

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MELVIN T. MARTIN,

Defendant-Appellee.

UNPUBLISHED
October 31, 2000

No. 222385
Oakland Circuit Court
LC No. 98-160504-FH

Before: Griffin, P.J., and Cavanagh and Gage, JJ.

MEMORANDUM.

Following a bench trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4). Over the objection of the prosecution, the trial court deviated downward from the sentencing guidelines range of two to five years' imprisonment and sentenced defendant to serve three years' probation with the first year to be served in the county jail. Plaintiff appeals as of right, arguing that a probationary sentence was invalid as a matter of law. We agree and vacate the sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Pursuant to MCL 771.1(1); MSA 28.1131(1), a sentencing court has the discretion to impose a term of probation for all felonies *except* murder, treason, *criminal sexual conduct in the first or third degree*, robbery while armed, and certain major controlled substance offenses. A sentence of probation is an alternative to confining a defendant in jail or prison and is granted as a matter of grace in lieu of incarceration. *People v McKeown*, 228 Mich App 542, 545; 579 NW2d 122 (1998). As a condition of probation, the trial court may order the defendant imprisoned in the county jail for not more than twelve months, MCL 771.3(2)(a); MSA 28.1133(2)(a), but in such cases, the one-year jail sentence constitutes a condition of probation rather than the sentence imposed. *Id.* Here, defendant's probationary sentence is plainly invalid under MCL 771.1(1). See *People v Frank*, 155 Mich App 789; 400 NW2d 718 (1986); *People v Austin*, 191 Mich App 468; 478 NW2d 708 (1991). Accordingly, the sentence must be vacated.

We decline the prosecution's request that we remand this matter before a different sentencing judge. We note that, in objecting to the probationary sentence below, the prosecution did not inform

the judge that such a sentence was invalid under MCL 771.1(1). We presume that, when confronted with the statutory constraints on its sentencing discretion, the lower court will impose a valid sentence.

Defendant's probationary sentence is vacated and this matter is remanded for resentencing. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage