

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WAYNE EDWARD ROSSIGNOL,

Defendant-Appellant.

UNPUBLISHED

June 20, 1997

No. 197559

Macomb Circuit Court

LC No. 93-3229 FH

Before: Gage, P.J., and Reilly and Hoekstra, JJ.

MEMORANDUM.

Defendant violated his probation and on August 1, 1996, was sentenced in this file, involving malicious destruction of property and a supplementation as a second offender, to five years four months to eight years imprisonment. He appeals by right. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends that his sentence is disproportionate to the offense and the offender by virtue of being the maximum allowed by the two-thirds rule of *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). The *Tanner* two-thirds rule applies to habitual offenders who receive indeterminate sentences. *People v Wright*, 432 Mich 84; 437 NW2d 603 (1989).

The mere fact that defendant's minimum sentence is two-thirds of the maximum does not make it disproportionate under the rule of *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). To the extent defendant's argument is based on the guidelines for the underlying offense, those guidelines are utterly inapposite to this Court's review of the proportionality of the sentence imposed on a habitual offender. *People v Edgett*, 220 Mich App 686; ___ NW2d ___ (1996). Where as here defendant, in light of the offense and his prior criminal record is given an entirely undeserved probationary sentence and thus an opportunity to demonstrate for the court that he is capable of leading a law-abiding lifestyle, and where, notwithstanding that his probationary sentence requires participation in alcohol abuse treatment he violates that probation by drunk driving and possession of marijuana, a minimum sentence which equals two-thirds of the maximum does not represent a punishment disproportionate to the offense or the offender.

However, this Court *sua sponte* is required to correct a sentencing error in this case, which has not been identified by counsel. As noted, defendant pled guilty to malicious destruction of property over \$100, a four-year felony, MCL 750.380; MSA 28.612, and to being a second offender, MCL 769.10; MSA 28.1082. As a second offender, defendant's sentence may be increased to six years imprisonment. The trial court was obviously under the misapprehension that defendant's plea to being a third offender in the companion felonious assault case extended to this crime as well. Since the maximum sentence that could be imposed is six years imprisonment, defendant's sentence must be reduced to four to six years imprisonment. Accordingly, this cause is being remanded to the Macomb Circuit Court for correction of the judgment of sentence in this case only, as enhanced, to four to six years imprisonment. *People v Thomas*, 447 Mich 390, 394; 523 NW2d 215 (1994).

The adjudication of probation violation and imposition of a minimum sentence of two-thirds of the maximum authorized by statute is affirmed; the cause is remanded to the Macomb Circuit Court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Maureen Pulte Reilly
/s/ Joel P. Hoekstra