

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN GERALD TRICE,

Defendant-Appellant.

UNPUBLISHED

September 23, 2004

No. 247537

Wayne Circuit Court

LC No. 02-008928

Before: Borrello, P.J., and Murray and Fort Hood, JJ.

MEMORANDUM.

Defendant appeals as of right from a sentence of two years' probation imposed on his conviction of assault and battery, MCL 750.81. We affirm.

Defendant's sole claim on appeal is that his sentence is invalid because assault and battery is punishable by up to ninety-three days in jail and he had served more than two hundred days in jail pending trial. We disagree.

Assault and battery is a misdemeanor punishable by up to ninety-three days in jail and/or a fine of up to \$500. MCL 750.81. If a defendant is convicted of "an offense that is not a felony," he may be placed on probation for up to two years. MCL 771.2(1). The court may "fix and determine the period and conditions of probation." MCL 771.2(2). "As a condition of probation, the court may require the probationer" to serve a jail sentence. "However, the period of confinement shall not exceed the maximum period of imprisonment provided for the offense charged if the maximum period is less than 12 months." MCL 771.3(2)(a). If a defendant is sentenced to time in jail as a condition of probation and the time served in jail equals or exceeds the maximum period of incarceration applicable to the offense, any additional probation time is invalid. *People v Bisogni*, 132 Mich App 244, 246-247; 347 NW2d 739 (1984); *People v Rose*, 117 Mich App 530, 536-537; 324 NW2d 25 (1982).

If the court had sentenced defendant to time in jail as a condition of probation, he would be entitled to credit against the jail sentence for time served. MCL 769.11b. Because that time exceeded the maximum period of incarceration applicable to the offense, he would have served the maximum sentence allowed and could not be required to serve probation as well. However, the trial court did not impose any jail time as a condition of probation. It simply sentenced him to two years' probation with other conditions permitted by law but not including jail time.

Although the probationary term exceeded the maximum possible jail sentence, the sentence was nonetheless valid. MCL 771.2(1).

Affirmed.

/s/ Stephen L. Borrello
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood