

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF THE
STATE OF MICHIGAN,

Plaintiff-Appellee,

vs.

EARNEST LAMONT WARREN,

Defendant-Appellant.

SC File No. 137666

COA File No. 276816

Lower Court File No. 06-53122-FC
Muskegon County Circuit Court

MUSKEGON COUNTY PROSECUTOR
Attorney for Plaintiff
By: Charles F. Justian (P35428)
Hall of Justice, Fifth Floor
990 Terrace Street
Muskegon, MI 49442
(231) 724-6435

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant
By: Desiree M. Ferguson (P34904)
3300 Penobscot Building
645 Griswold
Detroit, MI 48226
(313) 256-9833

**PLAINTIFF-APPELLEE'S SUPPLEMENTAL RESPONSE TO
DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE PURSUANT TO THE
APRIL 24, 2009, ORDER OF THIS HONORABLE COURT**

MUSKEGON COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

By: CHARLES F. JUSTIAN (P35428)
Chief Appellate Attorney

BUSINESS ADDRESS & TELEPHONE:

Hall of Justice, Fifth Floor
990 Terrace Street
Muskegon, MI 49442
(231) 724-6435

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

FOR MULTIPLE OFFENSES INVOLVING *CONCURRENT* SENTENCES, DID THE LEGISLATURE INTEND THAT THE SENTENCING GUIDELINES WOULD BE SCORED ONLY FOR THE CRIME CARRYING THE HIGHEST CRIME CLASS AND, THEREFORE, DID DEFENDANT FAIL TO SHOW THAT HIS SENTENCE WAS INVALID?

Plaintiff-Appellee says, "Yes".

Defendant-Appellant says, "No".

The trial court says, "Yes".

The Court of Appeals says, "Yes".

COUNTERSTATEMENT OF THE FACTS

On April 24, 2009, this Honorable Court ordered:

On order of the Court, the application for leave to appeal the September 18, 2008 judgment of the Court of Appeals is considered. We direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). At oral argument, the parties shall address whether the trial court is obligated under the statutory sentencing guidelines to score all felonies or only the highest class felony. See *People v Mack*, 265 Mich.App 122 (2005), *People v Johnigan*, 265 Mich App 463, 472 (2005), and MCL 777.21(2), as amended effective January 9, 2007. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers. [*People v Warren*, 2009 WL 1118726, 1 (Exhibit C).]

In ruling on this issue, the Court of Appeals stated:

[W]e reject defendant's argument that he must be resentenced for his assault conviction because no sentencing guidelines were prepared for that conviction and because his sentence for that conviction therefore amounts to an unlawful departure. Defendant was convicted of multiple offenses; thus, the trial court was required to score each offense, "subject to [MCL 771.14] ..." MCL 777.21(2). Because defendant received concurrent sentences, the trial court was not required to provide a recommended minimum sentence range for each conviction for which a consecutive sentence (not applicable here) was authorized, MCL 771.14(2)(e)(i), but instead was only required to prepare the recommended minimum sentence range for the crime having the highest crime class. MCL 771.14(2)(e)(ii). CSC 1 is a class A felony, MCL 777.16y, while assault with intent to do great bodily harm is a class D felony, MCL 777.16d. Thus, for sentencing on defendant's multiple convictions with concurrent sentences, the guidelines were properly prepared. *People v Mack*, 265 Mich App 122, 128; 695 NW2d 342 (2005). [Exhibit D, Slip op, p 6.]

The People agree with the Court of Appeals disposition of this issue and this constitutes their supplemental brief as authorized by this Court's April 24, 2009, order.

LAW AND ARGUMENT

FOR MULTIPLE OFFENSES INVOLVING CONCURRENT SENTENCES, THE LEGISLATURE INTENDED THAT THE SENTENCING GUIDELINES WOULD BE SCORED ONLY FOR THE CRIME CARRYING THE HIGHEST CRIME CLASS AND, THEREFORE, DEFENDANT HAS NOT SHOWN THAT HIS SENTENCE WAS INVALID.

A. Standard of review

“The proper meaning of a statute constitutes a question of law that this Court reviews de novo.” *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

The Court’s “fundamental obligation when interpreting statutes is ‘to ascertain the legislative intent that may reasonably be inferred from the words expressed in the statute.’” *People v Thompson*, 477 Mich 146, 151; 730 NW2d 708 (2007), quoting *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). MCL 8.3a provides:

All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases, and such as may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to such peculiar and appropriate meaning.

“This task begins by examining the language of the statute itself. The words of a statute provide ‘the most reliable evidence of its intent....’ If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written [and] ... [n]o further judicial construction is required or permitted....” *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999) (citations omitted). It is “[o]nly where the statutory language is ambiguous may a court properly go beyond the words of the statute to ascertain legislative intent.” *Id.*

In addition to “consider[ing] both the plain meaning of the critical word or phrase as well as ‘its placement and purpose in the statutory scheme[,]’ ... effect should be given to every

phrase, clause, and word in the statute.” *Id.*, 237 (citation omitted). “The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended.” *Id.*

Finally, statutes *in pari materia* are those sharing a common purpose or those that relate to the same subject. *State Treasurer v Schuster*, 456 Mich 408, 417; 572 NW2d 628 (1998). As such they must be read and construed together as one law even if they were enacted at different times and without specific reference to each other. *Id.* If statutory provisions can be construed in a manner that avoids conflict, then that construction should control the analysis. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). “The object of the *in pari materia* rule is to give effect to the legislative purpose as found in harmonious statutes.” *Id.* (citation omitted).

B. *Analysis of the issue*

1.

Defendant correctly notes that MCL 771.21(2) as contained in 2000 PA 279 has a typographical error, subjecting MCL 771.21(2) “to section 14 of chapter **IX**”, which is MCL 769.14, rather than “to section 14 of chapter **XI**”, which is MCL 771.14. This typographical error was fixed by 2006 PA 655, which became effective January 9, 2007, which reads as follows: “If the defendant was convicted of multiple offenses, subject to section 14 of chapter XI, score each offense as provided in this part.”

Defendant argues that he committed his offense before the amendment took effect and, therefore, he should receive the benefit of this obvious typographical error. The People disagree.

Under Michigan law, a new or amended statute generally applies prospectively unless the Legislature has expressly or impliedly indicated its intention to give the statute retrospective effect. *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992). However, an exception to

the general rule is recognized where a statute is remedial or procedural in nature. *Id.* “Statutes that operate in furtherance of a remedy already existing and that neither creates new rights nor destroys rights already existing are held to operate retrospectively unless a different intention is clear.” *Id.*

MCL 771.21(2) is found within the Code of Criminal Procedure. The Legislature “declared [the Code of Criminal Procedure] to be remedial in character and as such shall be liberally construed to effectuate the intents and purposes thereof.” MCL 760.2. Accordingly, the correction of this typographical error in 2006 should apply retroactively to Defendant, who was sentenced three months after the effective date of the correction.

It is noteworthy that the First Analysis of Senate Bill 373 (which became 2000 PA 279), which analysis was issued on May 25, 2000, identified this typographical error and how it was supposed to be cured. The First Analysis stated in relevant part at page 2:

Under the guidelines, before a court sentences a person, a probation officer is required to prepare and provide to the court a report that includes, among other things, the sentence grid containing the recommended minimum sentence ranges for each conviction and the computation that determines the recommended minimum sentence range for each conviction. Under the bill, in cases where a person was convicted of more than one crime, the computation to determine the recommended minimum sentence would only have to be performed on the crime with the highest crime class and the sentence grid containing recommended minimum sentence would only have to be provided for the crime with the highest crime class. However, the sentence grid and computation would have to be performed on every conviction for which a consecutive sentence was authorized or required. [*Note: A reference to this change contains a typographical error – the change is made in Chapter XI, Section 14 but the reference is to Chapter IX, Section 14.*]

It is, of course, unknown why this correction never made it into the legislation until 2006 with the enactment of 2006 PA 655.

In any event, Defendant acknowledges that 2000 PA 279 contained a typographical error: “[T]he 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”, observing that “MCL 769.14 is inapposite, as it pertains to application for pardon or commutation.” (Defendant’s brief, p 2.) Defendant also says, “[i]n 2006, the current version of MCL 769.21 was passed, *so that it now correctly cross-references* MCL 771.14 instead of MCL 769.14”. (Defendant’s brief, p 2. Emphasis supplied.)

Accordingly, because the statute is remedial and the 2000 amendment contained an obvious typographical error, it follows that it should be applied to Defendant.

2.

The Court of Appeals followed its holding in *People v Mack*, 265 Mich App 122, 128; 695 NW2d 342 (2005), and ruled that, “[b]ecause defendant received concurrent sentences, the trial court ... was only required to prepare the recommended minimum sentence range for the crime having the highest crime class. MCL 771.14(2)(e)(ii).” The People agree with this interpretation of MCL 777.21(2) and MCL 771.14, which were enacted together by 2000 PA 279.

Indeed, these statutes were not only enacted together, 2000 PA 279 made the former (MCL 777.21[2]) expressly subject to the latter (MCL 771.14 as corrected by 2006 PA 655).¹

¹ Before 2000 PA 279 amended MCL 777.21(2), it had read as follows: “If the defendant was convicted of multiple offenses, score each offense as provided in this part.” 1998 PA 317, MCL 777.21(2). Also, before 2000 PA 279 amended MCL 771.14, it had read in part as follows:

(2) A presentence investigation report prepared under subsection (1) shall include all of the following:

* * *

(e) For a person to be sentenced under the sentencing guidelines set forth in chapter XVII, all of the following:

Specifically, MCL 777.21(2) provides: “If the defendant was convicted of multiple offenses, **subject to section 14 of chapter IX [sic XI] [MCL 771.14²]**, score each offense as provided in this part.” (Emphasis supplied.) Thus, the Legislature established a general rule and made it “subject to” another rule, which is contained in MCL 771.14, which provides in relevant part as follows:

(2) A presentence investigation report prepared under subsection (1) shall include all of the following:

* * *

(e) For a person to be sentenced under the sentencing guidelines set forth in chapter XVII [MCL 777.1 *et seq.*], all of the following:

(i) For each conviction for which a consecutive sentence is authorized or required, the sentence grid in part 6 of chapter XVII that contains the recommended minimum sentence range.

(ii) Unless otherwise provided in subparagraph (i), for each crime having the highest crime class, the sentence grid in part 6 of chapter

(i) For each conviction entered, the sentence grid in part 6 of chapter XVII that contains the recommended minimum sentence ranges.

(ii) The computation that determines the recommended minimum sentence range for each conviction entered. [1998 PA 317, MCL 771.14(2)(e).]

² As stated, 2000 PA 279 contained a typographical error. It referred to section 14 of chapter IX, which was MCL 769.14 (which, of course, made no sense), when, in fact, it meant to refer to section 14 of chapter XI, which is MCL 771.14. This was corrected by 2006 PA 655 in 2006, which became effective January 9, 2007, three months before Defendant was sentenced. As stated, this should be applied retroactively to Defendant because the statutory scheme is remedial and it was obvious that the Legislature intended the reference to be to section 14 of chapter XI, which is MCL 771.14, all along. *People v Russo*, 439 Mich 584, 594; 487 NW2d 698 (1992).

XVII [MCL 777.61 *et seq.*] that contains the recommended minimum sentence range.

(iii) Unless otherwise provided in subparagraph (i), the computation that determines the recommended minimum sentence range for the crime having the highest crime class. [MCL 771.14(2)(e)(i)-(iii).]

“In interpreting the statute at issue, [the Court] ... consider[s] both the plain meaning of the critical word or phrase as well as ‘its placement and purpose in the statutory scheme.’” *Sun Valley Foods Co, supra*, 460 Mich at 237, quoting *Bailey v United States*, 516 US 137, 145; 116 S Ct 501; 133 L Ed 2d 472 (1995).

In MCL 777.21(2), the plain meaning of the critical word or phrase “*subject to*” as well as its placement and purpose” vis-à-vis MCL 771.14 is dispositive of the statutory interpretation question before the Court.

In *Mayor of Lansing v MPSC*, 470 Mich 154, 160; 680 NW2d 840 (2004), this Court held that the term “subject to” means “dependant upon” and “that interaction, rather than disconnection, of the subsections is called for”:

We note that *Random House Webster’s College Dictionary* (2001 ed), defines “subject” when used as an adjective in six ways. The most applicable is the fourth definition, “dependent upon something (usu. fol. by *to*): *His consent is subject to your approval.*” This definition, in essence, gives to the word “subject” the meaning, “dependent upon.” When used as it is here and in other places in the Legislature’s work, it is clear that the subsections work together[.]⁴

⁴ Moreover, even if one were inclined to utilize one of the other five definitions in the dictionary (“under the domination, control, or influence of something [often fol. by *to*]”; “being under the dominion, rule, or authority of a sovereign, state, etc. [often fol. by *to*]”; “open or exposed [usu. fol. by *to*]: *subject to ridicule*”; “being under the necessity of undergoing something [usu. fol. by *to*]: *All beings are subject to death*”; or “liable, prone [usu. fol. by *to*]: *subject to headaches*”), these also lead to the same conclusion that “dependent upon” yields: that interaction, rather than disconnection, of the subsections is called for.

In applying these rules and definitions to the plain language of MCL 777.21(2), the general rule requiring the “scor[ing of] each offense” “[i]f the defendant was convicted of multiple offenses” is *dependent upon* “section 14 of chapter XI[, MCL 771.14]....” When turning to “section 14 of chapter XI”, we find an exception to the general rule contained in MCL 777.21(2) for “scor[ing] each offense” when “multiple offenses” are involved. In other words, to confirm whether to “score each offense” where “the defendant was convicted of multiple offenses” the Court must turn to “section 14 of chapter XI”, MCL 771.14 to find the answer. Again, the former is dependent upon the latter.

In *People v Johnigan*, 265 Mich App 463; 696 NW2d 724 (2005), the Court says that “[t]he effect of the two statutes as written is that, while the probation department need only score the guidelines for the highest crime, the sentencing court must score the guidelines for the remaining crimes as well.” *Johnigan, supra*, 265 Mich App at 472. In other words, the *Johnigan* panel reads the statutory scheme as expecting our busy circuit court judges to perform the yeomen’s task of adding up the guideline numbers for each crime regardless whether the sentences imposed will run concurrently. This reading of the statutory scheme is not only *illogical*, as the *Johnigan* panel readily admits, *id.*, 470-471, it is inconsistent with the plain language of the statutes involved. It also ignores this Court’s rule of statutory interpretation that, “[a]s far as possible, effect should be given to every phrase, clause, and word in the statute.” *Sun Valley Foods Co, supra*, 460 Mich at 237. To be sure, the *Johnigan* panel’s reading of MCL 777.21(2) disregards the “subject to” language contained in MCL 777.21(2), which makes the general rule of scoring each offense “subject to” (i.e., *dependent upon*) “section 14 of chapter XI”, MCL 771.14.

When properly applying the “subject to” language contained in MCL 777.21(2), the statutory scheme pragmatically utilizes our scarce judicial resources by eliminating the illogical need of having probation agents and circuit court judges working independently of one another in calculating the guidelines score for each offense when, in the end, this extra expenditure of judicial labor and time will mean absolutely nothing to the amount of time the defendant would serve vis-à-vis concurrent sentences. Thus, when reading MCL 777.21(2) and MCL 771.14 together, the Legislature established that only those guidelines relevant to the “highest crime class” shall be scored when concurrent sentences will be imposed for multiple offenses.

This plain and harmonious reading of the statutes is also supported by the March 22, 2001, enrolled analysis of Senate Bill 373 that became 2000 PA 279, which enacted both MCL 777.21(2) and MCL 771.14. This analysis stated in part:

Under the Code of Criminal Procedure, before a court sentences a person, a presentence investigation report, containing specific information, must be prepared. Additional information is required for a person who is to be sentenced under the sentencing guidelines. Previously, this information included, for each conviction entered, the sentence grid containing the recommended minimum sentence range, and the computation that determines the recommended minimum sentence range. Under the bill, the report must include the sentence grid that contains the recommended minimum sentence range for each conviction for which a consecutive sentence is authorized or required. Otherwise, the report must include the sentence grid and the computation for the crime having the highest crime class.

The Code provides that, if the defendant was convicted of multiple offenses, the sentencing court must score each offense. Under the bill, this requirement is subject to the previous provisions. [Exhibit A, p 2. Emphasis supplied.³]

³ This is consistent with the First Analysis of Senate Bill 373 issued on May 25, 2000. (Exhibit B.) The First Analysis also noted the typographical error contained in the statute that the Senate Bill would also cure. The First Analysis stated in relevant part at page 2:

Under the guidelines, before a court sentences a person, a probation officer is required to prepare and provide to the court a report that includes, among other things, the sentence grid containing the recommended minimum sentence ranges for each conviction and the computation that determines the recommended minimum sentence range for each conviction. Under the bill, in cases where a

This, of course, was also the practice under the *judicial* sentencing guidelines that were in effect before January 1, 1999:

4. In instances when there are multiple convictions for a single offender, the judge must complete the SIR for the conviction that carries the highest statutory maximum. In instances in which the multiple convictions have the same statutory maximum, the judge may choose the conviction offense upon which to score the offender. [1988 Michigan Sentencing Guidelines (2d ed, West), p 1.]

Accordingly, the *Johnigan* panel’s reading of MCL 777.21(2) may not only “produce an illogical and even unintended result” as it readily acknowledges, *Johnigan, supra*, 265 Mich App at 471, it is inconsistent with the plain language of MCL 777.21(2), which is “subject to” or dependent upon “section 14 of chapter XI”, MCL 771.14, which, in turn, only requires the scoring of the guidelines for the “highest crime class” when the sentences for the multiple offenses under consideration are going to be served concurrently. MCL 771.14(2)(e)(i)-(iii).

3.

Defendant finally raises the aurora of what might occur if “the conviction for the highest offense is vacated on appeal on grounds which do no[t] permit retrial, then dismissed [T]he conviction for the lesser offense would remain intact, along with its illegal sentence, which could no longer be challenged.” (Defendant’s brief, pp 5-6.) This is, of course, not true because, obviously, the matter would have to be remanded for resentencing given that the sentence for the

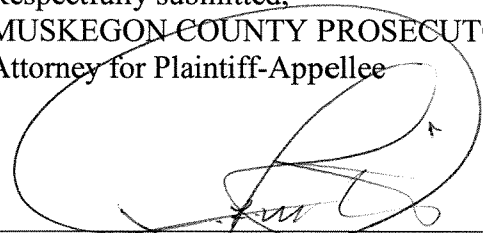
person was convicted of more than one crime, the computation to determine the recommended minimum sentence would only have to be performed on the crime with the highest crime class and the sentence grid containing recommended minimum sentence would only have to be provided for the crime with the highest crime class. However, the sentence grid and computation would have to be performed on every conviction for which a consecutive sentence was authorized or required. [Note: A reference to this change contains a typographical error – the change is made in Chapter XI, Section 14 but the reference is to Chapter IX, Section 14.]

nondismissed "lesser offense" would have been erroneously based, in part, on the dismissed offense.

CONCLUSION

For the foregoing reasons, Defendant's conviction and sentence should be affirmed.

Respectfully submitted,
MUSKEGON COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee



Dated: May 26, 2009

By: CHARLES F. JUSTIAN (P35428)
Chief Appellate Attorney

BUSINESS ADDRESS & TELEPHONE:
Hall of Justice, Fifth Floor
990 Terrace Street
Muskegon, MI 49442
(231) 724-6435