

STATE OF MICHIGAN  
IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

COA No. 336050

vs.

3<sup>rd</sup> Circuit No. 04-004270

GREGORY CARL WASHINGTON,

Oral Argument date: 07/07/17

Defendant-Appellee.

\_\_\_\_\_  
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**DEFENDANT-APPELLEE'S BRIEF ON APPEAL**

**PROOF OF SERVICE**

**(Oral Argument Requested)**

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**STATEMENT OF QUESTIONS PRESENTED**

- I. WHERE THE BRIEF FILED BY THE PROSECUTOR IN THE TRIAL COURT FAILED TO RAISE THE PRINCIPAL ISSUE THE PROSECUTOR HAS RAISED IN THIS COURT, THAT THE TERM “JURISDICTIONAL DEFECT,” AS USED IN MCR 6.508(D)(3), ONLY ENCOMPASSES CHALLENGES TO “SUBJECT-MATTER JURISDICTION,” HAS THE PROSECUTION WAIVED OR FORFEITED THIS ISSUE, AND SHOULD THE TRIAL COURT BE AFFIRMED?**

The trial court did not address this question.

The prosecutor says: “No”

The Defendant-Appellee says: “Yes”

- II. WHERE THE TRIAL COURT DID NOT HAVE JURISDICTION TO RE-SENTENCE MR. WASHINGTON ON OCTOBER 4, 2006, IS THIS A “JURISDICTIONAL DEFECT” THAT CAN PROPERLY BE RAISED IN A SUCCESSIVE MOTION FOR RELIEF FROM JUDGMENT, AND SHOULD THE TRIAL COURT’S GRANT OF ANOTHER RE-SENTENCING HEARING BE AFFIRMED?**

The trial court said: “Yes”

The prosecutor says: “No”

The Defendant-Appellee says: “Yes”

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**DEFENDANT-APPELLEE'S RESPONSE TO APPELLANT'S  
STATEMENT OF APPELLATE JURISDICTION**

The Defendant-Appellee agrees with the Appellant's Statement of Appellate Jurisdiction.

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**Statement of Facts and Proceedings**

Defendant-Appellee Gregory Carl Washington (hereinafter “Mr. Washington”) accepts the Statement of Facts filed in the prosecution Brief on Appeal. Any additional facts will be incorporated in the text of the Brief.

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## Arguments

**I. WHERE THE BRIEF FILED BY THE PROSECUTOR IN THE TRIAL COURT FAILED TO RAISE THE PRINCIPAL ISSUE THE PROSECUTOR HAS RAISED IN THIS COURT, THAT THE TERM “JURISDICTIONAL DEFECT,” AS USED IN MCR 6.508(D)(3), ONLY ENCOMPASSES CHALLENGES TO “SUBJECT-MATTER JURISDICTION,” THE PROSECUTION HAS WAIVED OR FORFEITED THIS ISSUE, AND THE TRIAL COURT SHOULD BE AFFIRMED.**

**Standard of Review:** Whether the prosecution has waived and/or forfeited its principal issue is a question of law, reviewable de novo. People v Carpentier, 446 Mich 19, 60, n. 19 (1994).

**Argument:** As stated in the Statement of Facts included within the Prosecutor’s Brief on Appeal, at p. 27, Mr. Washington filed the instant Motion for Relief From Judgment on June 22, 2016. On July 22, 2016, the trial court directed the prosecution to file a response to Mr. Washington’s Motion for Relief From Judgment.

The prosecution filed its Answer to Mr. Washington’s Motion on September 9, 2016. This Answer, like the Brief the prosecution has filed in the instant appeal, contained a 20 page summary of the evidence presented at trial (Prosecution’s Trial Court Answer, at 4-23). This was followed by a two page legal argument (Prosecution’s Trial Court Answer, at 29-30). The 20 page summary of the trial proceedings contains no information relevant to the issue on which this Court has granted leave to appeal.

The two page legal argument which was presented by the prosecutor to the trial court did not respond to Mr. Washington’s argument that the term “jurisdictional defect,” as used in MCR 6.508(D)(3), applied to this case. Mr. Washington argued in his Motion for Relief From Judgment that the trial court conducted the Resentencing Hearing previously ordered by this Court while Mr. Washington’s Application for Leave to Appeal was pending in the Michigan Supreme Court.

Therefore, the trial court lacked jurisdiction to conduct any proceedings in the case while the Application was pending in the Supreme Court.

The prosecutor's trial court brief did not present an issue that the term "jurisdictional defect," as used in MCR 6.508(D)(3), only includes challenges to "subject matter jurisdiction." Therefore, this issue has been waived and/or forfeited, and should not be considered by this Court.

This is an issue the prosecutor never raised in the trial court. Mr. Washington contends, therefore, that the prosecution forfeited or waived this issue by failing to raise it in the trial court. Alternatively, the prosecutor's argument is devoid of merit. See Issue II, *infra*.

If the prosecution believed that the term "jurisdictional defect," as used in MCR 6.508(D)(3), only applied to claims of "subject-matter jurisdiction," than it should have made this argument to the trial court. Instead, the prosecution laid back, and harbored potential appellate error as a parachute for an appeal, in case the trial court granted Mr. Washington's motion. This is not permitted under Michigan procedural rules. The Michigan Supreme Court made this clear in People v Grant, 445 Mich 535, 546-547 (1994):

[T]he courts of this state have long recognized the importance of preserving issues for the purpose of appellate review. As a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. See, e.g., Napier v Jacobs, 429 Mich 222, 235; 414 NW2d 862 (1987) (failure to raise a claim of insufficiency of the evidence); Moskalik v Dunn, 392 Mich 583, 592; 221 NW2d 313 (1974) (failure to object to an erroneous jury instruction); People v DerMartex, 390 Mich 410, 416-417; 213 NW2d 97 (1973) (failure of the defendant to request a limiting instruction on admissibility of prior-acts evidence); People v Farmer, 380 Mich 198, 208; 156 NW2d 504 (1968) (failure to raise the issue of the involuntariness of a confession). Indeed, the United States Supreme Court has recognized a state's right to develop procedural rules that lead to issue forfeiture even where the procedural rules implicate constitutional protections if the rules serve a legitimate state interest. Henry v Mississippi, 379 US 443; 85 S Ct 564; 13 L Ed 2d 408 (1965). [footnote omitted].  
Grant, *supra*, at 546-547 (emphasis added).

The Michigan Supreme Court then explained the importance of the forfeiture rule for the efficient operation of the criminal justice system:

A forfeiture rule, then, serves the important “need to encourage all trial participants to seek a fair and accurate trial the first time around . . .” United States v Young, 470 US 1, 15; 105 S Ct 1038; 84 L Ed 2d 1 (1985), quoting United States v Frady, 456 US 152, 163; 102 S Ct 1584; 71 L Ed 2d 816 (1982).<sup>29</sup> See also Michigan v Tucker, 417 US 433, 446; 94 S Ct 2357; 41 L Ed 2d 182 (1974) (“[T]he law does not require that a defendant receive a perfect trial, only a fair one”). Accordingly, the United States Supreme Court has recognized the importance of an incentive for criminal defendants to raise objections at a time when the trial court has an opportunity to correct the error, which could thereby obviate the necessity of further legal proceedings and would be by far the best time to address a defendant’s constitutional and nonconstitutional rights. Failure to timely raise error thus requires defendants to establish prejudice in order to avoid the forfeiture of an issue. [footnote omitted].

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29 See also Yakus v United States, 321 US 414, 444; 64 S Ct 660; 88 L Ed 834 (1944) (“No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it”).

Grant, supra, at 551-552 (emphasis added).

In the above excerpt, the Michigan Supreme Court states that the waiver/forfeiture rules apply to all: “trial participants.” Thus, these rules apply to the prosecution as well as to the defense in a criminal case. Accord: People v Pipes, 475 Mich 267, 715 NW2d 290, 296-297 (2006).

In People v Carines, 460 Mich 750, 761 (1999), the Michigan Supreme Court explained that appellate consideration of unpreserved claims of error is disfavored:

This state encourages litigants “to seek a fair and accurate trial the first time around . . .” Grant, supra, 445 Mich 551. This Court disfavors consideration of unpreserved claims of error. In Grant, this Court discussed the standards for reviewing unpreserved claims of nonconstitutional error. Carines, supra, at 761.

The reasons for these policies was explained in more detail in People v Carter, 462 Mich 206, 214 (2000):

The rule that issues for appeal must be preserved in the record by notation of objection is a sound one. People v Carines, 460 Mich 750, 762-765; 597 NW2d 130 (1999). Counsel may not harbor error as an appellate parachute. People v Pollick, 448 Mich 376, 387; 531 NW2d 159 (1995), quoting People v Hardin, 421 Mich 296, 322-323; 365 NW2d 101 (1984). Carter, supra, at 214. (Emphasis supplied).

Accord: Pipes, supra, at 297.

Carines, supra, at 762, n. 7, went on to explain the difference between forfeiture of an issue, and waiver of an issue:

“Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’” United States v Olano, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993). Carines, supra, at 762, n. 7.

In this case, the argument the prosecution seeks to raise on appeal has been both forfeited and waived. First, the prosecution’s argument is forfeited because the prosecution failed to timely raise this issue before the trial court, in its trial court Answer to Mr. Washington’s Motion for Relief From Judgment. Had the prosecution done so, the trial court would have had the opportunity to amplify the record, if it felt the need to do so. See Issue II, supra. Similarly, in Grant, supra, at 538-543, 552, the trial court had failed to give a statutorily-required preliminary jury instruction on insanity. The defendant failed to request the instruction, or otherwise object to the failure to give the instruction. The error was forfeited. In this case, the prosecution’s failure to raise this issue in a timely manner has forfeited this issue.

Alternatively, the prosecution’s issue has been waived. The prosecution was obviously aware that an issue pending before the trial court was the correct interpretation of the term “jurisdictional

defect,” as used in MCR 6.508(D)(3). Therefore, by failing to raise its issue that the term “jurisdictional defect,” as used in MCR 6.508(D)(3), only includes challenges to “subject matter jurisdiction,” the prosecution has intentionally relinquished a known right, that is, the right to request the courts to address this issue. The prosecution here has waived this issue just as assuredly as did the defendant in People v Clark, 243 Mich App 424, 425-26 (2000). In that case, the defendant moved pretrial for a change of venue. The motion was denied without prejudice, subject to reconsideration during the jury selection. “Defense counsel’s failure to renew the motion and his expression of satisfaction with the jury waived the change of venue issue.[citations omitted]” Similarly, in the instant case, the failure of the prosecution to raise the issue in the trial court has waived it.

The prosecution here is trying to do what it frequently accuses criminal defendants of doing. This cannot be tolerated. Just as the defense in a criminal case cannot harbor error as an appellate parachute, neither can the prosecution. Yet that is exactly what the prosecution is seeking to do in this case. This Court has repeatedly announced that it will not allow a party to harbor error as an appellate parachute. In Valentine v Valentine, 277 Mich App 37 (2007), this Court reiterated:

On numerous occasions, this Court has denied a party the right to raise an appellate challenge when the party harbored an error as an “appellate parachute.” See, e.g., In re Gazella, 264 Mich App 668, 679; 692 NW2d 708 (2005); Marshall Lasser, PC v George, 252 Mich App 104, 109; 651 NW2d 158 (2002); Weiss v Hodge (After Remand), 223 Mich App 620, 636; 567 NW2d 468 (1997); Dresselhouse v Chrysler Corp, 177 Mich App 470, 477; 442 NW2d 705 (1989). We do so again.

The prosecution here has both waived and forfeited the principle issue it has presented this Court in its appeal brief. This Court should therefore reject the appeal filed by the prosecution, and affirm the trial court.

**II. WHERE THE TRIAL COURT DID NOT HAVE JURISDICTION TO RE-SENTENCE MR. WASHINGTON ON OCTOBER 4, 2006, THIS IS A “JURISDICTIONAL DEFECT” THAT CAN PROPERLY BE RAISED IN A SUCCESSIVE MOTION FOR RELIEF FROM JUDGMENT, AND THE TRIAL COURT’S GRANT OF ANOTHER RE-SENTENCING HEARING SHOULD BE AFFIRMED.**

**Standard of Review:** This issue involves the interpretation of a Court rule, which is a question of law, reviewable de novo. People v Williams, 483 Mich 226, 231, 769 NW2d 605 (2009).

**Argument:** Mr. Washington asserts that the Circuit Court did not have jurisdiction to re-sentence him on October 4, 2006. The prosecution does not dispute Mr. Washington’s assertion that this re-sentencing hearing improperly took place while Mr. Washington’s Application for Leave to Appeal was pending before the Michigan Supreme Court. Indeed, it cannot. All the prosecution argues is that Mr. Washington’s previous Motion for Relief from Judgment has somehow waived or forfeited his right to make this claim at this time. A brief review of the language of MCR 6.500 et seq. makes it clear this issue has been neither waived nor forfeited.

The Circuit Court, in its Opinion and Order Denying Defendant-Appellant’s Motion for Relief From Judgment, issued in this case on July 9, 2008, clearly and correctly stated the law:

MCR 6.508(D) says that the court cannot grant relief when: (1). Jurisdictional defects are not the alleged grounds for relief; or (2) The grounds for relief could have been raised on appeal from default. People v Washington, Wayne Circuit No. 04-004270-01, Opinion and Order Denying Defendant-Appellant’s Motion for Relief From Judgment, (7/9/2008, p. 1) (Emphasis added).

As the Circuit Court correctly pointed out, MCR 6.508(D)(3)(a), and (b), clearly states that jurisdictional defects are not waived by a prior appeal or a prior motion for relief from judgment:

MCR 6.508

....

(D) Entitlement to Relief. The defendant has the burden of establishing entitlement to the relief requested. The court may not grant relief to the defendant if the motion

....

(3) alleges grounds for relief, other than jurisdictional defects, which could have been raised on appeal from the conviction and sentence or in a prior motion under this subchapter, unless the defendant demonstrates

(a) good cause for failure to raise such grounds on appeal or in the prior motion, and

(b) actual prejudice from the alleged irregularities that support the claim for relief. ....

Further, the prosecution cannot dispute that the judgment of this Court, which was issued on June 13, 2006 (People v Gregory Carl Washington, unpublished Opinion of the Michigan Court of Appeals, (No. 260155, June 13, 2006), had not yet become effective on October 4, 2006, when the Circuit Court presided over the Re-Sentencing Hearing. The Michigan Supreme Court made this clear in People v Swafford, 483 Mich 1, 6, n. 5, 762 NW2d 902 (2009) :

After the Court of Appeals rendered its first decision, but before this Court vacated that decision, defendant was brought to trial, convicted as charged, and sentenced to life in prison. Defendant should not have been brought to trial at that time. The Court of Appeals decision reversing the trial court's dismissal of charges and remanding the case for trial had not taken effect, because defendant had filed a timely appeal to this Court. MCR 7.215(F)(1)(a). Moreover, during the pendency of a timely appeal to this Court, a Court of Appeals decision remanding to a lower court for further proceedings is automatically stayed, unless the Court of Appeals or this Court orders otherwise. MCR 7.302(C)(5). Neither this Court nor the Court of Appeals ordered further proceedings to begin notwithstanding defendant's timely appeal. Accordingly, the trial court did not have proper jurisdiction to bring defendant to trial or convict defendant. Swafford, supra, at 6, n. 5 (emphasis added).

There is no indication in this opinion, or in the Michigan Court Rules, that the Michigan Supreme Court's use of the term "jurisdiction," in Swafford, supra, has any different meaning than the use of the term "jurisdictional defects" in MCR 6.508(D)(3).

As stated by this Court in Detroit v General Motors Corporation, 233 Mich App 132, 140

(1998):

The judgment of the Court of Appeals as rendered in an opinion becomes effective after the expiration of the time for filing a timely application for leave to appeal to the Supreme Court, or, if a timely application has been filed, after the disposition of the case by the Supreme Court. MCR 7.215(E)(1)(a) [Now renumbered 7.215(F)(1)(a)]. When the Supreme Court denies leave to appeal after a decision from this Court, “the Court of Appeals decision becomes the final adjudication and may be enforced in accordance with its terms.” MCR 7.302(F)(3) [Now renumbered 7.305(H)(3)].

The precisely applicable rule on these facts is MCR 7.305(C)(6)(a), which addresses appeals where the Court of Appeals issues an Opinion which denies relief on most issues, but grants a remand as to one issue.

MCR 7.305( C )

(6) Effect of Appeal on Decision Remanding Case. If a party appeals a decision that remands for further proceedings as provided in subrule (C)(5)(a), the following provisions apply:

(a) If the Court of Appeals decision is a judgment under MCR 7.215(E)(1), an application for leave to appeal stays proceedings on remand unless the Court of Appeals or the Supreme Court orders otherwise.

It cannot be disputed that the Court of Appeals Opinion issued June 13, 2006 was this Court’s Judgment. MCR 7.215(E)(1). (People v Gregory Carl Washington, unpublished Opinion of the Michigan Court of Appeals, (No. 260155, June 13, 2006). Most importantly, in this case, neither the Court of Appeals nor the Supreme Court ever ordered that the Court of Appeals opinion of June 13, 2006 was to be given immediate effect.

Thus, Mr. Washington’s Application for Leave to Appeal to the Michigan Supreme Court, which was timely filed on August 8, 2006, stayed the proceedings ordered by the Court of Appeals to take place on remand. MCR 7.305(C)(6)(a). The proceedings remained stayed until the Michigan Supreme Court issued its Order Denying Leave to Appeal on December 28, 2006. MCR

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7.305(H)(3). Thus, Circuit Court proceedings were stayed on October 6, 2006, when the Circuit Court presided over the Re-Sentencing Hearing. For these reasons, the Circuit Court was without jurisdiction to conduct the Re-Sentencing Hearing on October 6, 2006.

The question of jurisdiction is always within the scope of this Court's review. Walsh v. Taylor, 263 Mich App 618, 622; 689 NW2d 506 (2004). Michigan courts are bound to take notice of the limits of their own authority, and act accordingly by dismissing or otherwise disposing of proceedings they have no power to conduct or adjudicate. In re Fraser Estate, 288 Mich 392 (1939) at 394 (citing Bradley v. Board of State Canvassers, 154 Mich 274 (1908); J.F. Hartz Co. v. Luckaszowski, 200 Mich 230 (1918); Bolton v. Cummings, 200 Mich 234 (1918); Warner v. Noble, 286 Mich 654 (1938). An order entered by a court without jurisdiction "is absolutely void." Fox v. Board of Regents of the University of Michigan, 375 Mich 238, 242; 134 NW2d 146 (1965). An order void for lack of jurisdiction is meaningless. Cf. United States v. United Mine Workers of America, 330 US 258, 293; 67 S.Ct. 677; 91 L.Ed. 884 (1947); Walker v. City of Birmingham, 388 US 307, 320-321 (1967).

MCR 6.508(D)(3) exempts jurisdictional defects from the technical reasons for which a motion for relief from judgment may be denied. "Jurisdictional error has historically been recognized as fundamental, and for which collateral relief has accordingly been available. The doctrine of procedural default does not apply." United States v. Peter, 310 F.3d 709 (11<sup>th</sup> Cir. 2002); 2002 U.S. App. LEXIS 22422. "Because subject-matter jurisdiction involves a court's power to hear a case, it can never be forfeited or waived." U.S. v. Cotton, 535 U.S. 625, 155 L.Ed.2d 860, 122 S. Ct. 1781, 1782 (2002).

Therefore, because the Circuit Court did not have jurisdiction to preside over the Re-Sentencing hearing conducted on October 4, 2006, the sentences imposed at that hearing are null and

void. This Court should affirm the November 29, 2016 Opinion of the Circuit Court acknowledging this error, and remand this case to the Circuit Court so that the Re-Sentencing Hearing can be held properly.

**RELIEF REQUESTED**

THEREFORE, for all the above reasons, the Circuit Court correctly found that it did not have jurisdiction to Re-Sentence Mr. Washington on October 4, 2016. This jurisdictional defect can be raised at any time, and was properly raised by Mr. Washington in his Motion for Relief From Judgment. This issue has not been waived or forfeited by Mr. Washington's prior Motion for Relief from Judgment. The Circuit Court properly ordered that a Re-Sentencing Hearing be conducted. The Opinion of the Circuit Court should be upheld in all respects.

Respectfully submitted,

/S/ \_\_\_\_\_  
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DATED: June 20, 1017

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**STATE OF MICHIGAN  
IN THE COURT OF APPEALS**

**PEOPLE OF THE STATE OF MICHIGAN,**

Plaintiff-Appellant,

**COA No. 336050**

vs.

**3<sup>rd</sup> Circuit No. 04-004270**

**GREGORY CARL WASHINGTON,**

**Oral Argument date: 07/07/17**

Defendant-Appellee.

---

**JASON W. WILLIAMS (P51503)**  
Chief of Research, Training and Appeals  
Frank Murphy Hall of Justice

**JOHN F. ROYAL (P27800)**  
Attorney for Defendant-Appellee

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**PROOF OF SERVICE**

STATE OF MICHIGAN )  
 )  
SS COUNTY OF WAYNE )

John F. Royal, being first duly sworn, deposes and says that on 20th day of June, 2017, he served a copy of the attached papers upon the Wayne County Prosecuting Attorney, in the above-entitled matter via the TrueFiling System directed to:  
wcpaappeals@co.wayne.mi.us.

Subscribed and sworn to before me  
this 20th day of June, 2017

s/John F. Royal  
JOHN F. ROYAL

s/Dolores M. Goldbetter  
Dolores M. Goldbetter  
Notary Public  
County of Wayne  
My Commission Expires: April 17, 2023

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