# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 22, 2005 |
| v | No. 256910<br>Calhoun Circuit Court |
| JEFFREY LYNN FIELDS,<br><br>Defendant-Appellant. | LC No. 2003-001499-FH |

Before: Fitzgerald, PJ. and O'Connell and Kelly, JJ.

PER CURIAM.

Defendant was charged with operating a motor vehicle while under the influence of intoxicating liquor (OUIL), MCL 257.625(1), OUIL third offense, MCL 257.625(8) or impaired driving third offense, MCL 257.625(10), and assaulting, resisting, or obstructing a police officer, MCL 750.81d(1). Following a jury trial, defendant was convicted of OUIL third offense and assaulting, resisting, or obstructing a police officer. The trial court sentenced defendant to 18 to 60 months' imprisonment for the OUIL third offense conviction and 12 to 24 months' imprisonment for the assaulting, resisting, or obstructing a police officer conviction. Defendant appeals as of right. We affirm but remand for completion of a sentencing information report (SIR) on the OUIL third offense conviction and for the trial court to resentence defendant using the applicable sentencing guidelines.

Defendant first contends that there was insufficient evidence to support his convictions. We disagree. When reviewing a claim of insufficient evidence, we review the record de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.* This Court does not interfere with the jury's role in determining the weight of the evidence or the credibility of the witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004).

Defendant was convicted of assaulting, resisting, or obstructing a police officer in violation of MCL 750.81d(1), which provides,

> Except as provided in subsections (2), (3), and (4), an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties is guilty of

> a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

The statute defines "obstruct" in pertinent part as "the use or threatened use of physical interference or force or a knowing failure to comply with a lawful command." MCL 750.81d(7)(a). A "person" under the statute includes a police officer. MCL 750.81d(7)(b). To prove that an individual "knows or has reason to know [that an officer] is performing his or her duties," the prosecutor is required to prove actual, constructive, implied, or imputed knowledge. *People v Nichols*, 262 Mich App 408, 414; 686 NW2d 502 (2004). In doing so, a prosecutor may use evidence from the record to demonstrate that a defendant should have had knowledge based on the facts and circumstances of the case. *Id*.

Sufficient evidence existed for a rational trier of fact to find defendant guilty beyond a reasonable doubt of assaulting, resisting, or obstructing a police officer. The evidence demonstrated that the arresting officer was "performing his duties," when he encountered defendant. Officer Millikin testified that he was on duty during the evening of July 29, 2002, in police uniform, driving a fully marked patrol car. He encountered defendant in the parking lot of the Battle Creek Inn while investigating the source of a large plume of smoke, and saw defendant sitting in the driver's seat of a van in the lot. The van had its front tires "up over the curb and some shrubs," and its front resting against a parked car, it was running, and its back wheels were out in the parking lot, spinning, which created the smoke. Millikin also testified that defendant turned and looked at him as he pulled into the lot, and that he could not see anyone else inside or near the van. Millikin stated that defendant got out of the van and began walking toward I-94 when he pulled his patrol car behind the van.

In addition, the evidence supports a finding that defendant knew or should have known that Millikin was performing his duties. Millikin testified that defendant turned and looked at him as he pulled his patrol car into the parking lot, and that he pursued defendant after defendant walked away, and yelled for defendant to stop, but defendant kept walking. Millikin also testified that, after his third or fourth yell, defendant turned and looked at him, and then began to run. These actions fit within the "knowing failure to comply with a lawful command" of the "obstruct" definition in MCL 750.81d(7)(a).

The evidence also supported the finding that defendant assaulted, battered, wounded, resisted, obstructed, opposed, or endangered the arresting officer. The evidence shows that Millikin chased defendant, caught up to him from behind, and pushed defendant to the ground to detain him. Millikin testified that, as he tried to handcuff defendant, defendant swung his elbow back at him. Millikin also testified that defendant, who was lying on his stomach, ignored his requests to put his hands behind his back and kept them underneath his chest, which prevented Millikin from handcuffing defendant. This behavior constitutes physical interference under the definition of "obstruct" in MCL 750.81d(7)(a). Viewing the evidence in the light most favorable to the prosecution, there was sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that defendant assaulted, resisted, or obstructed a police officer.

Defendant was also convicted of OUIL under MCL 257.625(1), which provides,

> [a] person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles,

> including an area designated for the parking of vehicles, within this state if the person is operating while intoxicated. As used in this section, "operating while intoxicated" means either of the following applies:
>
> (a) The person is under the influence of alcoholic liquor, a controlled substance, or a combination of alcoholic liquor and a controlled substance.
>
> (b) The person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine, or, beginning October 1, 2013, the person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, or per 67 milliliters of urine. [This writer notes that the current statute requires a showing of an alcohol content of 0.08 grams or more per 100 milliliters of blood.]

Defendant's argues that he was not driving the van; rather, he was merely trying to dislodge the van from its position on the curb and shrubbery. However, MCL 257.625(1) does not require that defendant be driving the van, it requires that he be "operating" it. Our Supreme Court has defined "operating," under the OUIL statute, as follows:

> "[O]perating" should be defined in terms of the danger the OUIL statute seeks to prevent: the collision of a vehicle being operated by a person under the influence of intoxicating liquor with other persons or property. Once a person using a motor vehicle as a motor vehicle has put the vehicle in motion, or in a position posing a significant risk of causing a collision, such a person continues to operate it until the vehicle is returned to a position posing no such risk. [*People v Wood*, 450 Mich 399, 404-405; 538 NW2d 351 (1995).]

The record indicates that defendant was operating the van as contemplated by the OUIL statute. Millikin testified that when he first approached the van, its back wheels were spinning and defendant was sitting in the driver's seat of the van. In addition, defendant admitted to operating the van at trial. Although defendant denied driving the van to the Battle Creek Inn, or having its keys, he admitted that he tried to drive it off of the curb or landscaping. Defendant also admitted that the van was running while he was in the driver's seat, and admitted that he placed his foot on the brake or gas pedal to try and move the van. Thus, there was sufficient evidence to support a finding that defendant was operating the van. Further, the evidence showed that defendant operated the van in the public parking lot of the Battle Creek Inn, and defendant's blood alcohol content was determined to be 0.28 grams per 100 milliliters of blood. Viewing the evidence in the light most favorable to the prosecution, the prosecutor introduced sufficient evidence to allow a rational trier of fact to conclude beyond a reasonable doubt that defendant committed OUIL.

Defendant also challenges the sentences imposed by the trial court. Defendant first argues that his sentence for the assaulting, resisting, or obstructing a police officer conviction is an excessive upward departure and disproportionate to the offense and the offender. In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion and the

amount of the departure is reviewed for an abuse of discretion. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003).

The applicable statutory sentencing guidelines established a minimum term of 0 to 11 months. However, under the 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).

In sentencing defendant to 12 to 24 months' imprisonment for his assaulting, resisting, or obstructing a police officer conviction, the trial court articulated the following reasons for upward departure:

> Defendant's extensive [and] continual convictions for drinking [and] driving along [with] his failure to address his substance abuse issues although given numerous opportunities to do so in the past.
>
> His persistence in continuing to drive while drunk makes him a danger to our community which cannot adequately be addressed by a probationary term.

Defendant argues that an appropriate sentence is a jail term within the guidelines. However, the trial court had the authority pursuant to MCL 769.34(4)(a) to sentence defendant to a term of imprisonment if it had a substantial and compelling reason to do so. 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.

The trial court's reasons for departure are objective and verifiable. Defendant's PSIR indicates that defendant's history of alcohol-related convictions dates back to 1975 and includes eight others in addition to his conviction in the present case. The punishments imposed for those convictions, generally in the form of fines and probation or jail, did not effectively deter defendant from his recidivism. It also indicates that defendant, an admitted alcoholic, has received substance abuse treatment four times: he completed residential programs in 1994 and 1998, but failed to complete a detoxification program in 1983 and intensive outpatient treatment in 2001. While the fact that defendant has received treatment is encouraging, it appears to have had little to no positive effect on defendant. The trial court's reasons for its upward departure were substantial and compelling and the one-month upward departure is proportionate to defendant's conduct and history. *Babcock, supra* at 264.

Defendant also challenges his sentence for his OUIL conviction. Defendant was charged with and convicted of OUIL third offense pursuant to MCL 257.625(8). Defendant committed the offense giving rise to his conviction on July 29, 2002. Effective October 1, 2001, the statutory guidelines applied to an OUIL third offense under MCL 257.625(8)(c). Accordingly, the statutory guidelines were applicable to defendant's OUIL third offense conviction. However, an SIR was not prepared for this offense because the agent believed that the sentencing

guidelines did not apply to this offense at the time defendant committed the offense. Accordingly, the trial court did not use the sentencing guidelines, as provided by law, in sentencing defendant. This was incorrect. According to MCR 6.425(1),

> The court must use the sentencing guidelines, as provided by law. Not later than the date of sentencing, the court must complete a sentencing information report on a form prescribed by and returned to the state court administrator.

Therefore, we remand to the trial court for completion of an SIR on this offense and for the trial court to sentence defendant using the applicable sentencing guidelines.[1]

We affirm defendant's convictions, but remand for completion of an SIR on the OUIL third offense conviction and for the trial court to resentence defendant and "use the sentencing guidelines, as provided by law." We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

[1] We also note that the judgment of sentence incorrectly cites MCL 257.625(6)(d) as the citation for OUIL third offense. While this statute has undergone several changes, at the time of defendant's offense, the correct citation for OUIL third offense was MCL 257.625(8)(c).