

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OSSIE C. LEWIS,

Defendant-Appellant.

UNPUBLISHED

December 16, 2021

No. 354626

Berrien Circuit Court

LC No. 2011-003265-FH

Before: GADOLA, P.J., and SWARTZLE and CAMERON, JJ.

PER CURIAM.

In 2011, defendant pleaded guilty to one count each of possession of heroin with intent to deliver, second offense, MCL 333.7401(2)(a)(iv); resisting and obstructing a police officer, MCL 750.81d(1); and fourth-degree fleeing and eluding, MCL 257.602a(2). The trial court sentenced defendant to imprisonment of 76 to 900 months for his possession-of-heroin-with-intent-to-deliver conviction and 46 to 180 months each for his resisting-and-obstructing-a-police-officer and fleeing-and-eluding convictions. The trial court ordered that all three of those sentences be served consecutively. Defendant did not file a direct appeal, but he did file a motion for relief from judgment in 2019 seeking resentencing. The trial court denied defendant’s motion, and he now appeals by delayed leave granted.¹ We vacate defendant’s sentences, reverse the trial court’s order denying defendant’s motion for relief from judgment, and remand for proceedings consistent with this opinion.

I. BACKGROUND

This case stems from a traffic stop of a vehicle that defendant was driving. When defendant was asked by a police officer to step out of the car, defendant instead drove away. Defendant threw heroin out of his car window as he was driving with multiple police officers in pursuit. Not long after the chase began, police officers were able to pull over defendant’s vehicle again. When

¹ *People v Lewis*, unpublished order of the Court of Appeals, entered November 4, 2020 (Docket No. 354626).

defendant exited his vehicle, he laid face down on the ground with his arms under his body and did not comply with the police officers' orders to put his hands behind his back. Defendant was then stunned with a Taser and taken into custody.

Defendant pleaded guilty to possession of heroin with intent to deliver, resisting and obstructing a police officer, and fleeing and eluding. At sentencing, defense counsel argued that the trial court should not impose consecutive sentences because defendant's history and actions did not warrant such a lengthy stay in prison.² The trial court disagreed and stated that it was imposing consecutive sentences because of defendant's "abysmal" criminal record and his apparent failure to "learn[] from any of the opportunities that were provided for you." The trial court then continued, stating that "based upon everything I've heard, everything that's been said here, review of the PSI; I do think in this particular case you've earned those consecutive sentences." The trial court concluded that it had statutory authority to impose these consecutive sentences under MCL 333.7401(3); it did not provide any further explanation for imposing consecutive sentences. Defendant's trial counsel did not further object to the imposition of the consecutive sentences, even though the prosecutor had earlier pointed out that MCL 333.7401(3) only permitted the trial court to make the drug-offense sentence consecutive, not the others. Appellate counsel was appointed for defendant, but no appeal was filed in this matter.

Defendant moved for relief from judgment in May 2019, seeking to have his sentences vacated and to be resentenced. The impetus for this motion appears to be that defendant was granted parole in 2017 on the basis of an incorrect interpretation of his judgment of sentence by the department of corrections in which the department treated defendant's sentences as being concurrent with each other. But before defendant was released, the department realized that defendant's sentences were ordered to be served consecutively and changed his earliest release date to October 2025.

In his motion for relief from judgment, defendant argued that his sentences were invalid because the trial court did not provide a separate justification for the imposition of each consecutive sentence, and his trial and appellate counsel were ineffective for failing to identify the error. The trial court denied defendant's motion for relief from judgment. When denying the motion, the trial court noted that it had the statutory authority to impose a consecutive sentence for defendant's resisting-and-obstructing-a-police-officer conviction under MCL 750.81d(6). But, the trial court did not originally cite this authority at sentencing.

This appeal followed.

² When he committed these three crimes, defendant was on parole. Under MCL 768.7a, any sentence for these crimes had to run consecutive to his parole-based sentence. Defendant does not take issue with this aspect of his sentences.

II. ANALYSIS

A trial court's decision regarding a motion for relief from judgment is reviewed for an abuse of discretion. *People v Swain*, 288 Mich App 609, 628; 794 NW2d 92 (2010). Findings of fact related to the motion for relief from judgment are reviewed for clear error. *Id.*

A motion for relief from judgment requires a defendant to establish “good cause” for failing to raise the issue on appeal or in a prior motion as well as a showing of “actual prejudice.” MCR 6.508(D)(3)(a) and (b). “‘Good cause’ can be established by proving ineffective assistance of counsel.” *People v Kimble*, 470 Mich 305, 314; 684 NW2d 669 (2004). Additionally, the “actual prejudice” requirement can be met by establishing that defendant was subject to an invalid sentence. MCR 6.508(D)(3)(b)(iv). “Generally, a sentence is invalid where . . . it is based on a misconception of the law.” *People v Thomas*, 223 Mich App 9, 11; 566 NW2d 13 (1997).

Defendant argues that he had good cause for failing to challenge his sentences because his trial and appellate counsel were ineffective. He then argues that his sentences were invalid because the trial court failed to justify the consecutive feature of his sentences. We address each issue in turn, starting with whether defendant had good cause to raise this issue in a motion for relief from judgment based on ineffective assistance of counsel.

A. GOOD CAUSE

Regardless of whether a claim of ineffective assistance is properly preserved, if the trial court did not hold a *Ginther*³ hearing, “our review is limited to the facts on the record.” *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). “A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court’s findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo.” *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882 (2008).

To establish a claim of ineffective assistance of counsel, defendant must show that: (1) defense counsel’s performance was deficient; and (2) the deficient performance prejudiced the defense. *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). Defense counsel’s performance is deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). Defendant bears a heavy burden to show that counsel made errors so serious that counsel was not performing as guaranteed by the Sixth Amendment, and defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). The performance will be deemed to have prejudiced the defense if it is reasonably probable that, but for counsel’s error, the result of

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). No *Ginther* hearing was held in this case.

the proceeding would have been different. *Jordan*, 275 Mich App at 667. The “reasonable probability” standard can be satisfied by less than a preponderance of the evidence. *People v Trakhtenberg*, 493 Mich 38, 56; 826 NW2d 136 (2012).

Defendant argues that his trial counsel was ineffective for failing to raise adequate challenges to the trial court’s sentencing decision. Defendant pleaded guilty to one count each of possession of heroin with intent to deliver, second offense, MCL 333.7401(2)(a)(iv); resisting and obstructing a police officer, MCL 750.81d(1); and fourth-degree fleeing and eluding, MCL 257.602a(2). MCL 257.602a does not authorize or otherwise address consecutive sentences. Thus, for a sentence to be consecutive to a fleeing-and-eluding conviction, the fleeing-and-eluding conviction must be defendant’s first sentence served because it cannot run consecutively to another sentence. See *People v Lee*, 233 Mich App 403, 405; 592 NW2d 779 (1999). The trial court did not order defendant’s fleeing-and-eluding sentence to be served first; rather, it ordered each sentence “to run consecutively to the other” without identifying the order of defendant’s sentences.

With respect to the other two convictions, both possession of heroin with intent to deliver and resisting and obstructing a police officer authorize the trial court to impose consecutive sentences as long as specific requirements about defendant’s other convictions are met. See MCL 705.81d(6); MCL 333.7401(3). Those requirements were met in this case and, therefore, the trial court had statutory authority to order defendant’s possession-of-heroin-with-intent-to-deliver and resisting-and-obstructing-a-police-officer sentences to be consecutive. At sentencing, however, the trial court specified only MCL 333.7401(3) as authority for it to impose consecutive sentences here. MCL 333.7401(3) authorized the trial court to have defendant’s possession-of-heroin-with-intent-to-deliver sentence be served consecutive to one of defendant’s other sentences, but it did not authorize the trial court to impose any other consecutive sentences.

With respect to the adequacy of the trial court’s explanation for imposing three consecutive sentences, we note that defendant was sentenced in 2011, before this Court’s decision in *People v Norfleet*, 317 Mich App 649, 665; 897 NW2d 195 (2016). The prosecutor argues that *Norfleet* does not apply because it was decided after defendant’s sentencing. We need not decide that question because the trial court failed to provide sufficient justification based on the law at the time of defendant’s sentencing.

Before *Norfleet*, “concurrent sentencing [was] the norm” in Michigan, as it remains today. *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). Indeed, “[t]he imposition of a consecutive sentence is strong medicine” that “should be used only after awareness of a sentence already imposed so that the punitive effect of the consecutive sentence is carefully considered at the time of its imposition.” *People v Chambers*, 430 Mich 217, 231; 421 NW2d 903 (1988) (cleaned up). For this Court to determine whether a trial court abused its discretion at sentencing, “the trial court must, at the time of sentencing, articulate on the record its reasons for imposing the sentence given.” *People v Broden*, 428 Mich 343, 350-351; 408 NW2d 789 (1987). Additionally, at the time of sentencing in this case, the rule was that “[c]onsecutive sentences may be imposed only when specifically authorized by statute.” *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324 (2006).

The trial court imposed consecutive sentences because of defendant’s criminal history. Defendant has an extensive criminal record that very well could justify consecutive sentences. But

the trial court did not provide sufficient explanation for a single consecutive sentence, let alone multiple consecutive sentences. Such a departure from the norm of concurrent sentences required a more thorough explanation from the trial court, even based on the law at the time of defendant's sentencing.

The trial court, therefore, made three errors when it sentenced defendant. First, the trial court failed to order defendant to serve his fleeing-and-eluding sentence first to permit other sentences to be consecutively stacked on that one. Second, the trial court failed to identify the proper statutory authority that permitted resisting and obstructing a police officer to be a consecutive sentence. And, third, the trial court failed to provide a sufficient explanation of why it imposed consecutive sentences instead of concurrent sentences. There is no strategic rationale for not objecting on the basis of those three errors. While trial counsel did argue at sentencing that the trial court should not impose consecutive sentences, trial counsel did so on the basis that defendant's history and actions here did not warrant such a lengthy stay in prison. Trial counsel did not object when the trial court failed to identify the proper legal authority for the consecutive sentences or to provide a sufficient explanation for why three consecutive sentences were warranted here. Accordingly, we conclude that trial counsel's performance was deficient.

Moving to the prejudice prong, defendant was clearly prejudiced by the trial court not specifying that his fleeing-and-eluding sentence had to be served first. Without that specification, the trial court could not stack any of the other sentences on the fleeing-and-eluding one. The trial court's failure to identify the statutory authority for it to impose a consecutive sentence for defendant's resisting-and-obstructing-a-police-officer conviction also prejudiced defendant because, without that statutory basis, this sentence could not be served consecutively. And, with respect to the third error, defendant was prejudiced because an appellate court would have been left without an adequate record to review the appropriateness of his sentences. Thus, the failure of defendant's trial counsel to challenge his consecutive sentences prejudiced defendant and established that trial counsel was ineffective. Because we have concluded that defendant's trial counsel was ineffective, we need not consider whether defendant's appellate counsel was also ineffective; trial counsel's actions alone were sufficient to establish good cause for defendant's motion for relief from judgment.

B. ACTUAL PREJUDICE

The "actual prejudice" requirement can be fulfilled by an invalid sentence. MCR 6.508(D)(3)(b)(iv). "Generally, a sentence is invalid where . . . it is based on a misconception of the law." *Thomas*, 223 Mich App at 11.

As discussed already, the trial court failed to provide sufficient justification for its sentencing decision. The trial court did not identify sufficient legal authority for it to impose consecutive sentences in the manner that it did here. Moreover, because consecutive sentencing is such "strong medicine," a fuller explanation of why consecutive sentences were appropriate here was needed under then-existing case law. The errors were based on a misconception of the law and, therefore, made defendant's sentences invalid.

When considering defendant's motion for reconsideration, the trial court determined that it was statutorily permitted to impose consecutive sentences and that it provided an adequate

explanation for doing so. It also concluded that defendant's trial counsel was effective because any objection or appeal would have been futile. Both conclusions were in error. Thus, the trial court abused its discretion by denying defendant's motion for relief from judgment.

III. CONCLUSION

We reverse the trial court's order denying defendant's motion for relief from judgment, vacate his sentences, and remand for resentencing. We do not retain jurisdiction.

/s/ Michael F. Gadola
/s/ Brock A. Swartzle
/s/ Thomas C. Cameron