

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY L. BROWN,

Defendant-Appellant.

UNPUBLISHED

July 6, 2006

No. 261407

Wayne Circuit Court

LC No. 01-002012-01

Before: Davis, P.J., and Sawyer and Schuette, JJ.

PER CURIAM.

Defendant Roy Brown appeals as of right from his conviction of possession of a firearm during the commission of a felony, MCL 750.227b(1). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTS

Defendant was charged with possession with intent to deliver less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and felony-firearm for an incident that occurred on January 3, 2001. A jury found defendant guilty of the lesser included offense of possession of less than 50 grams of cocaine, MCL 333.7403(2)(a)(iv), and felony-firearm.

When defendant appeared for sentencing, the court granted defendant's renewed motion for a directed verdict (previously denied at trial) and dismissed the felony-firearm conviction on the ground that defendant had not actually used the gun to aid in the commission of the narcotics offense. The court sentenced defendant to three years probation for possession of cocaine. The prosecutor appealed and this Court reversed and remanded for reinstatement of the jury's verdict and for sentencing on the felony-firearm conviction. *People v Brown*, unpublished opinion per curiam of the Court of Appeals, issued September 18, 2003 (Docket No. 240498), slip op at 2.

On remand, the trial court scheduled a pretrial hearing for October 2003. Defendant failed to appear and the court issued a warrant for his arrest. The court set the warrant aside on December 14, 2004, and defendant appeared for sentencing on January 31, 2005. The court imposed the mandatory two-year sentence for felony-firearm. Defendant appeals this conviction.

II. RIGHT OF ALLOCUTION

A. Standard of Review

This Court reviews the sentencing transcript de novo to determine if defendant was denied his right of allocution. *Brandt v Brandt*, 250 Mich App 68, 75; 645 NW2d 327 (2002). Defendant failed to raise this issue below and thus it has not been preserved for appeal. *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 452; 506 NW2d 542 (1993). However, plain errors or defects that affect substantial rights, both constitutional and non-constitutional, may be noticed despite not being brought to the attention of the court. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). This Court must reverse only if the plain, forfeited error resulted in the conviction of an innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.*

B. Analysis

Defendant and his attorney were not denied the right of allocution. The rule governing defendant's right to allocution provides, in pertinent part:

(E) Sentencing Procedure.

(1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record:

* * *

(c) give the defendant, the defendant's lawyer, the prosecutor, and the victim an opportunity to advise the court of any circumstances they believe the court should consider in imposing sentence.

MCR 6.425(E)(1)(a)-(c), formerly MCR 6.425(D)(2)(a)-(c). This section allows a defendant to speak in mitigation of the sentence about to be imposed. *People v Petty*, 469 Mich 108, 119; 665 NW2d 443 (2003). The trial court needs only to make it possible for a defendant who wishes to allocute to do so but need not specifically ask the defendant if he has anything to say on his own behalf before imposing the sentence. *People v Petit*, 466 Mich 624, 628; 648 NW2d 193 (2002). Strict compliance with this rule is required and the failure to comply requires resentencing. *People v Wells*, 238 Mich App 383, 392; 605 NW2d 374 (1999).

Defendant claims that the trial court failed to comply section (c) at sentencing; defendant selectively quotes only a portion of the transcript, making it appear as if the court called the case, imposed the sentence and concluded the proceedings. The prosecutor, for unknown reasons, concedes that the trial court did not afford defendant the right to allocute. We disagree. When the case was called, defendant's attorney addressed the court and advised that defendant was entitled to four days credit and requested an appeal bond. The court then asked defendant, "Anything you wish to say, Mr. Brown?" and allowed defendant to respond. Although defendant did not say much, he was clearly afforded his right of allocution. Therefore, defendant's claim that he was never given the opportunity to allocute on his own behalf is false and no plain error occurred.

III. ACCURACY OF PRESENTENCE REPORT

A. Standard of Review

Defendant failed to raise this issue below and thus it has not been preserved for appeal. *Sean Jones, supra* at 452. However, plain errors or defects that affect substantial rights, both constitutional and non-constitutional, may be noticed despite not being brought to the attention of the court. *Carines, supra* at 763. This Court must reverse only if the plain, forfeited error resulted in the conviction of an innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.*

B. Analysis

While the trial court did fail to establish on the record that defendant and his attorney had read and discussed the presentence report for its accuracy, the error is harmless because defendant is subject to a mandatory determinate sentence which cannot be modified by the sentencing court. Before a defendant is sentenced for a felony conviction, a presentence report must be prepared. *People v Baker*, 215 Mich App 606, 609; 547 NW2d 62 (1996); MCL 771.14(1); MCR 6.425(A). The court must then permit defendant and his attorney to review the report “at a reasonable time before the day of sentencing.” MCR 6.425(B). Subrule (E) provides in pertinent part that:

(E) Sentencing Procedure.

(1) The court must sentence the defendant within a reasonably prompt time after the plea or verdict unless the court delays sentencing as provided by law. At sentencing, the court must, on the record

(a) determine that the defendant, the defendant's lawyer, and the prosecutor have had an opportunity to read and discuss the presentence report,

(b) give each party an opportunity to explain, or challenge the accuracy or relevancy of, any information in the presentence report, and resolve any challenges in accordance with the procedure set forth in subrule(E)(2),

MCR 6.425(E)(1), formerly MCR 6.425(D)(2). Although it appears that the trial court failed to comply with subrules (E)(1)(a) and (b), defendant does not assert on appeal that he did not have an opportunity to review and discuss the presentence report or that the report contained any inaccurate or irrelevant information. Further, the trial court had no discretion in the sentence to be imposed, a two-year determinate sentence mandated by law. Resentencing would be futile because the same sentence would have to be imposed. *People v Ristich*, 169 Mich App 754, 759; 426 NW2d 801 (1988). Therefore, appellate relief is not warranted.

Affirmed.

/s/ Alton T. Davis
/s/ David H. Sawyer
/s/ Bill Schuette