

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-VS-

EARNEST LAMONT WARREN,

Defendant-Appellant.

Supreme Court No. SC_NO

Court of Appeals No. 276816

Lower Court No. 06-53122FC

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF
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STATEMENT OF QUESTIONS PRESENTED

- I. DOES THE PLAIN LANGUAGE OF MCL 777.21 REQUIRES THE TRIAL COURT TO SCORE THE SENTENCING GUIDELINES FOR ALL CONVICTION OFFENSES, WITHOUT EXCEPTION?**

Trial Court made no answer

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

I. THE PLAIN LANGUAGE OF MCL 777.21 REQUIRES THE TRIAL COURT TO SCORE THE SENTENCING GUIDELINES FOR ALL CONVICTION OFFENSES, WITHOUT EXCEPTION.

Mr. Warren was convicted of first degree criminal sexual conduct and assault with intent to commit great bodily harm. The trial court scored guidelines for the CSC, but not for the assault. Had the court scored the guidelines for the assault, and done so consistently with those scored for the CSC, his guidelines for the assault would have been 43 to 152 months. In that event, the 240-month minimum sentence he received for that offense constitutes an unlawful and unintended departure from his sentencing guidelines. Moreover, based on errors which have been alleged in the scoring of his guidelines for CSC, his correctly scored guidelines for assault would have been 19 to 76 months. Under these circumstances, the 240-month minimum term he received for assault is a grossly unwarranted departure.

In an Order issued April 24, 2009, the Court has ordered oral argument and permitted supplemental briefing on the question of “whether the trial court is obligated under the statutory sentencing guidelines to score all felonies or only the highest class felony.” As least as it pertains to the version of the law applicable to Mr. Warren’s offense date, the answer is that the trial court erred in failing to score all offenses.

When the sentencing guidelines were passed in 1998, the sentencing court was directed to score each offense under the guidelines: “If the defendant was convicted of multiple offenses, score each as provided in this part.” MCL 777.21 (2) (1998 PA 317, effective January 1, 1999). That same Public Act likewise provided that for the preparation of sentencing guidelines for each offense in conjunction with preparation of the presentence report: “A presentence investigation report ... shall include ...for each conviction entered, the sentence grid ... that contains the

recommended minimum sentence ranges.” MCL 771.14 (1998 PA 317, effective January 1, 1999).

The legislature attempted in 2000 to amend MCL 777.21, as follows: “If the defendant was convicted of multiple offenses, subject to section 14 of chapter IX [i.e. MCL 769.14], score each offense as provided in this part.” MCL 777.21 (2) (2000 PA 279, effective October 1, 2000). This is the version of the statute that was in effect on the date of the instant offense, which is April 1, 2006.

But the 2000 amendment to MCL 777.21 had no effect, because in it, the legislature cross-referenced the wrong corresponding statute; it referred to MCL 769.14 rather than MCL 771.14.¹ The Court *People v Johnigan*, 265 Mich App 463, 470; 696 NW2d 724 (2005) recognized that the 2000 version of MCL 777.21 (2) “directs that all crimes be scored, except as provided by MCL 769.14.” Since it contained a nonsensical proviso, the 2000 revisions had no impact, and did not change the status quo.

As the Court noted in *People v Mack*, 265 Mich App 122, 127; 695 NW2d 342 (2005), the legislature also amended the presentence report statute, MCL 771.14, in 2000, to require the preparation of a presentence report only for the highest offense: “A presentence report ... shall include ... for each crime having the highest crime class, the sentence grid ... that contains the minim sentence range” and “the computation that determines the recommended minimum sentence range for the crime having the highest crime class.” MCL 771.14.

In 2006, the current version of MCL 777.21 was passed, so that it now correctly cross-references MCL 771.14 instead of MCL 769.14: “If the defendant was convicted of multiple offenses, subject to section 14 of chapter XI [i.e. MCL 771.14], score each offense as provided in

¹ MCL 769.14 is inapposite, as it pertains to application for pardon or commutation.

that part.” MCL 777.21 (2) (2006 PA 655, effective January 9, 2007). The Editor’s Notes to the Michigan Compiled Law Service publication of the statute affirms that, “[t]he 2006 amendment ... in subsection (2) substituted ‘XI’ for ‘IX’ following ‘14 of chapter’...”

In the current version of MCL 777.21, the caveat regarding “section 14 of chapter XI” refers to MCL 771.14, which requires that the presentence report include “the sentence grid ... that contains the recommended sentence range” for the crime “having the highest crime class” and “the computation that determines the recommended minimum sentence range for the crime having the highest crime class.” MCL 771.14 (2)(e)(ii) and (iii). These two statutory provisions – MCL 777.21 and MCL 771.14 -- are not easily reconcilable. The current version of MCL 777.21 mandates the preparation of a “sentencing information report” for each offense, while MCL 771.14 requires that the presentence report contain the “sentence grid” and “recommended sentence range” only for the crime in the highest crime class. The Court in *Johnigan* reconciled these two provisions by concluding that, by the plain language of their respective statutory provisions, the presentence report need only include the scoring for the highest offense, but the trial court must still score all offenses:

[U]nder the clear language of MCL 777.21 (2) as written, the sentencing court must score the sentencing guidelines for all offenses that fall within the scope of the guidelines. We note that this does not produce an irresolvable conflict with MCL 771.14 (2)(e)(ii) which requires the probation department only to prepare a presentence investigation report with a sentencing guidelines recommendation for only the highest crime class among multiple crimes carrying concurrent sentences. The effect of the two statutes as written is that, while the probation department need only score guidelines for the highest crime, the sentencing court must score the guidelines for the remaining crimes as well. *Johnigan, id.* at 471-472.

The *Johnigan* Court’s interpretation finds support in the fact that the provision which mandates scoring guidelines for each offense (MCL 777.21) appears in the statute subtitled, “Scoring Instructions for Sentencing Guidelines,” while the provision which evidently only requires scoring guidelines for the highest offense (MCL 771.14) appears in the statute subtitled, “Probation.” Indeed, MCL 777.21 (2) directs the trial court to “...score each offense as provided in *this part*,” where “part” can only refer to that very same statute, which is entitled, “Part 3. Scoring Instructions for the Sentencing Guidelines.”

That the statute requires the sentencing judge to score each conviction offense separately is further evidenced by the mandate in MCL 769.34 (2) that all sentences be within the guidelines range, absent a departure. A judge cannot know whether he or she is complying with this requirement without scoring each offense, even if the sentence for that offense is not controlling. This is precisely what occurred in Mr. Warren’s case, where the failure to score guidelines for a lesser offense resulted in the imposition of a sentence which grossly exceeds the guidelines had they been scored.

As the Court held in *Johnigan*, it is of no consequence that the probation statute elsewhere requires probation officers to report the guidelines computation in the presentence report only for the offense with the highest crime class and for offenses which will result in a consecutive sentence. MCL 771.14 (2)(e)(i) and (ii). This provision clearly relates to the reporting responsibilities of probation agents, not the scoring obligations of the sentencing judge, who is ultimately responsible for the sentence.

As the statute currently reads, the two statutes now have distinct requirements – MCL 777.21 requires that all offenses be scored by the trial court, while MCL 771.14 provides that only one offense be scored in conjunction with preparation of the presentence report: “If the

defendant was convicted of multiple offenses, subject to section 14 of chapter XI [i.e. MCL 771.14], score each offense as provided in this part.” MCL 777.21 (2) (2006 PA 655, effective January 9, 2007).

But regardless of the arguable contradictions between the current versions of MCL 777.21 and MCL 771.14, it is the 1998 version of MCL 777.21 which governs the instant case, since, as is discussed *supra*, the 2000 amendment had no effect and the 2006 version did not become effective until January 9, 2007, which is after Mr. Warren’s offense date of April 1, 2006. The 1998 version does not involve any of this confusion, because it clearly states with no exception that “[i]f the defendant was convicted of multiple offenses, score each as provided in this part.” Indeed, this Court construed the law in *People v Sargent*, 481 Mich 346, 348; 750 NW2d 161 (2008) in holding that “MCL 777.21 (2) instructs us to ‘score each offense’ if ‘the defendant was convicted of multiple offenses ...’”² [Emphasis omitted].

Since the governing version of the statute required the scoring of all offenses, it was necessary for the trial court below to score sentencing guidelines for each of Mr. Warren’s offenses.

The harmful effect of failing to calculate guidelines for each offense is most apparent when considered in light of the circumstance in which the conviction for the highest offense is vacated on appeal on grounds which do not permit retrial, such as insufficient evidence, violation of the right against double jeopardy or to speedy trial. A similar result would occur if the conviction for the highest offense were reversed, remanded for retrial, then dismissed (because, for example, reversal was based on suppression of critical evidence), or then the defendant were acquitted upon retrial. In either scenario, the conviction for the lesser offense would remain

intact, along with its illegal sentence, which could no longer be challenged. For example, if Mr. Warren's conviction for CSC were vacated on appeal, dismissed after reversal and remand, or resolved by acquittal, he would now be serving a minimum term for assault which is clearly illegal, and against which he would have no recourse.

The harm of failing to score guidelines for each offense also manifests when the minimum sentence for the higher offense is deemed erroneous on appeal, and once corrected, is actually lower than the illegal minimum term for the lesser offense. For example, if corrections to Mr. Warren's first degree CSC sentence resulted reducing his minimum term below 20 years, then he would actually be serving a higher sentence for assault with intent to commit great bodily harm, a far less serious offense, and again, with no possible remedy.

For all of these reasons, Mr. Warren continues to urge this court to require that the trial court score sentencing guidelines for both of his offenses.

² The lower court number in *Sargent*, which is 04-013744, reveals that the offense occurred no later than 2004, and therefore, the Court was interpreting either the 1998 or the 2000 version of the statute, but not the 2006 version.

SUMMARY AND RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant continues to urge this court to require that the trial court score sentencing guidelines for both of his offenses.

Respectfully submitted,

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