

IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
Schuette, P.J., and O'Connell and Owens, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-v-

JESSE GENE BURNS,

Defendant-Appellant.

Supreme Court No. 131898

Court of Appeals No. 270886

Circuit Court No. 02-12311 FH

DEFENDANT-APPELLANT'S REPLY BRIEF ON APPEAL

STATE APPELLATE DEFENDER OFFICE

JEANICE DAGHER-MARGOSIAN (P35933)
Attorney for Defendant-Appellant
Assistant Defender
101 North Washington, 14th Floor
Lansing, MI 48913
(517) 334-6069

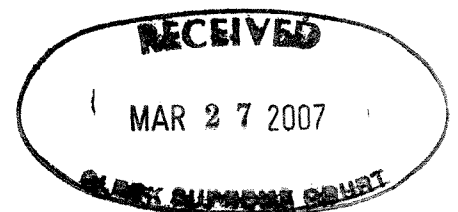


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STATEMENT OF JURISDICTION

Defendant-Appellant was convicted in the Allegan County Circuit Court by plea of guilty and was sentenced on July 15, 2005. Defendant-Appellant requested the appointment of appellate counsel on July 27, 2005. The offenses occurred after the effective date of the November, 1994 ballot Proposal B that eliminated the right to file a claim of appeal from plea-based convictions. The Court of Appeals had jurisdiction to consider the Defendant-Appellant's application for leave to appeal as it was filed within 21 days of the Circuit Court Order of May 19, 2006 denying his Motion for Resentencing, which motion was filed within 12 months of judgment. MCR 7.203(B); MCR 7.205(F)(4). The Court of Appeals denied leave to appeal on July 18, 2006. Defendant-Appellant filed a timely application for leave to appeal on August 18, 2006. This Court granted leave to appeal on November 17, 2006 and therefore has jurisdiction over this case. MCR 7.301(A).

STATEMENT OF QUESTIONS PRESENTED

- I. DID THE TRIAL COURT’S UPWARD DEPARTURE FROM THE 12-MONTH MAXIMUM SENTENCE OF THE APPLICABLE INTERMEDIATE SANCTION CELL WITHOUT A JURY FINDING BEYOND A REASONABLE DOUBT OR AN ADMISSION BY DEFENDANT DURING PLEA PROCEEDINGS VIOLATE RIGHTS UNDER *BLAKELY V. WASHINGTON* AND US CONST, AMS V, VI, XIV; CONST 1963, ART 1, §§ 17, 20?**

Court of Appeals made no answer.

Prosecutor-Appellee answers, “No”.

Defendant-Appellant answers, "Yes".

- II. DOES MR. BURNS’ PLEA-BASED CONVICTION AND SENTENCING AFTER A PROBATION REVOCATION CHANGE THE CONSTITUTIONALLY MANDATED RESULT IN THIS CASE?**

Court of Appeals made no answer.

Prosecutor-Appellee answers, “No”.

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

The prosecutor has filed a brief in this case delineating his posture on Defendant-Appellant's claims. This is Defendant's opportunity to reply, under MCR 7.306 (C). Defendant refers to and incorporates by reference his statement of facts filed in his brief on appeal with this Court.

ARGUMENT

- I. THE TRIAL COURT'S UPWARD DEPARTURE FROM THE 12-MONTH MAXIMUM SENTENCE OF THE APPLICABLE INTERMEDIATE SANCTION CELL WITHOUT A JURY FINDING BEYOND A REASONABLE DOUBT OR AN ADMISSION BY DEFENDANT DURING PLEA PROCEEDINGS VIOLATED RIGHTS UNDER *BLAKELY V. WASHINGTON* AND US CONST, AMS V, VI, XIV; CONST 1963, ART 1, §§ 17, 20.

The prosecutor contends that this case is not subject to the rulings of *Cunningham v California*, --- U.S. ----, 127 S Ct 856, 2007 WL 135687 (Jan. 22, 2007); *Blakely v Washington*, 542 U.S. 296, 124 S Ct 2531, 159 L.Ed.2d 403 (2004) because intermediate sanctions are not maximum terms under Michigan's statutory scheme. See Appellee's Brief at 4-11. The Appellee is, quite simply, not correct. A growing body of constitutional law now makes it indisputable that where a defendant's applicable term of punishment is increased by judicial findings outside the facts admitted during the plea hearing, or those that were found by a jury beyond a reasonable doubt, the sentence is violative of Sixth Amendment protections. See e.g., *Blakely, supra*; *Cunningham, supra*. The sentence in this case is unconstitutional under these decisions.

As Mr. Burns discussed in his brief on appeal, Michigan's statutory scheme as to intermediate sanctions is very close to Washington's. As in *Blakely*, if an offender falls within an intermediate sanction cell, the maximum term of incarceration allowed is 12 months. MCL 769.31(b); MCL 769.34(4)(a).¹ No greater term of incarceration may be imposed except in the

¹ These provisions create an exception to the indeterminate sentencing generally used in Michigan.

unusual instance there are *substantial and compelling reasons to do so*.² Thus, MCL769.34(4)(a) creates an initial, lower maximum term for those offenders subject to intermediate sanctions. It is comparable to the initial “standard” term in the Washington scheme, or a threshold maximum term. In Michigan, as in Washington, this term of incarceration is what a defendant *can expect* to receive unless the necessary findings are made. Accordingly, the prosecution’s assertion that intermediate sanctions do not set an expected maximum term is simply wrong.

The crux of *Blakely* and its progeny is not *whether substantial and compelling reasons* can be found, but *how substantial and compelling reasons* are found by a trial court. *It is indisputable that they may not be made unilaterally by a judge*. This is the part of our present scheme that is unconstitutional under *Blakely* and *Cunningham*. It is also the critical aspect of these watershed decisions that the State completely misses. As Mr. Burns discussed at length in his brief, these findings must be made by a jury, beyond a reasonable doubt, or affirmatively admitted on the record by the defendant after a waiver of his or her jury trial right. Justice Scalia points out in *Blakely* that this is a reasonable accommodation in the relatively small number of cases where departures are appropriate. 124 S Ct at 2541. If departure factors are present in accord with the requirements of *Blakely* and *Cunningham*, a departure upward may be constitutionally acceptable. At that point, and only at that point, does the second, *more onerous* maximum term set by penal statute become operative. As Justice Scalia admonishes in *Blakely*: “(O)ur precedents make clear, however, that the ‘statutory maximum’ for *Apprendi* purposes is

² It bears repeating that this is the exact language of the Washington statute. There, the law required finding “substantial and compelling reasons justifying an exceptional sentence.” The trial judge justified the higher sentence by finding that Mr. Blakely acted with “deliberate cruelty.” See *Blakely*, 124 S Ct at 2535. These reasons are very close to the judge’s findings that Mr. Burns was “gross” and “abusive” in the instant case.

the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.” 124 S Ct 2537.

A major deficiency in Appellee’s position is that it completely disregards the “bright line rule” of *Blakely* and *Cunningham*. There is no reference to this pivotal principle in the State’s brief at all. Thus, the prosecution also ignores the reasons that a bright-line rule is necessary.

They are discussed eloquently by Justice Antonin Scalia in *Blakely*, 124 S Ct 2531 at 2540:

Petitioner argued below that second-degree kidnaping with deliberate cruelty was essentially the same as first-degree kidnaping, the very charge he had avoided by pleading to a lesser offense. The court conceded this might be so but held it irrelevant. See 111 Wash.App., at 869, 47 P.3d, at 158. Petitioner’s 90-month sentence exceeded the 53-month standard maximum by almost 70%; the Washington Supreme Court in other cases has upheld exceptional sentences 15 times the standard maximum. See *State v. Oxborrow*, 106 Wash.2d 525, 528, 533, 723 P.2d 1123, 1125, 1128 (1986) (en banc) (15-year exceptional sentence; 1-year standard maximum sentence); *State v. Branch*, 129 Wash.2d 635, 650, 919 P.2d 1228, 1235 (1996) (en banc) (4-year exceptional sentence; 3-month standard maximum sentence). Did the court go too far in any of these cases? There is no answer that legal analysis can provide. With too far as the yardstick, it is always possible to disagree with such judgments and never to refute them.

Whether the Sixth Amendment incorporates this manipulable standard rather than Apprendi’s bright-line rule depends on the plausibility of the claim that the Framers would have left definition of the scope of jury power up to judges’ intuitive sense of how far is too far. We think that claim not plausible at all, because the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury. [Emphasis added.]

In *Cunningham*, the Court’s admonition was that state courts were not observing the bright-line character of the *Blakely* mandate, and the message was even stronger. The Justices reiterated that application of the *Blakely* bright-line rule should be applied regularly by all of the states. The Supreme Court chastised the California courts for failing to do so, and for

manipulating the *Blakely* reasoning to uphold its similar, but not at all identical, sentencing scheme. See e.g., 127 S Ct, at 858-859. When the resounding mandate of *Cunningham* is viewed in conjunction with the Supreme Court's recent grants of certiorari in over 175 cases where the *Blakely* argument was rejected in state courts, it is beyond dispute that it applies to cases where intermediate sanctions indicate an upper limit of punishment.³

³ These cases included Michigan's *People v McCullar*, 475 Mich 176; 715 NW2d 798 (2006), *certiorari granted, judgment vacated by, McCuller v Michigan*, 127 S Ct 856; 2007 WL 505959 (Feb 20, 2007).

II. MR. BURNS' PLEA-BASED CONVICTION AND SENTENCING AFTER A PROBATION REVOCATION DOES NOT CHANGE THE CONSTITUTIONALLY MANDATED RESULT IN THIS CASE.

The prosecution's argument that Mr. Burns has does not have the same constitutional protections at sentencing as any other defendant by virtue of his probation revocation fails completely. As Defendant discussed in his brief on appeal, a probation revocation does nothing more than provide a legal basis for alteration of the original sentence, a probationary term, to a non-probationary one. It is not a separate offense. See *People v Kaszmarek*, 464 Mich 478, 482-83 (2001); 628 NW2d 484 (2005) [a probation violation is not a separate felony in the Penal Code, MCL 750.1 et seq., or anywhere else]. *Instead, revocation of probation simply allows sentencing on the original offense*, as it would have been had the court not initially granted the grace of probation. M.C.L. sec. 771.4. It is, in fact, a sentencing on the original offense. Accordingly, the sentencing guidelines apply in exactly the same way they would have if probation had never been imposed.

This Court's decision in *People v Hendrick*, 472 Mich 555, 560-565; 697 NW2d 511 (2005), is squarely on point. There, the Court relied on *Kaszmarek, supra*, to decide that if probation is revoked due to an offender's violation of probation conditions, there is no new offense created. Although a court may impose a prison term, as it could have done had it not imposed a probationary term, the Michigan legislative sentencing guidelines, MCL 769.34 are to be applied if the crime is a guidelines offense [*Hendrick, supra*, at :563]:

Of course, not every probation violation and revocation warrants an upward departure. A trial court has broad latitude in deciding whether to revoke probation. *It has less latitude in imposing a sentence in excess of the guidelines. The sentencing court must always follow the requirements set forth in M.C.L. §*

769.34, as interpreted in *People v Babcock*, 469 Mich. 247, 666 N.W.2d 231 (2003). [Emphasis added.]

It is beyond question that the sentencing guidelines applied to Mr. Burns following revocation of probation in his case. It logically follows that correct guidelines scoring placed him in an intermediate sanction cell; he was subject to a jail sentence of no more than 12 months. Prison was not an option without a finding of the same “substantial and compelling reasons” that the trial judge in *Blakely* had to find in order to increase the first presumptively correct sentencing maximum incarceration period of 53 months to the second, exceptional incarceration period of 90 months. The latter term was unconstitutionally imposed. See *Blakely, supra*, at 2535. *Blakely* is also identical to the case at bar in that the judge was held not to have based those “substantial and compelling” reasons on *either* a jury determination beyond a reasonable doubt, or by the affirmative admission of the defendant, subject to a constitutionally adequate waiver. The exact same scenario took place in Allegan County.

The prosecutor misses this crucial point. Instead, Appellee’s brief appears to confuse the rights at a probation violation hearing and the rights at sentencing following a revocation based upon the facts adduced at that hearing. See e.g. See Appellee’s Brief at 14-15. The State spends time and space elaborating on Defendant’s duty to follow the order of probation. Appellee’s brief points out that “[A] prohibition against violating criminal laws or ordinances is a mandatory probation condition.” *Id.* at 15. None of this is in dispute, nor is the manner in which the trial court conducted the hearing. The prosecution also stresses that after a revocation, a defendant may be sentenced as if no probation had been ordered. Again, we agree. Where we disagree is the point at which the State takes the position that an intermediate sanction cell is not

distinguishable from straddle or prison cells. This is sheer mistake; the United States Supreme Court has impliedly pronounced it so by its swift action to remand the *McCullar* case, *supra*.

When Judge Harry Beach sentenced Jesse Burns to prison, he was sentencing him for the underlying attempted breaking and entering. The probation revocation hearing concerned his obnoxious harassment of several 17 and 18-year old women at a marina. These facts *functioned as reasons to revoke probation*. Once the probation was revoked, however, the trial court was sentencing the Defendant on the original conviction, as if probation had never been granted. The court's range of options was constrained by the Sixth Amendment of the United States Constitution. Since there were no substantial and compelling reasons to depart upward *which were either jury-found beyond a reasonable doubt or admitted by the defendant on the record after an adequate waiver, knowing they would be used as a means of increasing his exposure to incarceration*, Defendant's sentence was unconstitutionally imposed. The State's response does not alter this conclusion in any way.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant reiterates his request that this Honorable Court vacate the sentence in this case due to its unconstitutionality as discussed above. In the alternative, he asks that the Court grant any other relief it deems fair and just.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

Jeanice Dagher-Margosian (P35933)

Assistant Defender

101 North Washington

14th Floor

Lansing, MI 48913

(517) 334-6069

Dated: March 27, 2007