

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN CHARLES OLIVER,

Defendant-Appellant.

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UNPUBLISHED

November 22, 2005

No. 253865 & 260416

Livingston Circuit Court

LC No. 01-012355-FH

Before: Donofrio, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

A jury convicted defendant of operating a motor vehicle while under the influence of intoxicating liquor (OUIL), MCL 257.625(1), third offense. Defendant was sentenced to eighteen months' to five years' imprisonment. Defendant appealed as of right in Docket No. 253865, and on defendant's motion, this Court remanded the case to the trial court for resentencing, but retained jurisdiction over the remaining issue in that appeal. The trial court imposed the same sentence at defendant's resentencing, and stated the reasons for its departure from the sentencing guidelines on the record. Defendant appeals as of right from his resentencing in Docket No. 260416.<sup>1</sup> Because the trial court properly admitted defendant's blood alcohol test results and provided a sufficient remedy by the stipulation concerning destruction of the blood evidence, lack of merit in the argument that defendant was denied the right of effective assistance of counsel, and the trial court's sufficient articulation of substantial and compelling reasons for the sentence imposed, we affirm.

Defendant first argues that his blood alcohol content test result should have been excluded at trial based on the prosecutor's violation of the discovery order requiring that defendant's blood samples be provided to him. We have twice addressed the issue of whether defendant's blood alcohol content test result should be suppressed. We first reversed the trial court's order suppressing the result, and then peremptorily reversed a subsequent order granting defendant an evidentiary hearing to further consider the suppression issue. See *People v Oliver*, unpublished per curiam opinion of the Court of Appeals, issued November 26, 2002 (Docket No.

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<sup>1</sup> Defendant has served his minimum sentence and was paroled on July 14, 2005. However, this appeal is not moot since defendant is scheduled to remain on parole until January 14, 2007.

241976); Order, Docket No. 246061. Our ruling in Docket No. 241976 is controlling because it is the law of the case. *Grievance Administrator v Lopatin*, 462 Mich 235, 259-260; 612 NW2d 120 (2000), our Supreme Court stated:

Under the law of the case doctrine, “if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.” *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The appellate court's decision likewise binds lower tribunals because the tribunal may not take action on remand that is inconsistent with the judgment of the appellate court. *Sokel v Nickoli*, 356 Mich 460, 465; 97 NW2d 1 (1959). Thus, as a general rule, an appellate court's determination of an issue in a case binds lower tribunals on remand and the appellate court in subsequent appeals. *Webb v Smith (After Second Remand)*, 224 Mich App 203, 209; 568 NW2d 378 (1997); see, generally, 5 Am Jur 2d, Appellate Review, § 605, p 300. [(Internal footnotes omitted.)]

And, the law of the case doctrine applies regardless of the correctness of the prior determination, so a conclusion that a prior appellate decision was erroneous is not sufficient in itself to justify ignoring the law of the case. *Grace v Grace*, 253 Mich App 357, 363; 655 NW2d 595 (2002).

Defendant contends that our previous rulings in Docket Nos. 241976 and 246061 did not affect the trial court's decision to suppress defendant's blood alcohol content test result on this basis. We conclude that suppression of defendant's blood alcohol content test result on that basis would constitute an action inconsistent with this Court's judgment. We initially stated that a defendant was required to show bad faith in order for the failure to preserve evidence to constitute a denial of due process, and held that defendant failed to meet this burden. *Oliver*, *supra* at 2 (Docket No. 241976). The record indicates the discovery violation issue was before us at that time. The trial court did not err when it admitted the evidence of defendant's blood alcohol content.

Defendant also argues that the trial court should have instructed the jury that it could draw an inference adverse to the prosecution from its failure to preserve defendant's blood sample for inspection by the defense. We review questions involving the applicability of jury instructions de novo. *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). We review jury instructions in their entirety to determine whether there is error requiring reversal. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). “We will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights.” *Id.*

At trial, defense counsel stated that an adverse jury instruction was a proper remedy for violating a court order, and indicated that he would later request one. Defense counsel later argued for the admission of the district court's May 7, 2001 discovery order, and the prosecutor's letter stating the dates of blood evidence submission and destruction, as recorded by the lab. A lengthy discussion regarding these two exhibits ensued, and resulted in a stipulation that despite the entry of a court order, the evidence was subsequently destroyed without notice to defendant. The trial court twice declined to instruct the jury that the prosecutor erred.

Defendant contends that the stipulation, although helpful, was inadequate to protect his rights because it did not inform the jury of any means of compensation to defendant for “the stolen opportunity” to impeach the prosecutor’s evidence. In support, defendant cites our holding in *People v Cress*, 250 Mich App 110, 157-158; 645 NW2d 669, vacated in part 466 Mich 883 (2002), rev’d on other grounds 468 Mich 678 (2003), “the trial court shall instruct the jury that if it determines that the prosecutor acted in bad faith it may infer that the destroyed, potentially exculpatory evidence would have been favorable to defendant.” However, our Supreme Court later reversed our ruling on this issue: “[t]he question of whether evidence was destroyed in bad faith is an issue to be decided by the trial judge. The Court of Appeals erred in directing that the issue be submitted to a jury.” *People v Cress*, 466 Mich 883; 646 NW2d 469 (2002). What remains from *Cress* is the rule that the adverse inference instruction is appropriate where the prosecutor acted in bad faith. As noted, this Court has already ruled that defendant has failed to establish that fact. Therefore, the trial court properly declined to give an adverse inference instruction.

In addition, the record shows that the trial court allowed evidence that the blood samples were destroyed because it “at least it gives rise to the argument that they have been deprived of the opportunity to hire their own expert to test the sample for the results.” Further, defense counsel argued in closing about the lack of evidence which gave the jury the opportunity to consider the issue. The jury instructions sufficiently protected defendant’s rights.

Defendant also argues that defense counsel was ineffective for failing to obtain an adverse inference jury instruction. To establish ineffective assistance, a defendant must demonstrate that his counsel’s performance fell below an objective standard of reasonableness and that counsel’s representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). A defendant must overcome the strong presumption that counsel’s performance was sound trial strategy. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). The record demonstrates that defense counsel diligently pursued the adverse inference jury instruction, and agreed to the stipulation when the trial court declined to give the instruction and admit the discovery order and prosecutor’s letter into evidence. As previously noted, defense counsel also argued the adverse inference to the jury. Defendant is unable to overcome the presumption that defense counsel’s performance constituted sound trial strategy.

Defendant also argues that the trial court did not articulate substantial and compelling reasons for its upward departure from the statutory sentencing guidelines. We review a sentence imposed that departs from the sentencing guidelines range to determine whether the trial court based the departure on a substantial and compelling reason. *People v Babcock*, 469 Mich 247, 272-273; 666 NW2d 231 (2003).

Defendant’s statutory sentencing guidelines established a minimum term of zero to six months. The trial court initially sentenced defendant to a term of eighteen months’ to five years’ imprisonment under a belief that the statutory sentencing guidelines did not apply. However, we remanded for resentencing because under the statutory sentencing guidelines, if the upper limit of the recommended minimum sentence range is eighteen months or less, the court must impose an intermediate sanction unless it states on the record that a substantial and compelling reason exists to commit a defendant to the Department of Corrections. MCL 769.34(4)(a). An intermediate sanction may include a jail term of twelve months or less, but does not include a

prison term. *Id.*; MCL 769.31(b); *People v Stauffer*, 465 Mich 633, 635; 640 NW2d 869 (2002). The trial court resentenced defendant to eighteen months' to five years' imprisonment, which constitutes an upward departure from the guidelines.

Reasons justifying departure should keenly or irresistibly grab the court's attention and be recognized as having considerable worth in determining the length of a sentence. *Babcock*, *supra* at 257. A factor meriting departure from the sentencing guidelines must be objective and verifiable. *Id.* at 257-258. To be objective and verifiable, the factors must be actions or occurrences external to the mind and must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 672 NW2d 533 (2003). Here, at defendant's resentencing, the trial court indicated:

I'm exceeding the guidelines because I'm satisfied that they do not take into account the new case in Oakland County. That is, it was committed while you were on bond in this case. The fact that you were driving 60 miles an hour on the wrong way down a boulevard, which—and you were uncooperative with the arresting officer, escaping from the officer, and finally being taken into custody three and a half hours later.

The trial court's reasons for departure are based on defendant's subsequent OUIL offense in Oakland County that defendant committed while on bond in the present case. The record shows that defendant pled guilty to resisting and obstructing arrest and OUIL third offense in Oakland County, and was sentenced to nine months' in jail, to be served concurrently with his sentence in the present case. The record shows that defendant has a long history of alcohol-related convictions, that begins in 1996 with two minor in possession convictions, a 1998 conviction for driving while impaired, and a 1999 conviction for OUIL. The present offense occurred on March 10, 2001, and defendant's subsequent OUIL offense occurred on December 14, 2002.

Defendant's history of alcohol-related convictions is objective and verifiable, and demonstrates a pattern of recidivism that was not deterred by the fact that defendant was on bond in the present case when he was again arrested for drunk driving. That defendant committed another OUIL offense while on bond in the present case and continued his pattern of drinking and driving and related miscreated behaviors constitutes a substantial and compelling reason for the trial court's upward departure from the statutory sentencing guidelines. Additionally, in light of that history, we conclude that the trial court's departure rendered a sentence proportionate to the seriousness of the offense and the offender. See *Babcock*, *supra* at 264.

Affirmed.

/s/ Pat M. Donofrio  
/s/ Brian K. Zahra  
/s/ Kirsten Frank Kelly