

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

TYRONE DORSEY,

Defendant-Appellant.

UNPUBLISHED

March 15, 2011

No. 294872

Wayne Circuit Court

LC No. 05-011715-FC

Before: K. F. KELLY, P.J., and BORRELLO and RONAYNE KRAUSE, JJ.

PER CURIAM.

The People of the State of Michigan appeal as of right an order granting defendant's motion for post-conviction relief pursuant to MCR 6.508. We affirm.

In 2005, defendant was charged with two counts of assault with intent to commit murder, MCL 750.83, two counts of felonious assault, MCL 750.82, and one count each of first-degree home invasion, MCL 750.110a(2), aggravated stalking, MCL 750.411i, felon in possession of a firearm, MCL 750.224f, and felony-firearm, MCL 750.227b. The trial court dismissed the felonious assault charges. A jury found defendant not guilty of assault with intent to commit murder, home invasion, felon in possession, or felony-firearm; it found defendant guilty as charged of aggravated stalking. Defendant's status as a habitual offender, fourth offense, MCL 769.12, his sentencing guidelines range was calculated to be ten to 46 months' imprisonment. The trial court departed upwards and imposed a sentence of fifteen to thirty years' imprisonment. Defendant's convictions were affirmed in a prior appeal that inexplicably did not raise any sentencing issues. *People v Dorsey*, unpublished opinion per curiam of the Michigan Court of Appeals, issued October 25, 2007 (Docket No. 273181).

In 2009, defendant moved for relief from judgment and sought resentencing. The trial court granted the motion, resentencing defendant to 46 to 180 months' imprisonment. The prosecutor now appeals. We review a trial court's grant of relief from judgment pursuant to MCR 5.608 for an abuse of discretion, although the court's factual findings are reviewed for clear error. *People v McSwain*, 259 Mich App 654, 681; 676 NW2d 236 (2003). An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 274; 666 NW2d 231 (2003). The interpretation of a court rule is a question of law that is reviewed de novo. *People v Hawkins*, 468 Mich 488, 497; 668 NW2d 608 (2003).

The prosecution first argues that the trial court erroneously failed to order the prosecution to respond to defendant's motion, in violation of MCR 6.504(B)(4). MCR 6.504(B)(4) provides that if a defendant's motion for post-conviction relief "is not dismissed under subrule (B)(2) [summary dismissal], the court shall order the prosecuting attorney to file a response as provided in MCR 6.506, and shall conduct further proceedings as provided in MCR 6.505-6.508." However, the prosecution has made it clear that it is not interested in this Court ordering any actual relief on this issue. Because the Court Rule does not provide a sanction a failure to order a response by the prosecution, and because the prosecution actually appeared before the trial court and argued its position, we are in any event unable to imagine what relief would accomplish anything other than a waste of judicial resources. We therefore decline to consider the prosecution's implied request for an advisory opinion as to the significance of MCR 6.504(B)(4) in this context.

The prosecution also argues that the trial court abused its discretion by granting defendant's motion for post-judgment relief. We disagree.

Defendant is first required to establish entitlement to relief. MCR 6.508(D). Because of defendant's prior appeal, which did not raise any sentencing issue, defendant was required to show "good cause for failure to raise such grounds on appeal" and actual prejudice as a result, meaning "the sentence is invalid." MCR 6.508(D)(3). Ineffective assistance of counsel may constitute good cause. *People v Reed*, 449 Mich 375, 378-379; 535 NW2d 496 (1995). While appellate counsel is not obligated to raise all arguable or colorable claims and should not be evaluated in hindsight, *id.* at 382, we cannot comprehend any sound tactical reason for prior appellate counsel's failure to raise a sentencing claim, particularly in light of the extent of the upward departure from the guidelines and the fact that trial counsel preserved an objection to the sentence. We cannot find any support for plaintiff's assertion that there can be no ineffective assistance of appellate counsel in the absence of ineffective assistance of trial counsel.

We also observe that this Court has *not* previously "found defendant's initial sentence to be valid," because the validity of defendant's initial sentence was not raised in the prior appeal. As discussed, the trial court imposed a sentence that was dramatically higher than the guidelines range: 15 to 30 *years*' imprisonment instead of 10 to 23 *months*' imprisonment. Unless this sentence was supported by an articulation on the record of objective and verifiable facts justifying the departure, MCL 769.34(3), defendant's sentence would have been invalid and he would have been prejudiced by appellate counsel's failure to raise the issue.

The trial court may impose a sentence that departs from the sentencing guidelines range if it articulates on the record substantial and compelling reasons for doing so. *Babcock*, 469 Mich at 256-257. These reasons must be unusually noteworthy and should exist only in exceptional situations. *Id.* at 257-258. Those reasons must be capable of independent confirmation and exist outside the minds of those involved in the decision, and they must not already be matters adequately taken into account by offense or offender characteristics already considered under the guidelines. *People v Horn*, 279 Mich App 31, 43 n 6; 755 NW2d 212 (2008). Finally, those reasons must not merely justify *some* departure, they must justify the *particular* departure. *Babcock*, 469 Mich at 256-261.

It appears that the trial court articulated four reasons for the enhanced sentence here: defendant's status as a fourth-offense habitual offender, the fact that defendant was on probation for stalking a different victim, that there existed a need to protect women from defendant, and the jury's conclusion that defendant lied under oath. The first two are certainly objective and verifiable. But we are particularly concerned with the latter. A sentencing court may properly take into account evidence in the record that provides a rational basis for concluding that a defendant committed perjury and that his perjury has implications for his rehabilitation prospects. *People v Adams*, 430 Mich 679, 693; 425 NW2d 437 (1988). However, there is no such evidence here. The trial court apparently concluded that the jury's verdict necessarily entailed a finding that defendant lied. However, *at the most*, the jury did not find defendant to be the most credible witness, from which we feel it is inappropriate to extrapolate a finding of perjury. And in fact, the jury acquitted defendant of the most serious of his charges, so the more likely conclusion is that the jury *did* find defendant credible in significant part.

We need not consider the other justifications articulated by the trial court. The trial court erred in finding that defendant committed perjury and therefore erred in concluding that his perjury constituted a substantial and compelling basis for departing from the sentencing guidelines. The trial court did not articulate that it would have departed to the same extent absent its finding of perjury, and indeed, it did not explain why its particular sentence was justified. Therefore, defendant's initial sentence was invalid, and defendant has established entitlement to relief from judgment. *McSwain*, 259 Mich App at 681. The trial court did not abuse its discretion by granting it.

We finally note that plaintiff may appeal by right defendant's new sentence. *People v Martinez*, 193 Mich App 377, 380-381; 485 NW2d 124 (1992). The prosecution has not, however, presented any argument that defendant's new sentence is itself invalid. Because plaintiff does not argue that the new sentence was invalid, and because defendant has not cross-appealed, we deem the validity of defendant's new sentence abandoned.

Affirmed.

/s/ Kristen Frank Kelly
/s/ Stephen L. Borrello
/s/ Amy Ronayne Krause