

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 14, 2011

v

KENNETH EDWARD MAXEY,
Defendant-Appellant.

No. 296542
Wayne Circuit Court
LC No. 07-005862-FC

Before: DONOFRIO, P.J., AND CAVANAGH AND STEPHENS, JJ.

PER CURIAM.

Defendant pleaded guilty to unarmed robbery, MCL 750.530, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was initially sentenced to 1½ to 15 years' imprisonment for the unarmed robbery conviction, and three years' probation under the Holmes Youthful Trainee Act (HYTA), MCL 762.16, for the felony-firearm conviction. During the probationary period, defendant was convicted of other felonies, constituting a probation violation that caused his HYTA status to be revoked. Defendant was then sentenced to two years' imprisonment for felony-firearm, consecutive to his sentences for the other crimes. Defendant now appeals by leave granted. We affirm in part and remand in part.

Defendant argues that the trial court erred in imposing the felony-firearm sentence consecutive to the sentences for his new crimes, and in denying him credit for time served. "Whether the trial court properly imposed consecutive sentences is a question of law, which we review de novo." *People v Wyrick*, 265 Mich App 483, 486; 695 NW2d 555 (2005), vacated in part by 474 Mich 947 (2005). "We review de novo a defendant's claim that he is entitled to sentence credit." *People v Patton*, 285 Mich App 229, 238; 775 NW2d 610 (2009).

Defendant was initially sentenced to probation under the HYTA. The HYTA "allows probation of a youth who 'pleads guilty to a charge of a criminal offense, other than a felony for which the maximum punishment is life imprisonment . . . committed on or after the individual's seventeenth birthday but before his or her twenty-first birthday.'" *People v Bobek*, 217 Mich App 524, 529; 553 NW2d 18 (1996) (quoting MCL 762.11). However, the trial court "may at its discretion revoke such status at any time prior to the youth's final release." *People v Cochran*, 155 Mich App 191, 193; 399 NW2d 44 (1986); MCL 762.12.

In Michigan, “concurrent sentencing is the norm.” *People v Alvarado*, 192 Mich App 718, 721; 481 NW2d 822 (1992). “A consecutive sentence may be imposed only if specifically authorized by statute.” *People v Lee*, 233 Mich App 403 405; 592 NW2d 779 (1999). The felony-firearm statute specifically provides that “a term of imprisonment . . . shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony.” MCL 750.227b.

While MCL 750.227b provides for consecutive sentencing for a felony-firearm conviction, it only authorizes consecutive sentencing to any term of imprisonment imposed for the underlying felony. “No language in [MCL 750.227b] permits consecutive sentencing with convictions other than the predicate offense.” *People v Clark*, 463 Mich 459, 464; 619 NW2d 538 (2000). Defendant’s predicate offense for felony-firearm was the unarmed robbery, not the more recent offenses.

In this case, there is no applicable statute authorizing the trial court’s imposition of consecutive sentencing. The trial court only had authority to impose a felony-firearm sentence consecutively to the predicate felony, not consecutively to sentences from subsequent, unrelated felonies. Both defendant and the prosecution agree that the court misinterpreted its sentencing authority under the felony-firearm statute. The prosecution admits that there is no statute under which defendant’s felony-firearm sentence could be served consecutively to the sentences imposed for his new offenses. Absent specific statutory authorization, defendant’s felony-firearm sentence should be served concurrently with the sentences imposed for his most recent convictions.

Defendant also claims that he should be given credit for time served. He claims that it was error to not be awarded credit for time served on the unarmed robbery offense under MCL 769.11b, which provides that where any person who “has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense of which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.” MCL 769.11b does not apply in this case, however, because defendant’s previous time was served not because he was unable to furnish bond, but because he was held for a parole violation. According to the presentence investigation report, defendant was on parole from May 8, 2008, to November 8, 2009. He committed the subsequent felonies on April 18, 2009, and was sentenced on September 21, 2009, all while he was on parole.

Defendant also cites MCL 791.238 in support of his view that he is eligible for credit. MCL 791.238(2) states:

A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner and is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment. The time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served.

The Supreme Court, in *People v Idziak*, 484 Mich 549; 773 NW2d 616 (2009), interpreted that statute. In *Idziak*, like in the present case, a parolee committed other felonies and then was held on a parole violation. The Court ruled, “the jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole.” *Id.* at 562. The Court concluded that the defendant “resumed serving his original maximum sentences when he was arrested in connection with the new criminal offense.” *Id.* at 588. In this case, defendant’s time served counts towards his maximum sentence for unarmed robbery, not towards the felony-firearm sentence. Because there is still a portion of defendant’s maximum sentence of 15 years for the unarmed robbery that he has yet to serve, he is not eligible for credit towards any other offense.

Affirmed in part and remanded to the trial court for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Cynthia Diane Stephens