

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

CHARLES WILLIAM O'NEAL,

Defendant-Appellant.

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UNPUBLISHED

October 7, 2010

No. 293199

Oakland Circuit Court

LC No. 2006-210565-FH

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Defendant entered a plea of no contest to a charge of receiving or concealing property over \$1000 but less than \$20,000, MCL 750.535(3)(a). He was initially sentenced as a fourth habitual offender, MCL 769.12, to four to 30 years in prison. In *People v Charles William O'Neal*, unpublished opinion per curiam of the Court of Appeals, issued February 26, 2009 (Docket No. 283026), this Court remanded for resentencing, finding that the trial court erred in scoring offense variable 13. Defendant was resentenced to a term of five to 30 years with credit for 839 days served. This Court granted defendant's delayed application for leave to appeal. We vacate defendant's sentence and again remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

On remand, the sentencing court departed upward from the sentencing guidelines range and imposed the lengthier sentence for the following reasons: (1) defendant was on parole a very short time before committing the offense; (2) he was on parole for similar property crimes; (3) he had either been in prison or on parole for a large portion of his adult life; (4) he had numerous convictions for breaking and entering, the original charge in this case; (5) he had considerably more than the maximum number of 75 points for prior record variables (PRVs); and, (6) he had one major unchallenged misconduct during his imprisonment.”<sup>1</sup> The court stated that the upward deviation of approximately 25 percent was proportionate because these factors were either unaccounted for or given inappropriate weight, and the sentence roughly reflected what the sentencing grid would have provided if the additional PRV points could have been plotted. Further, the court said that each of these factors independently warranted the upward departure,

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<sup>1</sup> Defendant had two major misconduct citations, but apparently was challenging one.

and that the departure would be the same even if the subsequent misconduct were not taken into consideration.

Defendant argues that the trial court did not provide a substantial and compelling reason for the departure, and that his resentencing to a greater term reflected the court's vindictiveness for defendant's successful appellate challenge to his original sentence. We need not address whether the court had substantial and compelling reasons for the upward departure, as we find that the increased sentence violated defendant's right to due process.

A presumption of vindictiveness is raised when the same judge resents a defendant to a second sentence that is longer than the first. However, the presumption can be overcome "if the trial court enunciates reasons for doing so at resentencing." *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). Here, most of the factors considered by the trial court for the departure were factors known at the time of the previous sentencing and yet the trial court imposed a longer minimum term. Thus, although they may otherwise have constituted substantial and compelling reasons for departure, these factors do not provide a reasonable explanation for the increased sentence on resentencing.

The departure was also based on the subsequent misconducts in prison. However, one misconduct was being challenged and may have involved defendant's possession of his own medication, not possession of stolen property. The other may have simply reflected that defendant was not taking his medication. The trial court had no information at sentencing to suggest that these misconducts involved anything else.

Defendant admitted to prior abuse of drugs. The prosecutor argues that defendant's substance abuse contributed to the crime at issue, and because the misconducts related to substance abuse they therefore provided a valid reason for the harsher sentence. However, the sentencing court did not relate the use of substances to the charged crimes or indicate that such a concern was the reason for the increased sentence. Rather, it indicated that the misconducts and defendant's history reflected a disregard for the rule of law. Thus, the fact that the misconducts may have involved substances was not significant.

The prosecutor also focuses on the fact that *People v Smith*, 482 Mich 292; 754 NW2d 284 (2008), released during the interim between sentencings, provided guidance on the extent of departures from the sentencing guidelines. The court did look for guidance from *Smith* in imposing the resentencing. However, in imposing sentence, the court focused on the extent of departure, not the fact of departure or the reason for increasing the sentence. Thus, they did not provide a reasonable basis for imposing the harsher sentence. Accordingly, the sentencing court did not overcome the presumption that the harsher sentence was the result of vindictiveness.

Defendant next argues that he should have been granted credit for time served in jail prior to sentencing, even though he was a parolee, pursuant to MCL 769.11b. Defendant acknowledges that *People v Idziak*, 484 Mich 549, 562-563; 773 NW2d 616 (2009) calls for a different result. This Court is bound to follow decisions of our Supreme Court until our Supreme Court overrules itself. *O'Dess v Grand Trunk Western R Co*, 218 Mich App 694, 700; 555 NW2d 261 (1996). Accordingly, defendant is not entitled to credit against his sentence for time served while he was being held based on the parole violation.

Sentence vacated; remanded for proceedings consistent with this opinion before a different judge. We do not retain jurisdiction.

/s/ Peter D. O'Connell  
/s/ Deborah A. Servitto  
/s/ Douglas B. Shapiro