich 316, 326; 537 NW2d 842 (1995);
- The longest concurrent sentence is the sole basis for determining when a defendant will become eligible for parole, *Lickfeldt v Dep’t of Corrections*, 247 Mich App 299, 304; 636 NW2d 272 (2001);
- The longest concurrent sentence is the sole basis for determining when a defendant will be entitled to discharge from a sentence, *Id.*;
- Plea bargaining tends to result in a “package deal,” *People v Blanton*, 317 Mich App 107, 125; 894 NW2d 613 (2016);
- In cases involving multiple convictions, only one presentence report is prepared, MCL 771.14;
- In multiple ways, the guidelines require higher scores (and higher sentencing ranges) where defendants have multiple convictions arising from the same transaction; e.g. MCL 777.57 (Prior Record Variable 7);

- In cases involving multiple concurrent convictions, the presentence report need only include the guidelines for the highest class offense and the court need only consider those guidelines when imposing all other sentences, *People v Mack*, 265 Mich App 122; 695 NW2d 342 (2005); MCL 771.14(2)(e)(iii); and
- The Court of Appeals routinely declines to review defendant's lesser concurrent sentences, especially where the defendant is also serving a sentence of life without parole, because the significance of the lesser sentences is "effectively nullifie[d]" by the longer sentence, E.g. *People v Watkins*, 209 Mich App 1, 5; 530 NW2d 111 (1995).

The prosecution repeatedly asserts that Mr. Turner's arguments related to Michigan's practice of imposing concurrent sentences as a package rely "extensively" or "entirely" on federal law. See Plaintiff-Appellee's Brief on Appeal, 10/10/2019 at 17, 18. As the above list demonstrates, Mr. Turner's arguments are based on Michigan's sentencing scheme as laid out in Michigan's statutes and as interpreted by Michigan's appellate courts. Mr. Turner's references to the practices of other jurisdictions are all contained in a section of his brief titled, "Other jurisdictions treat sentences as a package and have required resentencing on all counts post-*Miller*." Defendant-Appellant's Brief on Appeal, 8/9/2019 at 23. As suggested by the section heading, Mr. Turner provided this Court an overview of the practices of some other jurisdictions to show that Michigan is not an outlier when it comes to treating concurrent sentences as a package.

E. Michigan's Court Rules do not and cannot limit the relief to which defendants are constitutionally entitled.

In its brief, the prosecution asserts that MCR 6.429 precludes Mr. Turner from being resentenced for assault. See Plaintiff-Appellee's Brief on Appeal, 10/10/2019 at 24. For the reasons explained in Mr. Turner's Brief on Appeal, MCR 6.429 does not preclude relief. See Defendant-Appellant's Brief on Appeal, 8/9/2019 at 15, 26.

In the alternative, this Court should alter MCR 6.429(C) to explicitly give sentencing courts the authority to resentence on all counts where resentencing has been granted

pursuant to MCL 769.25a in order to effectuate justice, as it did in *People v Kimble*, 470 Mich 305, 314 FN 7; 684 NW2d 669 (2004) (altering MCR 6.429(C) to comport with the increased opportunities to preserve scoring errors provided in MCL 769.34(10)). The court rules are meant to effectuate justice, including securing a criminal defendant's constitutional rights; if following the letter of the court rules fails to do that despite this Court's good intentions, then the court rules must yield and change. *People v Cole*, 491 Mich 325, 331-332; 817 NW2d 497 (2012) (the defendant's plea was not constitutionally valid where the court failed to inform the defendant that he would be subject to lifetime electronic monitoring (LEM) though the court rule did not specifically require it); MCR 6.302, Staff Comment to 2012 amendment that added the LEM warning to comport with *Cole*.

II. Even if this Court finds resentencing on the other counts is only appropriate via MCR 6.500, *et seq*, the trial court did not abuse its discretion in granting Mr. Turner's motion for relief from judgment as he satisfied those requirements.

Mr. Turner established his entitlement to resentencing for his assault conviction, even under the heightened review standards of MCR 6.500, *et seq*. The trial court properly found Mr. Turner established good cause and prejudice and the prosecution waived any alleged procedural defects related to the successive motion bar by agreeing to proceed with an expedited briefing schedule and by declining to raise any objections in the trial court.

The prosecution did not assert that Mr. Turner was precluded from seeking relief under MCR 6.500, *et seq*, until it filed its brief in the Court of Appeals. In the trial court, the prosecution agreed to a procedure and briefing schedule lesser than provided for in MCR 6.504 and MCR 6.506, and did not make any reference to MCR 6.502(G)(2) or a "successive motion" anywhere in its responsive pleading. Nor did the prosecution make any arguments about the successive motion bar at the motion hearing in the trial court. In its recently filed

