

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSIE HARRISON,

Defendant-Appellant.

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UNPUBLISHED

September 16, 2008

No. 279123

Wayne Circuit Court

LC No. 86-005155-01

Before: Whitbeck, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order denying his motion for relief from judgment brought pursuant to MCR 6.508(D). Defendant asserts that his consecutive sentences for his jury convictions of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, and reckless use of a firearm causing death, MCL 752.861, were improper. We reverse the trial court's denial of defendant's motion for relief from judgment, and direct the trial court, on remand, to amend defendant's judgment of sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with one count of second-degree murder, MCL 750.317, for the shooting death of 16-year-old Derrick Barfield, and one count of assault with intent to commit murder, MCL 750.83, for the wounding of Derrick's 15-year-old brother Roger. Defendant was also charged with felony-firearm. During an argument, a classmate threatened Roger using a gun the classmate received from defendant. A few days later, Derrick, Roger, and two friends were driving around looking for the classmate. They spotted defendant, and confronted him. When defendant was approximately ten feet from the car, he drew a gun and fired several shots into the car, striking Derrick and Roger. At trial, defendant claimed that he acted out of self-defense.

The jury was instructed on the lesser included offense of reckless discharge of a firearm causing death. The jury found defendant guilty of this lesser offense, and of felony-firearm. On November 17, 1986, defendant was sentenced to 16 to 24 months in prison for reckless discharge of a firearm causing death, to be served consecutively to a two-year term for felony-firearm. This Court affirmed defendant's convictions. *People v Jessie Harrison, Jr.*, unpublished per curiam opinion of the Court of Appeals, issued July 8, 1988 (Docket No. 98756).

Defendant subsequently moved for relief from judgment on the ground that the trial court's imposition of consecutive sentences was improper. The trial court denied the motion.

We review for an abuse of discretion a trial court's denial of relief from judgment under MCR 6.508. *People v Ulman*, 244 Mich App 500, 508; 625 NW2d 429 (2001). A defendant may not base a motion for relief from judgment on an issue that could have raised on direct appeal unless the defendant demonstrates good cause for failing to raise the issue on appeal and caused actual prejudice. MCR 6.508(D)(3). "Actual prejudice" includes situations where, "in the case of a challenge to the sentence, the sentence is invalid." MCL 6.508(D)(3)(b)(iv).

In this case, the parties agree that defendant was improperly sentenced to consecutive terms for his convictions of reckless discharge of a firearm and felony-firearm. Defendant was charged with a felony, but was ultimately convicted of a misdemeanor.

We review a sentencing issue de novo on appeal. *People v Alexander*, 234 Mich App 665, 675; 599 NW2d 749 (1999). "A consecutive sentence may be imposed only if specifically authorized by statute." *Id.* MCL 750.227b provides that on conviction of felony-firearm, the term of imprisonment "shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the *felony* or the attempt to commit the felony." [Emphasis added.] See also *People v Clark*, 463 Mich 459, 463-464; 619 NW2d 538 (2000).

The plain language of the statutes involved, considered in light of the purposes sought to be accomplished, leads us to conclude that the Legislature intended two-year misdemeanors to be considered as misdemeanors for purposes of the Penal Code, but as felonies for purposes of the Code of Criminal Procedure's habitual offender, probation, and consecutive sentencing statutes. [*People v Smith*, 423 Mich 427, 434; 378 NW2d 384 (1985).]

The felony-firearm statute appears in the Penal Code, where a two-year misdemeanor remains a misdemeanor. See *id.* A two-year misdemeanor is insufficient to invoke the felony-firearm consecutive sentencing provision. See also *People v Williams*, 243 Mich App 333, 335; 620 NW2d 906 (2000); *People v Baker*, 207 Mich App 224, 225; 523 NW2d 882 (1994). Because the underlying conviction here was a misdemeanor, defendant should have been sentenced to concurrent terms. A remand for correction of the judgment of sentence is required.

Defendant's sentence is invalid. This constitutes "actual prejudice" for defendant's MCR 6.508 claim. Defendant contends that he has provided good cause for failure to raise the claim that he was entitled to concurrent sentencing earlier because trial and appellate counsel provided ineffective assistance. Plaintiff agrees. Because the trial court's error is plain, and the result would have been different had appellate counsel raised this issue below, we agree that counsel was ineffective for failing to raise this error in defendant's direct appeal. Defendant has presented good cause for relief from judgment. *People v Kimble*, 470 Mich 305, 313-314; 684 NW2d 669 (2004).

We reverse the trial court's denial of defendant's motion for relief from judgment, and direct the trial court, on remand, to correct defendant's judgment of sentence. We do not retain jurisdiction.

/s/ William C. Whitbeck  
/s/ Richard A. Bandstra  
/s/ Pat M. Donofrio