

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

RODNEY JEAN RICHARDS,

Defendant-Appellant.

UNPUBLISHED

June 3, 2004

No. 246630

Wayne Circuit Court

LC No. 01-011723-01

Before: Markey, P.J., and Wilder and Meter, JJ.

MEMORANDUM.

Defendant appeals as of right his sentence of thirty-four months to ten years in prison imposed on his jury-based conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. We vacate defendant's sentence and remand for resentencing.

A prosecutor must file a notice of intent to seek sentence enhancement. MCL 769.13(1). A prosecutor may not amend a timely filed supplemental information merely to allege additional convictions and to seek further sentence enhancement. *People v Ellis*, 224 Mich App 752, 755-757; 569 NW2d 917 (1997).

The prosecution concedes that the trial court erred in imposing sentence, and agrees that defendant is entitled to resentencing. At sentencing, the parties agreed that the high end of the recommended minimum term range enhanced for a second felony was twenty-eight months, and that the high end of the recommended minimum term range enhanced for a third felony was thirty-four months. Defendant received timely notice that the prosecutor would seek enhancement of his sentence for a second felony, MCL 769.13(1); MCL 769.10, and accordingly, he could not be sentenced as a third habitual offender. *Ellis, supra*. In imposing sentence, the trial court was required to impose a minimum term of no more than twenty-eight months unless it found on the record that substantial and compelling reasons existed to depart upward from the guidelines. MCL 769.34(3). The trial court exceeded the applicable guidelines range without making such a finding, and therefore defendant is entitled to be resentenced. MCL 769.34(11). On remand, the trial court may impose a minimum term that exceeds the guidelines only if it finds on the record that substantial and compelling reasons exist to do so. MCL 769.34(3).

Vacated and remanded. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Patrick M. Meter