

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 19, 2011

v

ALAN DALE PETERSON,
Defendant-Appellant.

No. 297829
Iron Circuit Court
LC No. 94-007762-FH

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

Defendant pleaded guilty to a probation violation. He was sentenced to a term of 12 months in jail. This Court granted defendant's delayed application for leave to appeal. We vacate the order imposing a two-year term of probation.

Defendant pleaded no contest to a charge of embezzlement over \$100, MCL 750.174. He was sentenced to five years' probation. He subsequently pleaded guilty to violating his probation based on a failure to report and a failure to make restitution payments. The trial court sentenced defendant to 12 months in jail. Nothing was said about probation at the sentencing hearing. However, the trial court granted a probation officer's petition to amend the probation order to read that defendant had been sentenced to two years' probation with the first twelve months in jail.

On appeal, defendant argues that because the 12-month jail sentence for the probation violation was a valid sentence, the trial court was without authority to enter the subsequent order providing for a two-year term of probation. We agree.

Although defendant did not preserve the issue below, we consider it because it is a question of law and the facts necessary for its resolution have been presented. *People v Houston*, 237 Mich App 707, 712; 604 NW2d 706 (1999). We review de novo questions of law. *Id.*

In *People v Dotson*, 112 Mich App 589; 316 NW2d 268 (1982), rev'd 417 Mich 940 (1983), on the defendant's motion, the trial court announced that it was resentencing the defendant to a term of 10 to 20 years in prison. *Id.* at 590-591. However, the trial court called the parties back the next day and announced that it had misspoken and that its intent was to impose a sentence of 20 to 40 years. *Id.* at 591. This Court held that the trial court could "correct a mistake, honestly made, in pronouncing sentence." *Id.* The Supreme Court reversed,

stating that “[t]he trial court was without authority to set aside a valid sentence after the defendant had been remanded to jail to await the execution of the sentence.” *People v Dotson*, 417 Mich 940; 331 NW2d 477 (1983). See also *In re Jenkins*, 438 Mich 364, 368; 475 NW2d 279 (1991) (“[O]nce the defendant begins serving the original sentence, even one day of it, the authority over the defendant passes out of the trial court’s hands by its own order.”); *People v Wybrecht*, 222 Mich App 160, 174; 564 NW2d 903 (1997).

In *People v Thomas*, 447 Mich 390, 391-392; 523 NW2d 215 (1994), the sentencing court increased the defendant’s sentence to 60 to 90 years after determining that the defendant’s initial sentence of 60 to 75 years violated the two-thirds rule of *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). Although the Court assumed that the initial error was inadvertent, the Court cited *Dotson* for the proposition “that an inadvertently stated sentence cannot be set aside merely on the ground that the court misspoke.” *Id.* at 393.¹

In *People v Barfield*, 411 Mich 700, 701; 311 NW 2d 724 (1981), the defendant was sentenced to the Detroit House of Correction for one year for a probation violation; there was no “record evidence” of an intent to make the sentence a condition of probation or to otherwise “continue the probation at the time of the jail sentence.” Two months later, the court entered an order continuing the probation. *Id.* The defendant’s probation was subsequently revoked and he was sentenced to prison. *Id.* at 702. The Supreme Court held that this sentence had to be vacated, stating that “[o]nce the original and valid sentence of one year in the Detroit House of Correction was imposed the court did not have the power to release the defendant, nor could the court order that the defendant be continued on probation at a later date.” *Id.*

In the present case, the trial court did not sentence defendant to probation at the resentencing hearing. It imposed a valid sentence of twelve months in jail. Moreover, it appears that defendant was returned to jail immediately following this sentence. Pursuant to *Barfield*, the trial court could not subsequently continue defendant on probation following sentencing. Accordingly, we vacate the order for amendment of order of probation that imposed a two-year term of probation.²

Vacated.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly

¹ The Court remanded the case “for imposition of a 50-year minimum term of imprisonment and a 75-year maximum term of imprisonment.” *Thomas*, 447 Mich at 394.

² Given our disposition of this issue, we need not address defendant’s remaining arguments.