STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v GEORGE HENRY MARTIN III, Defendant-Appellee.	FOR PUBLICATION July 8, 2003 9:10 a.m. No. 243008 Oakland Circuit Court LC No. 02-184542-FH Updated Copy August 29, 2003

Before: Owens, P.J., and Bandstra and Murray, JJ.

MURRAY, J., (*concurring).*

We granted leave in this case to decide whether it is unlawful for a trial court to sentence a second-offense habitual offender to a straight jail term as an intermediate sanction under the statutory sentencing guidelines, MCL 769.34(4)(c)(ii). Under the controlling statutes, an indeterminate sentence must be imposed upon a second-offense habitual offender only when the court sentences a defendant to imprisonment for a "term of years," MCL 769.10(2), and therefore, a straight jail term is a permissible form of intermediate sanction under MCL 769.31(b). I write separately, however, to specifically address the prosecution's argument under MCL 769.31(b).

Resolution of this case requires us to apply several different provisions of our state sentencing statutes to the facts presented before the trial court, a task we perform utilizing a de novo standard of review. *People v Hegwood,* 465 Mich 432, 436; 636 NW2d 127 (2001). "In construing a statute, it is our obligation to review the words of the statute and give the words used their plain and ordinary meanings." *Stone v Michigan,* 467 Mich 288, 291; 651 NW2d 64 (2002), citing *Herald Co v Bay City*, 463 Mich 111, 117-118; 614 NW2d 873 (2000). It is likewise our duty to read statutes dealing with the same subject matter in pari materia, that is, to interpret them consistently with each other, so long as the language in the statutes permit such a construction. *People v Webb,* 458 Mich 265, 274; 580 NW2d 884 (1998). It is equally clear that we must give effect to all words and provisions within a statute, so as to avoid a construction that renders any part of a statute nugatory. *Pohutski v City of Allen Park,* 465 Mich 675, 683-684; 641 NW2d 219 (2002).

There are several statutes that must be considered in resolving this issue. As noted, the maximum punishment for the felony committed by defendant is ten years in a state prison. MCL

750.357. However, because defendant is a second-offense habitual offender, MCL 769.10(1)(a) sets forth the additional sentencing options of probation or a maximum sentence of 1-1/2 times the maximum for a first conviction. This section provides, in pertinent part:

> (1) If a person has been convicted of a felony or an attempt to commit a felony, whether the conviction occurred in this state or would have been for a felony or attempt to commit a felony in this state if obtained in this state, and that person commits a subsequent felony within this state, *the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:*
>
> (a) If the subsequent felony is punishable upon a first conviction by imprisonment for a term less than life, the court, except as otherwise provided in this section or section 1 of chapter XI, may place the person on probation or sentence the person to imprisonment for a maximum *term* that is not more than 1-1/2 times the longest term prescribed for a first conviction of that offense or for a lesser *term*. [*Id.* (emphasis added).]

MCL 769.10(2) provides that if the court decides to impose a sentence of imprisonment for any "term of years" under 769.10(1)(a), the sentence "shall" be an indeterminate one:

> If the court pursuant to this section imposes a sentence of imprisonment for any *term of years*, the court shall fix the length of both the minimum and maximum sentence within any specified limits in *terms of years* or a fraction of a year and the sentence so imposed shall be considered an indeterminate sentence. [Emphasis added.]

In this case, rather than sentencing defendant to either probation (which could also include jail time) or an indeterminate sentence of imprisonment for a "term of years," the trial court sentenced defendant to a straight ten months in the county jail.

I agree that defendant was entitled to an intermediate sanction because it was stipulated before the trial court that his sentence was scored under the sentencing guidelines as five to twenty-eight months. MCL 769.34(4)(c)(ii) provides:

> (4) Intermediate sanctions shall be imposed under this chapter as follows:
>
> (c) If the upper limit of the recommended minimum sentence exceeds 18 months, and the lower limit of the recommended minimum sentence is 12 months or less, the court shall sentence the offender as follows absent a departure:
>
> (i) To imprisonment with a minimum term within that range.
>
> (ii) To an *intermediate sanction* that may include a term of imprisonment of not more than twelve months. [Emphasis added.]

However, "intermediate sanction" is specifically defined as "probation or any sanction, other than imprisonment in a state prison or state reformatory, *that may lawfully be imposed.*" MCL 769.31(b) (emphasis added).

The question left unanswered by the majority is whether an intermediate sanction of straight jail time "may lawfully be imposed" when the habitual-offender statute *requires* a court to give an indeterminate sentence once the court decides to sentence a second-offense habitual offender to a "term of years." In my view, by giving effect to both statutory provisions, the answer is that a straight jail term can be lawfully imposed on a second-offense habitual offender.[1]

The caveat within MCL 769.31(b) that the intermediate sanction must be one that can "lawfully be imposed" ensures that other sentencing provisions enacted by the Legislature for a particular circumstance are given effect. Thus, in this case, because defendant is a second-offense habitual offender, the trial court was required, when determining the lawfulness of an intermediate sanction, to consider the indeterminate sentence requirement of MCL 769.10(2). By doing so, the provisions within both statutes are given full effect. *Webb, supra*; *Pohutski, supra*.

As noted, under MCL 769.10(2), a court must only impose an indeterminate sentence *if* the court imposes a sentence that is for a term "*of years*." Imposing a "term of years" is discretionary, which is made clear by both the language of MCL 769.10(2) ("If the court . . .") and MCL 769.10(1)(a), which provides the court with the sentencing options of either (1) probation, (2) imprisonment, which can be for a maximum "term"[2] of no more than 1½ times the maximum for a first conviction, or (3) imprisonment for a "lesser term."[3] Thus, by following the plain, straightforward words of these statutes, it appears that the Legislature desired indeterminate sentences only when a court imposed a sentence consisting of a "term of years," MCL 769.10(2), but that a court could, in sentencing a second-offense habitual offender, impose a sentence of imprisonment for a "term," with the only caveat being that it not exceed 1½ times the maximum sentence for the first conviction.[4]

In this case, the trial court did not sentence defendant to imprisonment for a "term of years," and, hence, the indeterminate-sentencing requirement was inapplicable. Rather, the trial court followed the applicable sentencing guidelines, which allowed for an intermediate sanction and which was lawfully imposed, because the court could impose straight jail time as a lesser

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[1] The majority correctly notes that the ten-year maximum sentence under MCL 750.357 does not render use of the intermediate sanction unlawful because the Legislature specifically included MCL 750.357 within the crimes to which the guidelines are applicable. MCL 777.16r. There is no such provision for habitual offenders.

[2] Not "term of years" as provided in MCL 769.10(2).

[3] Again, not for a lesser "term of years," but a lesser "term."

[4] The prosecution's reliance on *People v Bewersdorf*, 438 Mich 55, 60 n 5; 475 NW2d 231 (1991), is misplaced, because the reference in footnote was obiter dictum since the Court recognized the sentencing issue under MCL 769.10(2) was not raised on appeal.

"term" under MCL 769.10(1)(a). For these reasons, I believe the trial court lawfully imposed the sentence on defendant.

/s/ Christopher M. Murray