# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 4, 2001 |
| v | No. 226117<br>Muskegon Circuit Court |
| WILLIE ROBERT HARWELL,<br><br>Defendant-Appellant. | LC No. 95-138635-FH |

Before: Talbot, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

This case is before this Court on remand from our Supreme Court "for consideration as on leave granted." *People v Harwell*, 461 Mich 993 (2000). Defendant pleaded guilty to indecent exposure, MCL 750.335a; MSA 28.567(1), and being a sexually delinquent person, MCL 750.10a; MSA 28.200(1). He was sentenced to a term of one day to life imprisonment. Defendant's motion for resentencing was granted, and he was again sentenced, by a different judge, to a term of one day to life imprisonment. Defendant's subsequent motion for resentencing was denied. After defendant's application for leave to appeal was denied by this Court, our Supreme Court remanded this matter for our consideration, as on leave granted, whether the trial court erred in concluding that a period of probation for up to five years under MCL 771.2(1); MSA 28.1132(1) was unavailable in this case. We reverse.

The trial court erred in determining that felony probation is inapplicable in this case. The general probation statute, MCL 771.2(1); MSA 28.1132(1), provides as follows:

> Except as provided in section 2a of this chapter, if the defendant is convicted for an offense that is not a felony, the probation period shall not exceed 2 years. Except as provided in section 2a of this chapter, if the defendant is convicted of a felony that is not a major controlled substance offense, the probation period shall not exceed 5 years.

The question, then, is whether defendant was convicted of a misdemeanor or a felony. MCL 750. 335a; MSA 28.567(1), provides as follows:

> Any person who shall knowingly make any open or indecent exposure of his or her person or of the person of another shall be guilty of a misdemeanor,

> punishable by imprisonment in the county jail for not more than 1 year, or by a fine of not more than $500.00, or if such person was at the time of the said offense a sexually delinquent person, may be punishable by imprisonment in the state prison for an indeterminate term, the minimum of which shall be 1 day and the maximum of which shall be life: Provided, That any other provision of any other statute not withstanding, said offense shall be triable only in a court of record.

The language of the statute suggests that indecent exposure is, in all cases, a misdemeanor. This Court, however, has previously held that, when a sexually delinquent person is convicted of indecent exposure, the offense becomes a felony. In *People v Murphy*, 203 Mich App 738, 748-749; 513 NW2d 451 (1994), we opined as follows:

> This offense should be considered a felony, An offense is a felony if the maximum sentence is more than one year or if the law designates it as a felony. MCL 750.7; MSA 28.197, MCL 761.1(1)(g); MSA 28.843(1)(g), *People v Blythe*, 417 Mich 430, 437; 339 NW2d 339 (1983). The statute on indecent exposure provides for a mandatory prison sentence of one day to life for a sexually delinquent person. This is more than a sentencing enhancement provision; it is an alternate sentencing provision; it is an alternate sentencing provision tied to a larger statutory scheme. [*People v*] *Helzer,* [404 Mich 410; 273 NW2d 44 (1978)]; *People v Kelly*, 186 Mich App 524, 528; 465 NW2d 569 (1990).
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> Furthermore, in *Helzer*, 424, the Court concluded that defendant was entitled to the number of peremptory challenges provided to a party accused of a capital crime at that time. Charges of sexual delinquency are tried in circuit court which has exclusive jurisdiction to try felonies. *People v Curtis*, 42 Mich App 652, 655; 202 NW2d 539 (1972), rev'd in part on other grounds 389 Mich 698; 209 NW2d 243 (1973). Together, these factors also lead to the conclusion that this offense is a felony rather than a quasi-civil commitment, as defendant contends.

It would be inconsistent to treat this case as a misdemeanor for purposes of the probation statute, while treating it as a felony for purposes of the consecutive sentencing statute, peremptory challenges, and court of jurisdiction.

This conclusion is consistent with the manner in which the Legislature has defined the terms "felony" and "misdemeanor" in the Code of Criminal Procedure and the Penal Code. MCL 761.1; MSA 28.843 provides in pertinent part as follows:

> (g) "Felony" means a violation of a penal law of this state for which the offender, upon conviction, may be punished by death or by imprisonment for more than 1 year or an offense expressly designated by law to be a felony.
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> (h) "Misdemeanor" means a violation of a penal law of this state that is not a felony or a violation of an order, rule, or regulation of a state agency that is punishable by imprisonment or a fine that is not a civil fine.

Similarly, the Penal Code defines those terms as follows:

> The term "felony" when used in this act, shall be construed to mean an offense for which the offender, on conviction may be punished by death, or by imprisonment in state prison. [MCL 750.7; MSA 28.197.]
>
> When any act or omission, not a felony, is punishable according to law, by a fine, penalty or forfeiture, and imprisonment, or by such fine, penalty or forfeiture, or imprisonment, in the discretion of the court, such act or omission shall be deemed a misdemeanor. [MCL 750.8; MSA 28.198.]
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> When the performance of any act is prohibited by this or any other statute, and no penalty for the violation of such statute is imposed, either in the same section containing such prohibition, or in any other section or statute, the doing of such act shall be deemed a misdemeanor. [MCL 750.9; MSA 28.199.]

When someone is convicted of indecent exposure as a sexually delinquent person, the definitions of "misdemeanor" no longer apply to the offense. A misdemeanor under each of the definitions is an offense that is not a felony. Thus, we must determine if it is a felony. Looking to the definitions of "felony," we conclude those definitions apply. Under the Code of Criminal Procedure an offense is a "felony" if it is punishable by imprisonment for more than one year. The life maximum in this case qualifies under that definition. Under the Penal Code definition an offense is a felony if the defendant may be imprisoned in the state prison. The indecent exposure statute, MCL 750. 335a; MSA 28.567(1), specifically provides for "imprisonment in the state prison" if convicted as a sexually delinquent person.

Furthermore, while the definition of "felony" under the Code of Criminal Procedure specifically provides that a crime is a felony if designated as such, there is no corresponding provision in the definition of "misdemeanor." Therefore, the mere fact that the offense is designated as a "misdemeanor" in the statute is irrelevant. Because it carries a potential penalty of more than one year imprisonment in the state prison, it is to be treated as a felony for all purposes under the Penal Code and Code of Criminal Procedure, including the probation statute.

The prosecutor also argues that our decision in *People v Kelly*, 186 Mich App 524, 530-531; 465 NW2d 569 (1990), controls here. We disagree. In *Kelly*, the defendant was convicted of indecent exposure as a sexually delinquent person. The trial court sentenced him to life in prison. We reversed, holding that a term of life in prison was not an available sentencing option. This Court reasoned that the only applicable indeterminate sentence was one in which the minimum sentence was one day and the maximum sentence was life. *Id.* at 529.

However, at issue here is not what is available as a sentence of imprisonment, but instead what is available in terms of probation. Neither the indecent exposure statute nor the sexually delinquent person statute makes any specific provisions for probation in this case. If either of those statutes set forth specific provisions affecting probation, then the rationale in *Kelly* would be applicable. For example, if the statute provided that a person convicted as a sexually delinquent person could be placed on life probation, then *Kelly* would presumably lead us to the

conclusion that that specific probation provision would control over the general probation statute. However, no such provisions were made regarding probation.

Therefore, the general probation statute is left undisturbed. Because the general probation statute does not exempt sexually delinquent persons from its coverage and, as discussed above, this offense is to be treated as a felony, the provisions of the general probation statute for felony probation applies to the case at bar. Accordingly, the trial court erred in refusing to consider felony probation for defendant.

Defendant also raises two additional issues related to his sentence. However, the Supreme Court's remand is very specific:

> In lieu of granting leave to appeal, the case is remanded to the Court of Appeals for consideration as on leave granted. MCR 7.301(F)(1). That Court is to consider whether the trial court erred in concluding that a period of probation for up to five years under MCL 771.2(1); MSA 28.1132(1) was unavailable in this case. [*People v Harwell*, 461 Mich 993 (2000).]

Accordingly, we conclude that defendant's other issues are not properly before us and, therefore, we decline to address those issues.

For the above reasons, we conclude that the trial did err in concluding that a period of probation of up to five years was unavailable under the probation statute. Accordingly, we remand the matter to the trial court for reconsideration of defendant's sentence. On remand, the trial court shall either resentence defendant to the term of one day to life in prison or shall place defendant on probation for up to five years as provided for under the probation statute.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Jane E. Markey