

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICKY D. SCOTT,

Defendant-Appellant.

UNPUBLISHED

April 19, 2002

No. 227342

Wayne Circuit Court

LC No. 99-009673

Before: Talbot, P.J., and Gage and Wilder, JJ.

MEMORANDUM.

Defendant was charged with first-degree home invasion, MCL 750.110a, and two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(c). After a jury trial, defendant was convicted of entering a dwelling without the owner's permission, MCL 750.115(1), a misdemeanor. The trial court sentenced defendant to a term of three years' probation and ordered him to complete sex offender therapy as part of his probation. We affirm defendant's sentence as modified.

Defendant contends that his probationary sentence is invalid. A sentence is invalid when it exceeds statutory limits or is based on improper assumptions of guilt. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Under MCL 771.2(1), the probationary period for conviction of a misdemeanor cannot exceed two years. Defendant, who was convicted of a misdemeanor, received a sentence of three years' probation. Because the three-year term of probation exceeds statutory limits, we find the sentence invalid to that extent.

When a court imposes a sentence that is partially invalid, the Legislature has provided that the sentence is not to be "wholly reversed and annulled," but rather must be set aside only "in respect to the unlawful excess." *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994), quoting MCL 769.24. Because only the final year of defendant's probationary sentence qualifies as invalid under MCL 771.2(1), we order modification of defendant's judgment of sentence to reflect a maximum probationary term of two years.

Defendant also argues that the trial court's inclusion of the condition that he undergo sex offender therapy reflects that the court improperly sentenced him for the criminal sexual conduct charges of which the jury acquitted him. While a trial court may not make an independent finding of guilt and then sentence a defendant on the basis of that finding, it may consider the evidence admitted at trial as an aggravating factor in determining the appropriate sentence.

People v Gould, 225 Mich App 79, 89; 570 NW2d 140 (1997). The instant record contains extensive testimony that defendant sexually assaulted the victim. Although the jury acquitted defendant of those charges, the trial court properly considered the evidence of sexual conduct that did not result in conviction in fashioning an appropriate sentence. *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).¹

In light of our finding that resentencing is not required, we need not address defendant's claim that resentencing should occur before a different judge.

We remand this case solely for administrative correction of defendant's judgment of sentence to reflect a maximum probationary term of two years. In all other respects, we affirm defendant's conviction and sentence. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder

¹ Although the instant offense occurred after January 1, 1999, the legislative sentencing guidelines do not apply to defendant's misdemeanor conviction. MCL 769.34(1), (2). Assuming that proportionality represents the principle governing the propriety of defendant's sentence, we note that the instant sentence unquestionably reflected the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).