

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS NO. 270886

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

JESSE GENE BURNS,

Docket No. 131898

Defendant-Appellant.

Court of Appeals No. 270886

Allegan County Circuit Court No. 02-012311

**BRIEF ON APPEAL OF CRIMINAL DEFENSE
ATTORNEYS OF MICHIGAN AS AMICUS CURIAE IN
SUPPORT OF DEFENDANT-APPELLANT**

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THIS APPEAL INVOLVES A RULING THAT A PROVISION OF A STATUTE IS INVALID



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STATEMENT OF FACTS AND PROCEDURAL HISTORY

Amicus curiae Criminal Defense Attorneys of Michigan, relies on the Statement of Facts of Defendant-Appellant, Burns, whom amicus supports.

ARGUMENT

I. INTERMEDIATE SANCTIONS ARE A STATUTORY MAXIMUM UNDER *BLAKELY V. WASHINGTON*, AND ANY FACT THAT INCREASES A SENTENCE BEYOND AN INTERMEDIATE SANCTION MUST BE FOUND BY A JURY BEYOND A REASONABLE DOUBT.

A. Intermediate sanctions are a statutory maximum sentence that must be imposed.

Intermediate sanctions are a mandatory guidelines sentence. Intermediate sanctions, one of the sentences defined by the Michigan legislative guidelines, include “probation or any sanction, other than imprisonment in a state prison or reformatory, that may lawfully be imposed.” M.C.L. 769.31(b). If probation is given as an intermediate sanction, a number of conditions such as drug treatment may also be imposed. *Id.* An intermediate sanction may also include a jail term, but the term cannot be longer than the upper limit of the recommended sentencing range or 12 months, whichever is less. MCL 769.34(4)(a). The jail sentences imposed are fixed, determinate sentences. *See People v Martin*, 668 N.W.2d 397, 257 Mich. App. 457 (2003). Our legislature and courts have emphasized the binding nature of the legislative guidelines, including intermediate sanctions. *See, e.g., People v. Hegwood*, 636 N.W.2d 127, 131-32, 465 Mich. 432 (2001). The sentencing court “shall” impose this sentence. MCL 769.34(4)(a). Therefore, when the guidelines call for intermediate sanctions, the sentencing court “shall” impose them. *See id.* If the defendant’s highest recommended guidelines sentence is 18 months or less, intermediate sanctions are the maximum sentence that can be given under the Michigan legislative guidelines *See id.; see also People v. Stauffer*, 640 N.W.2d 869, 465 Mich. 633 (2002).

Intermediate sanctions are a statutory maximum under *Apprendi v. New Jersey*, *Blakely v. Washington* and, most recently, *California v. Cunningham*. In *Apprendi v. New Jersey*, the U.S. Supreme Court held that any fact that increases a defendant's statutory maximum must be determined by a jury beyond a reasonable doubt. *Apprendi*, 530 U.S. 466, 490 (2000). In *Blakely v. Washington*, the Court reaffirmed its holding in *Apprendi*, and clarified the meaning of "statutory maximum." *Blakely*, 542 U.S. 296, 301 (2004). A statutory maximum is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Id.* at 303 (emphasis in original). This holding is rooted in the historic and fundamental Sixth Amendment right to a jury determination of the facts necessary to punishment. *Blakely*, 542 U.S. at 301-02. Additional facts, determined by the trial court by a preponderance of the evidence, cannot be used as a basis for an increase in the statutory maximum without violating the defendant's Sixth Amendment and due process rights. *Blakely*, 542 U.S. at 305-06; *Apprendi* 530 US at 476-77.

Most recently, in *California v. Cunningham*, __S.Ct. __, 2007 WL 135687 (2007), the Court again emphasized that "the Federal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." 2007 WL 135687, at *5. *Cunningham* applied *Blakely*'s holding to California's sentencing scheme, which provides for three possible sentences for an offense. *See id.* Under California law, the "middle" sentence is the presumptive sentence, which must be imposed unless the court finds additional aggravating or mitigating circumstances. If aggravating circumstances are found, the court can then

impose the higher possible sentence. *See id.* The Court found that this system had the same constitutional flaws as the sentencing system in *Blakely* – namely, that it “allow[ed] a judge to impose a sentence above the statutory maximum based on a fact . . . not found by a jury or admitted by the defendant.” *Id.* at *4. The Court also emphasized that the trial court’s discretion to choose the aggravating facts and discretion to choose whether to give the higher sentence once these aggravating circumstances were found did not eliminate the constitutional violation. *See id.* at *12.

Judicial factfinding that increases a defendant’s sentence beyond an intermediate sanction violates *Blakely*. Unless the defendant knowingly and voluntarily waives his right to jury fact-finding, or knowingly admits relevant facts, any fact that increases the defendant’s sentence beyond a statutory maximum must be submitted to a jury and proven beyond a reasonable doubt. *Blakely*, 542, U.S. at 303, 310. When a defendant’s guidelines call for an intermediate sanction, the defendant is entitled to a statutory maximum determinate jail sentence. However, at present the law permits the judge to increase the sentence based on facts found by a preponderance of the evidence. *Cf. People v Ratkov*, 505 N.W.2d 886, 201 Mich. App. 123, 125-26 (1993). These facts are not admitted by the defendant or submitted to a jury to be proven beyond a reasonable doubt. The court violates a defendant’s due process and Sixth Amendment rights when it engages in factfinding that increases the defendant’s statutory maximum sentence beyond an intermediate sanction. “[E]very defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment.” *Blakely*, 542 U.S. at 313. A defendant, such as Mr. Burns, whose guidelines call for an intermediate sanction is entitled to receive this sentence unless additional facts are found by a jury beyond a

reasonable doubt. *Blakely*, 542 U.S. at 301, *see also United States v. Booker*, 543 U.S. 220, 233 (2005).

B. Mr. Burns' initial sentence complied with the statutory maximum.

Mr. Burns' guidelines dictated an intermediate sanction sentence. His guidelines were scored at 0 to 11 months, which falls into an intermediate sanction cell. *See Basic Information Report.*¹ Under Michigan statute, Mr. Burns was entitled to an intermediate sanction sentence, with a maximum term of incarceration of 11 months. *See MCL 769.34(4)(a).* At his initial sentencing hearing on July 19, 2002, no additional facts were admitted by Mr. Burns or proven to a jury beyond a reasonable doubt. Therefore, the judge was required to impose a sentence within this statutory range. Because intermediate sanctions are also defined as any sentence other than imprisonment, a sentencing court can choose, when imposing a sentence within the guideline range, to sentence a defendant to probation, drug treatment, or other alternatives to incarceration. *See M.C.L. 769.31(b).* In Mr. Burns' case, on July 19, 2002, the judge set the sentence at three years' probation and four months in jail. *See Basic Information Report.* This sentence is within the statutory definition of intermediate sanction and is within the guidelines authorized by the fact of the conviction. Therefore, at his initial sentencing hearing, the court made no error – there was no factual finding that increased Mr. Burns' sentence beyond the statutory maximum intermediate sanction that was authorized.

¹ Mr. Burns was given 10 Offense Variable points and 17 Prior Record Variable points. *See Basic Information Report.* Amicus respectfully believes that judicial fact-finding, including the findings of offense variable facts, that increase a defendant's statutory maximum sentence violates *Blakely*. *See Brief on Appeal of Criminal Defense Attorneys of Michigan as Amicus Curiae in Support of Defendant-Appellant in People v. Raymond A. McCuller*, Docket No. 128162. This Court has apparently found that judicial factfinding to determine offense variables does not violate a defendant's constitutional rights. *See People v. McCuller*, 475 Mich. 176 (2006). In Mr. Burns' case, even without the offense variable points scored, the guidelines would have called for intermediate sanctions, only with a lesser maximum jail term. The sentence that was, in fact, imposed is permissible with or without scoring of the offense variables.

II. ON A VIOLATION OF PROBATION, THE COURT MAY NOT SENTENCE TO A PUNISHMENT BEYOND THAT AUTHORIZED BY THE FACT OF CONVICTION, ANY FACTS KNOWINGLY ADMITTED BY THE DEFENDANT, OR FACTS PROVEN TO A JURY BEYOND A REASONABLE DOUBT.

A. The trial court may not exceed the original sentence authorized by law when sentencing on a violation of probation.

As stated above, an intermediate sanction was the maximum sentence authorized by Mr. Burns' conviction and the statutory guidelines. *Blakely* requires that any additional fact that increases a defendant's statutory maximum be found by a jury beyond a reasonable doubt. *See Blakely*, 542 U.S. at 300-01. These constraints on the sentence that is authorized remain when Mr. Burns is resentenced for the original offense.

A sentence imposed after a violation of probation is not a sentence for a new crime; instead it is a resentencing on the original offense of conviction. *People v. Kaczmarek*, 628 N.W.2d 484, 464 Mich. 478 (2001); *Johnson v. United States*, 529 U.S. 694, 701 (2000). For example, in this case, when Mr. Burns is sentenced on his violation of probation, he is being resentenced on his original attempted breaking and entering a building offense.

If a defendant is found to have violated the conditions of his probation, the court may continue his probation, impose a new term of probation, or impose a term of incarceration, among other things. "If a probation order is revoked, the court may sentence the probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made." MCL 771.4. In other words, the court can sentence the offender to probation or to any sentence that was authorized at the time of the initial sentencing.

At the resentencing on the original offense, the court has statutory and constitutional constraints on the sentence it may impose. On a violation of probation, the court may not sentence beyond the maximum sentence for the statutory offense. *See, e.g. People v. Crook*, 333 N.W.2d 317, 319, 123 Mich. App. 500, 503 (1983). For example, at a violation of probation sentencing for the misdemeanor offense of assault and battery, the court may not sentence the defendant to more than 93 days in jail and/or a fine of \$500. *See* M.C.L. 750.81(1). For felony offenses, the court, when resentencing after a violation of probation, must also abide by the legislative guidelines. M.C.L. 769.34(2) (stating that the sentence “shall be within” the guidelines range); *People v. Hendrick*, 697 N.W.2d 511, 472 Mich. 555 (2005). This means that if the original conviction authorized an intermediate sanction, with a statutory maximum of a jail sentence, then this is still true at the time of the violation of probation sentencing. At this resentencing, the court cannot impose a sentence that is outside of the constitutional and statutory boundaries present at the time of the initial sentencing. For an intermediate sanction sentence, the trial court at the time of the original sentence was required to impose an intermediate sanction with a statutory maximum determinate jail sentence. At the resentencing, the court is still bound by this constraint. It cannot sentence the defendant beyond the statutory maximum intermediate sanction permitted by the original offense.

Facts found by the trial court at the violation of probation hearing by a preponderance of the evidence standard do not release the constraints on the court. When resentencing a defendant after a violation of probation, the court can take into account judge-found facts to resentence the defendant to a more punitive sentence within the permissible range. “If a probation order is revoked, the court may sentence the

probationer in the same manner and to the same penalty as the court might have done if the probation order had never been made.” MCL 771.4. For example, an offender whose guidelines called for intermediate sanctions could be resentenced to a jail term, instead of the less restrictive probation sentence. The court may not, however, exceed the statutory maximum based on facts found by the court using a preponderance of the evidence standard.

B. A defendant cannot be sentenced beyond the statutory maximum intermediate sanction - the maximum authorized by the offense of conviction - at his violation of probation resentencing.

Mr. Burns was alleged to have violated the conditions of his term of probation. The probation officer alleged that he violated his probation by, in part, touching a woman in a way that constituted criminal sexual conduct, fourth. Additional allegations were that Mr. Burns consumed alcohol while on probation, in violation of the conditions set by the court, committed the offense of harassment, and engaged in assaultive, abusive, threatening, or intimidating behavior. *See* Petition, Affidavit and Bench Warrant. Mr. Burns did not admit these allegations. Instead, the court heard evidence of the alleged violations of probation and determined, by a preponderance of the evidence, that Mr. Burns had 1) consumed alcohol; 2) committed the offense of CSC, 4th; and 3) engaged in assaultive, abusive, threatening or intimidating behavior. Presentence Investigation Report, Case Report. In other words, the court in Mr. Burns’ case heard evidence of the alleged violations in a contested hearing, and made factual findings based on this evidence. Because of these factual findings, the court imposed a new sentence, as the court is permitted to do. MCL 771.4. When imposing a sentence after a violation of probation conditions, the court may continue the initial probation, may sentence Mr.

Burns to a new period of probation, or may sentence “as the court might have done if the probation order had never been made.” MCL 771.4. The court can choose to resentence Mr. Burns in the same way and to the same penalty as if it were imposing the initial sentence. *See id.* In sum, the court can sentence Mr. Burns, based on a violation of his probation conditions, under the initial guidelines.

The trial court is limited by the statutory maximum of these intermediate sanction guidelines. In Mr. Burns’ case, the guidelines called for an intermediate sanctions sentence. As stated above, an intermediate sanctions sentence is a statutory maximum for purposes of *Apprendi* and *Blakely*. The court may not exceed this statutory maximum except based on an admission of the defendant or if facts are proven beyond a reasonable doubt. *Blakely*, 542 U.S. at 303. After a violation of probation, the court may only impose a sentence that would have been statutorily and constitutionally permissible for the offense and the offender in the first instance. Here, the trial court, in imposing the sentence for the violation of probation, is constrained to the statutory maximum intermediate sanction.

Instead of sentencing within the constitutional and statutory range, the trial court exceeded the statutory maximum sentence and imposed a prison term. The court did so based on additional facts that were found by a preponderance of the evidence at a contested probation violation hearing. These facts were neither admitted by the defendant, nor proven to a jury beyond a reasonable doubt. Based on these judge-found facts, the court could not impose a sentence beyond the statutory maximum intermediate sanction without violating *Apprendi* and *Blakely*.

C. Complying with these constitutional and statutory limits at sentencing has limited implications for judges' discretion at violation of probation hearings.

Complying with the constitutional requirements of *Apprendi* and *Blakely* does not significantly limit sentencing court's discretion. The court can find facts that lead him or her to impose a sentence more restrictive than probation; the sentence given must merely stay below the statutory maximum. In Mr. Burns' case, for example, the court was free to find additional facts, using a preponderance of the evidence standard, to increase Mr. Burns' sentence *within* the constitutionally permissible range. *See Blakely* 542 U.S. at 308-09. Instead of resentencing Mr. Burns to probation, the court could have imposed a determinate jail term. This sentence would have complied with the constitutional limits on judicial fact-finding, yet imposed additional punishment on the defendant for the alleged violations of the court's conditions.

Additionally, the court will be constitutionally permitted to impose a sentence beyond the statutory maximum in some circumstances. For example, the defendant may knowingly and intelligently waive his rights and admit to facts that would increase the statutory maximum for the offense. *See Blakely*, 542 U.S. at 310. Also, the alleged violations can be proven beyond a reasonable doubt to a jury. In the common situation where the alleged violation is a new criminal offense, this is and can be a commonplace way to punish defendants for additional violations of the law, yet respect the defendant's constitutional rights. For example, in this case, a prosecutor in the appropriate jurisdiction could have pursued a separate charge of criminal sexual conduct based on the alleged actions of Mr. Burns. These allegations could have been submitted to a jury, and if proven beyond a reasonable doubt, these alleged acts could be separately punished.

D. Any other rule would distort sentencing practice.

Allowing the trial court to impose a sentence beyond the statutory maximum after a violation of probation would undermine the due process and Sixth Amendment rights ensured by *Apprendi* and *Blakely*.

The *Blakely* Court clearly considered the possibility that alleged wrongdoing would occur during or after the criminal trial for the initial offense. *Blakely*, 542 U.S. at 307 n.11. Facts about the offense or offender arising after the initial charge has been brought were, until *Blakely*, considered by the courts at sentencing. The Court determined that the desire to punish the defendant for all alleged misconduct, such as perjury during trial, was constrained by his Sixth Amendment rights. *Blakely*, 542 U.S. at 307 n.11. In fact, the *Blakely* Court explicitly suggested that the proper means to punish a defendant beyond the statutory maximum for this additional conduct was through a separate charge and, if necessary, jury trial. *See id.* The same is true here. The court may make factual findings, using a preponderance of the evidence standard, that the defendant has committed additional criminal acts. However, the court may only use these facts to increase the defendant's punishment up to the statutory maximum. The court may not make factual findings, using a lesser standard of evidence, that increase the defendant's sentence beyond what the relevant state statute allows. To do otherwise would ignore the *Blakely* Court's insistence on a jury's determination of the fact essential to sentence; even if it is occasionally inconvenient. *Blakely*, 542 U.S. at 313 (noting that "nonadversarial" fact-finding may be efficient or even fair, but that courts are bound to uphold the jury trial requirements of the Constitution).

In addition, any other rule would create incentive for opportunistic behavior designed to evade the dictates of the Sixth Amendment. At worst, courts could impose an overly lenient initial sentence, in combination with stringent conditions of probation. If the probationer misstepped, the court then could circumvent the defendant's Sixth Amendment and due process rights and impose a sentence beyond the statutory maximum that was not authorized by the plea or the jury verdict. The result -- an end-run around the dictates of the Constitution -- is clearly not within the letter or the spirit of the Court's holdings.

CONCLUSION

Intermediate sanctions are a statutory maximum under *Blakely v. Washington*, 542 U.S. 296 (2004). Any sentence that exceeds this statutory maximum based on facts found by a judge using a lesser standard than beyond a reasonable doubt violates the Sixth Amendment and due process rights of the defendant, regardless of whether the sentence was imposed directly after trial or following a violation of probation.

Respectfully submitted,

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