

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE J. STANKO,

Defendant-Appellant.

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UNPUBLISHED

January 27, 2004

No. 242876

Oakland Circuit Court

LC No. 2001-177228-FH

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right from a sentence of two-and-a-half to fifteen years' imprisonment for a conviction of operating under the influence of intoxicating liquor causing death, MCL 257.625(4). We remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant contends on appeal that the trial court erred in scoring offense variables 3 and 6. MCL 777.33; MCL 777.36. "A sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

The version of OV 3 applicable to this case provided that one hundred points were to be assessed for the death of the victim, but only if homicide is not the sentencing offense. MCL 777.33(1)(a), (2)(b). A homicide is defined as "any crime in which the death of a human being is an element of that crime." MCL 777.1(c). Because a person's death was an element of the crime charged, the court could not assess one hundred points. The prosecutor argued, and the court agreed, that it could assess twenty-five points because the victim sustained severe injury. Defendant challenges the court's interpretation of the statute. An issue of statutory interpretation and application presents a question of law that is reviewed de novo on appeal. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998).

The rules of statutory construction require the courts to give effect to the Legislature's intent. This Court should first look to the specific statutory language to determine the intent of the Legislature, which is presumed to intend the meaning that the statute plainly expresses. *Institute in Basic Life Principles, Inc v Watersmeet Twp (After Remand)*, 217 Mich App 7, 12;

551 NW2d 199 (1996). If the language is clear and unambiguous, the plain meaning of the statute reflects the legislative intent and judicial construction is not permitted. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135-136; 545 NW2d 642 (1996). "Statutory language should be construed reasonably, keeping in mind the objective and purpose of the act." *In re S R*, 229 Mich App 310, 314; 581 NW2d 291 (1998). Statutory language is to be given its ordinary and generally accepted meaning, although if the statute defines a given term, that definition is controlling. *Tryc, supra*. The court must "afford the statute an interpretation that achieves harmony between and among specific provisions to provide a reasonable meaning." *Messenger v Dep't of Consumer & Industry Services*, 238 Mich App 524, 533; 606 NW2d 38 (1999). "Furthermore, nothing will be read into a statute that is not within the manifest intent of the Legislature as gathered from the act itself." *S R, supra*.

The statute offered scoring options of one hundred points if the victim was killed, twenty-five points if the victim sustained a life-threatening or permanent incapacitating injury, ten points if the victim sustained an injury requiring medical treatment, five points if the victim sustained an injury that did not require medical treatment, and zero points if the victim was not injured. MCL 777.33(1). The statute reflects a graduated scale for assessing the harm to the victim. Given that death is assessed the highest number of points and no injury at all is assessed no points, the plain and most reasonable meaning of the intervening sections is that they are meant to apply where there is some harm short of death. Otherwise, a death for which points cannot be assessed under § 33(2)(b) could be assessed points under § 33(1)(b), (c), or (d) if the victim died after sustaining some injury. If that were the intent of the Legislature, it would not have limited the assessment of points for a victim's death to those crimes in which death of a person is not an element, but would have eliminated § 33(2)(b) altogether. This interpretation is supported by the October 2000 amendment of the statute which now permits an assessment of thirty-five points if death results from a drunk driving offense. The instant offense occurred on April 26, 2000, and was prior to the amendment of MCL 777.33, adding (2)(c), and which provides for the scoring of thirty-five points for the operation of a motor vehicle while under the influence or while impaired causing death.

The guidelines applicable to this case consider only death or survival short of death, not survival followed by death. Because the victim in this case did not survive the accident, the trial court erred in scoring OV 3.

The trial court originally assessed zero points for OV 6, MCL 777.36, indicating no intent to kill or injure and ten points for OV 17, MCL 777.47, indicating gross negligence. The prosecutor argued, and the court agreed, that that it could assess twenty-five points for OV 6 because defendant created a high risk of death or serious injury knowing that death or serious injury was the probable result of his actions. Defendant challenges the interpretation of this statute as well.

The statute offers scoring options of fifty points, twenty-five points, ten points, or zero points, depending on the defendant's "intent to kill or injure another individual." MCL 777.36(1). The options for which points are assessed correspond to the circumstances or intent necessary to make a killing first-degree murder, MCL 777.36(1)(a), second-degree murder, MCL 777.36(1)(b), or manslaughter, MCL 777.36(1)(c).

Operating under the influence of intoxicating liquor (OUIL) causing death is a general intent crime. *People v Lardie*, 452 Mich 231, 234, 256; 551 NW2d 656 (1996). The elements of the crime are similar to those for involuntary manslaughter, except that the prosecutor need not prove the element of gross negligence because it is presumed as a matter of law that driving while intoxicated constitutes gross negligence. *Id.* at 251, 259. Drunk driving alone does not establish the element of malice necessary for second-degree murder. There must be “a level of misconduct that goes beyond that of drunk driving.” *People v Goecke*, 457 Mich 442, 464; 579 NW2d 868 (1998).

The trial court is required to score OV 6 “consistent with a jury verdict unless the judge has information that was not presented to the jury.” MCL 777.36(2)(a). A score of ten points would be consistent with the jury’s verdict because defendant was convicted of a crime in which gross negligence is presumed.<sup>1</sup> Whether the evidence was sufficient to support a finding of the intent necessary for second-degree murder cannot be determined because the parties stipulated to provide less than the full transcript, MCR 7.210(B)(1)(d), and, thus, the trial transcript is not available. Because there is no evidence in the record before this Court to support a finding of malice sufficient to support a conviction of second-degree murder, we find that the trial court erred in scoring OV 6 at twenty-five points.

Had the guidelines been properly scored, defendant would have zero points for OV 3, ten points for either OV 6 or OV 17, and ten points for OV 18 (the scoring of which was not disputed). An offense variable score of twenty points places defendant in the A-II category for which the minimum sentence range is zero to seventeen months. MCL 777.64. Because the upper limit is less than eighteen months, the trial court was required to impose an intermediate sanction unless it found a substantial and compelling reason to sentence defendant to prison. MCL 769.34(4)(a).

Because the trial court erred in scoring the guidelines and consequently did not impose a sentence within the applicable guidelines range and did not state on the record a substantial and compelling reason for departing from the guidelines, a remand for resentencing is required. MCL 769.34(10). The trial court may consider our unpublished opinion in *People v Hauser*, unpublished opinion per curiam of the Court of Appeals, issued October 29, 2002 (Docket No. 239688).<sup>2</sup> In *Hauser* this Court noted that the guidelines prior to October 1, 2000, did not consider the fact that the victim died under circumstances similar to the instant matter. Death of a victim not considered by the guidelines is a factor that is objective and verifiable such, that upon proper articulation by the trial court, may be considered to determine if a substantial and compelling reason for upward departure exists. See *Hauser, supra*. Because the trial court sentenced defendant within the guidelines as it had calculated them and the sentence imposed

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<sup>1</sup> This degree of negligence is accounted for by OV 17, MCL 777.47, which the trial court originally scored at ten points. If any points are assessed under OV 6, ten points cannot be scored under OV 17. MCL 777.47(2). Therefore, the trial court may assess ten points under OV 6 and no points under OV 17, or ten points under OV 17 and no points under OV 6.

<sup>2</sup> We cite this case because of the limited case law, but note that unpublished opinions are not binding under the rules of stare decisis. MCR 7.215(C)(1).

was a result of the improper scoring of the guidelines rather than any prejudice or improper attitude toward defendant, resentencing by a different judge is not required. *People v Hegwood*, 465 Mich 432, 440-441 n 17; 636 NW2d 127 (2001).

Remanded for resentencing. We do not retain jurisdiction.

/s/ Pat M. Donofrio  
/s/ Richard Allen Griffin  
/s/ Kathleen Jansen