

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE LEE WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

August 15, 2000

No. 213743

Genesee Circuit Court

LC No. 98-002539-FH

Before: Smolenski, P.J., and Doctoroff and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645, and receiving and concealing stolen property over \$100 (RCSP), MCL 750.535; MSA 28.803. Defendant was sentenced on the RCSP charge only, as a third habitual offender, MCL 769.11; MSA 28.1083, to six to ten years' imprisonment. We vacate defendant's UDAA conviction and otherwise affirm.

Defendant first contends that his convictions of both UDAA and RCSP violate his rights under the double jeopardy clauses of the state and federal constitutions. US Const, Am V; Const 1963, art 1, § 15. We agree. A double jeopardy issue constitutes a question of law which this Court reviews de novo on appeal. *People v Lugo*, 214 Mich App 699, 705; 542 NW2d 921 (1995). In the context of multiple punishments for the same offense, as in the instant case, the purpose of the double jeopardy protection is to ensure that the defendant is not punished more severely than intended by the Legislature. *People v Griffiths*, 218 Mich App 95, 100; 553 NW2d 642 (1996). Because this protection is a limitation on the courts and the prosecutors, not on the Legislature's power to define crimes and fix punishments, "this Court's inquiry when determining whether the Legislature intended to authorize cumulative punishment for certain criminal conduct necessarily focuses on the intent of the Legislature." *Id.* at 101. When attempting to ascertain the intent of the Legislature in enacting criminal statutes, this Court has traditionally considered several factors, including: "whether each statute prohibits conduct violative of a social norm distinct from that protected by the other, the amount of punishment authorized by each statute, whether the statutes are hierarchical or cumulative, and the elements of each offense." *People v Rivera*, 216 Mich App 648, 650-651; 550 NW2d 593 (1996).

Defendant contends that the dual convictions for UDAA and RCSP violate the constitutional prohibitions against double jeopardy because both statutes serve to punish the same conduct. The essential elements of UDAA are: (1) possession of a vehicle; (2) driving the vehicle away; (3) the act is done willfully; and (4) the possession and driving away must be done without authority or permission. *People v Hendricks*, 200 Mich App 68, 71; 503 NW2d 689 (1993), aff'd 446 Mich 435 (1994). The essential elements of RCSP over \$100 are: (1) the property was stolen; (2) the property has a fair market value of over \$100; (3) the defendant bought, received, possessed, or concealed the property with knowledge that the property was stolen; and (4) the property was identified as being previously stolen. *People v Gow*, 203 Mich App 94, 96; 512 NW2d 34 (1993).

We conclude that both statutes prohibit conduct violative of the same social norm, i.e. theft. In *People v Oxendine*, 201 Mich App 372, 374; 506 NW2d 885 (1993), this Court held that convictions for RCSP and operating a “chop shop” violated the defendant’s right against multiple punishments for the same offense, under the double jeopardy clauses of the state and federal constitutions. In so holding, this Court relied on its reasoning in *People v Allay*, 171 Mich App 602, 609; 430 NW2d 794 (1988):

Even a superficial review of these two provisions [RCSP and operating a chop shop] suggests that both are aimed at protecting society from persons whose activities amount to profiteering from or otherwise furthering larcenous activity.

This Court further reasoned that the “chop shop statute is aimed at a subset of conduct already encompassed by the more general statute.” *Id.* at 610. Likewise, UDAA is a subset of conduct described under the more general RCSP statute. Accordingly, we hold that the two statutes in question prohibit conduct violative of the same social norm.

Turning to the relationship of the criminal penalties for each offense, a first conviction for UDAA is punishable by a term of imprisonment up to five years. MCL 750.413; MSA 28.645. At the time defendant committed the instant offense, a first conviction for RCSP over \$100 was also punishable by up to five years’ imprisonment. MCL 750.535; MSA 28.803.¹ Given the similarities in punishment between the UDAA and RCSP statutes, we hold that multiple convictions in the instant case would be inconsistent with the Legislature’s intent.

Addressing the elements of the offenses, plaintiff argues that, because the crimes of UDAA and RCSP do not involve identical elements, defendant’s dual convictions should not be prohibited by double jeopardy concerns. The prosecutor, however, fails to specify how the elements are fundamentally different. Moreover, in *Allay*, this Court noted that when the other indications of

¹ MCL 750.535; MSA 28.803 was amended by 1998 PA 311 and took effect on January 1, 1999, after defendant’s conviction in this case. Given the estimated value of the vehicle of \$4,000 to \$5,000 dollars, if defendant had been convicted under the amended statute the maximum punishment would also have been up to five years. MCL 750.535(3)(a); MSA 28.803(3)(a).

legislative intent preclude multiple punishment, an application of the similar elements test is only marginally probative. *Allay, supra* at 611.

Accordingly, one of defendant's convictions must be vacated. The normal course of action is to affirm the conviction of the higher charge and to vacate the lower conviction. *People v Harding*, 443 Mich 693, 714 (Brickley, J), 735 (Cavanagh, CJ); 506 NW2d 482 (1993). Because both convictions call for the same maximum punishment and the trial court already sentenced defendant pursuant to the RCSP conviction, we vacate the UDAA conviction.

Defendant next contends that the trial court erred when it determined that defendant's use of prescription medication was inadmissible on redirect examination. During defense counsel's redirect examination of defendant, she attempted to elicit testimony pertaining to defendant's use of prescription medication for his alleged mental illness. The prosecutor objected, arguing that defendant's medication had been mentioned in neither the direct examination nor the cross-examination, and thus, the subject of defendant's medication was an improper topic for redirect examination. The trial court sustained the prosecution's objection. This Court reviews the trial court's decisions on evidentiary matters for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). While this Court has held that a trial court *may* permit open redirect-examination, that decision is soundly within the trial court's discretion. *People v Stevens*, 230 Mich App 502, 507; 584 NW2d 369 (1998); *Bates v Genesee Co Rd Comm*, 133 Mich App 738, 745; 351 NW2d 248 (1984).

Defendant's main contention is that the trial court's decision to exclude the medication testimony rendered him unable to present evidence regarding his state of mind. We disagree. Because defendant introduced testimony regarding voluntary intoxication, his state of mind was already before the jury. Defendant testified that he was intoxicated at the time of the offense, because he had consumed a forty ounce beer, one half pint of Hot Damn and two to three joints of marijuana. The trial court instructed the jury that voluntary intoxication is a defense to UDAA, which is a specific intent crime. *People v Lerma*, 66 Mich App 566, 571; 239 NW2d 424 (1976). However, the trial court instructed the jury that voluntary intoxication is not a defense to RCSP. This Court has held that RCSP is not a specific intent crime, and thus, intoxication is not a valid defense. *People v Watts*, 133 Mich App 80, 83; 348 NW2d 39 (1984).

In view of our decision to vacate the UDAA conviction, defendant's claim is without merit. Defendant's voluntary intoxication is irrelevant to his conviction of the general intent crime of RCSP. Moreover, defendant failed to demonstrate how the added testimony of his prescription medication would have enhanced his defense. Accordingly, we hold that the trial court did not abuse its discretion in refusing to admit testimony regarding plaintiff's medication, on the grounds that the testimony exceeded the scope of both direct and cross-examination.

Defendant next contends that his six year minimum sentence for RCSP, as a third habitual offender, was disproportionate. We disagree. This Court reviews the proportionality of a sentence under the abuse of discretion standard. *People v Phillips (On Rehearing)*, 203 Mich App 287, 290; 512 NW2d 62 (1994). A sentence constitutes an abuse of discretion when it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435

Mich 630, 636; 461 NW2d 1 (1990); *People v Honeyman*, 215 Mich App 687, 697; 546 NW2d 719 (1996).

Defendant argues that his minimum sentence of six years exceeded the guidelines recommendation of zero to twenty-four months. Defendant's contention is inapposite because the judicial sentencing guidelines do not apply to habitual offenders. *People v Gatewood*, 450 Mich 1025; 546 NW2d 252 (1996). Furthermore, the guidelines may not be considered on appeal in determining the proper sentence for an habitual offender. *Id.*; *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

Defendant also argues that several factors support his potential for rehabilitation. We disagree. The trial court noted that defendant has a criminal history consisting of two prior felonies, one of which was another UDAA conviction, as well as four misdemeanor convictions. The trial court also noted that defendant has a very serious drug and alcohol problem which he has been unable, or unwilling, to control. The trial court considered the potential for defendant to reform as well as the need to punish him for his crime. We hold that the trial court did not abuse its discretion in sentencing defendant, and accordingly, affirm his sentence.

Defendant next contends that defense counsel's failure to request the instruction for the lesser included offense of joyriding, MCL 750.414; MSA 28.646, constituted ineffective assistance of counsel. Because defendant failed to request an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), we review defendant's claim of ineffective assistance of counsel only to the extent that defense counsel's mistakes are apparent on the record. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). Because this Court vacated defendant's UDAA conviction, defendant was not prejudiced by defense counsel's failure to request a jury instruction on a lesser included offense of that charge.

Affirmed.

/s/ Michael R. Smolenski
/s/ Martin M. Doctoroff
/s/ Kurtis T. Wilder