

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

Supreme Court No. 131942

-VS-

CAPRESE GARDNER,

Defendant-Appellant.

Third Circuit No. 01-003494-01
Court of Appeals No. 267317

131942
reply

BRIEF IN RESPONSE TO OPPOSITION,
TO APPLICATION FOR LEAVE TO APPEAL

CAPRESE D. GARDNER #192486
Defendant In Pro Per
17601 Mound Road
Detroit, Michigan 48212

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QUESTION PRESENTED

I.

I. MCL 769.11 REQUIRES THAT TO BE CONSIDERED AN HABITUAL OFFENDER THIRD FOR THE PURPOSE OF SENTENCE ENHANCEMENT, A PERSON MUST HAVE BEEN CONVICTED PREVIOUSLY OF ANY COMBINATION OF TWO OR MORE FELONIES. HERE, THE DEFENDANT HAD BEEN CONVICTED OF FELONIOUS ASSAULT AND FELONY FIREARM BEFORE BEING SENTENCED AS A THIRD-TIME HABITUAL OFFENDER. DEFENDANT DISAGREES, THAT THE STATUTE DOES NOT SAY WHAT PEOPLE V STOUEMIRE REQUIRES, THAT TWO CONVICTIONS ARISING OUT OF A SINGLE TRANSACTION BE COUNTED AS ONE. SHOULD THE COURT REALLY CONSIDER OVERRULING PEOPLE V STOUEMIRE AND DENY RELIEF TO THE DEFENDANT?

THE PEOPLE ANSWERS: "YES."
DEFENDANT ANSWERS: "NO."

STATEMENT OF FACTS

The defendant was convicted in 2001, for second degree murder pursuant to MCL 750.317; felon in possession of a firearm pursuant to MCL 750.224(f); possession of a firearm in the commission of a felony (felony firearm) pursuant to MCL 750.227(b); and third habitual offender pursuant to MCL 769.11; MSA 28.1083. The Honorable Prentis Edwards presided over his jury trial.

The defendant appealed to the Court of Appeals for reversal of his convictions presenting the following argument:

- I. THE CIRCUIT JUDGE VIOLATED DEFENDANT CAPRESE GARDNER'S RIGHTS TO CONFRONTATION, TO PRESENT HIS DEFENSE, AND TO DUE PROCESS BY SUPPRESSING EVIDENCE RELATING TO BIAS AND MOTIVE AND TO THE DEFENSE THEORY THAT THE KILLING WAS DRUG RELATED, THAT THE DECEASED AND JAMES WRIGHT, THE CHIEF WITNESS AGAINST DEFENDANT GARDNER, WERE INVOLVED IN SELLING DRUGS, AND THAT WRIGHT COMMITTED THE KILLING.

On April 15, 2003, the Court of Appeals issued an unpublished per curiam opinion affirming the defendant's conviction.

The defendant filed a motion for relief from judgment in the Circuit Court that was denied without the Court ever having possession of defendant's motion. (SEE IN APPENDIX BOTH CONFLICTING LETTERS FROM THE COURT). The Court of Appeals denied defendant's application for leave to appeal. This Court has ordered the prosecutor to respond to defendant being falsely accused as a third habitual offender.

I. MCL 769.11 REQUIRES THAT TO BE CONSIDERED AN HABITUAL OFFENDER THIRD FOR THE PURPOSE OF SENTENCE ENHANCEMENT, A PERSON MUST HAVE BEEN CONVICTED PREVIOUSLY OF ANY COMBINATION OF TWO OR MORE FELONIES. HERE, THE DEFENDANT HAD BEEN CONVICTED OF FELONIOUS ASSAULT AND FELONY FIREARM BEFORE BEING SENTENCED AS A THIRD-TIME HABITUAL OFFENDER. DEFENDANT DISAGREES, THAT THE STATUTE DOES NOT SAY WHAT PEOPLE V STOUDEMIRE REQUIRES, THAT TWO CONVICTIONS ARISING OUT OF A SINGLE TRANSACTION BE COUNTED AS ONE. THE COURT SHOULD NOT CONSIDER OVERRULING PEOPLE V STOUDEMIRE OR DENY RELIEF TO THE DEFENDANT.

STANDARD OF REVIEW

Two standards of review apply to this issue: de novo and Plain Error. The interpretation of either a statute or a court rule is a question of law subject to review de novo. People v Chavis, 468 Mich 84, 91; 658 NW2d 469 (2002). Plain Error, is defined as an egregious error, one that obvious affects "substantial rights," and seriously impairs the fairness or integrity of the judicial proceedings. United States v Collins, 78 F3d 1021, 1033 (CA 6, 1996).

ARGUMENT

Its evident that the prosecutor doesn't clearly understand the language of the legislative intent of the habitual offender statute. A felony-firearm conviction can not be used as an habitual offender predicate. See People v Honeycutt, 163 Mich App 757 (1987). MCL 769.11(3), specifically states that a conviction shall not be used to enhance a sentence under this section if that conviction is used to enhance a sentence under a statute that, prohibits use of the conviction for further enhancement under this section. MCL 768.34(10), makes clear that the legislative intended to have defendant's sentenced according to accurately scored guidelines and in reliance on accurate information. People v Miles, 454 Mich 90, 96; 559 NW2d 299 (1997), says "a sentence is invalid if it is based on inaccurate information."

In People v Francisco, 474 Mich 82, 89-90 (2006), states that a defendant

is entitled to be sentenced by a Trial Court on the basis of accurate information; even where a minimum sentence is within the appropriate guidelines sentence range, a defendant is entitled to be resentenced if there was a scoring error or if inaccurate information was relied upon in determining the defendant's sentence.

This issue was never raised in defendant's appeal of right, because Appellant Counsel was also negligent in checking the information charging defendant as a third habitual offender. By trial counsel's own admission, he had no defense strategy to use other than what had been suppressed by the trial judge. Trial Counsel having no defense theory, fell below reasonable and competent required the US Const. Ams VI, XIV, Const 1963, §§ 17,20, for failure to at least challenge or check any charges that presented against defendant. Appellant-Counsel, raised no trial errors whatsoever, his sole claim of error was in regards to evidentiary rulings made by the trial judge. The exclusion of evidence is within the sound discretion of the trial court. People v Golochowics, 413 Mich 298 (1982). In United States v Cronin, 446 US 648,--n.19, 104 S Ct 2039, 2045-46n. 19, 80 LE d2 657, 666 n.19 (1984), this Court stated, "[E]ven when no theory of defense is available, if the decision to stand trial has been made, counsel must hold the prosecution to its heavy burden of proof beyond reasonable doubt."

Defendant had only one opportunity for reformation before being charged as a third habitual offender. Defendant has shown "good cause" where trial counsel fell to check the information which charged defendant as a third habitual offender, and appellant counsel's failure to raise it on defendant's appeal of right. "prejudice," is proven under United States v Olano, 507 US 725; 113 S Ct 1170; 123 L Ed2d 508 (1993), where the error is made "plain" and affected the substantial rights of the defendant. The error "seriously"

affect[ed] the fairness, integrity, and public reputation of the judicial proceedings." Olano, supra. Defendant was scored at 180 months to 300 months, which is 15 to 25 years, but because of the third habitual enhancement, defendant was sentenced on the higher part of the guild lines to 25 to 50 years. Its possible that without the third habitual enhancement, defendant would have received a lesser amount of time on his minimum sentence other than the 25 years. Because this was a Six and Fourteenth Amendment violation, the Court should remand defendant back for resentencing as articulated in People v Stoudemire, 429 Mich 262 (1987).

PROPOSAL

Defendant offers three reason why the Michigan Supreme Court, should not consider any arguments induced by the prosecution, other than why was defendant improperly charged as a third habitual offender:

1. Defendant initial brief was submitted in July 10, 2006, and the prosecutor had ample time to respond, but for whatever reason chose not to.

2. The brief in opposition submitted by the prosecution was incomplete, where it did not address all the issues raised in defendant's initial relief application.

3. The most important reason would be that the prosecutor's brief in opposition was not in compliance with the Court order making all other issues invalid.

RELIEF SOUGHT

WHEREFORE, the Defendant implores this Honorable Court, on the grounds that defendant was improperly charged as a third habitual offender, on inaccurate information. This Court should grant defendant's relief for resentencing or whatever the Court deems necessary to mend the injustice that occurred.

Respectfully Submitted,



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Dated: the 5, day of FEBRUARY, 2007.