

REL: 11/21/2014

Notice: This opinion is subject to formal revision before publication in the advance sheets of Southern Reporter. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0649), of any typographical or other errors, in order that corrections may be made before the opinion is printed in Southern Reporter.

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2014-2015

CR-13-0892

Demetrius Tarrelle Oliver

v.

State of Alabama

Appeal from Montgomery Circuit Court
(CC-12-506)

BURKE, Judge.

On July 11, 2012, Demetrius Tarrelle Oliver pleaded guilty to second-degree theft of property, a violation of § 13A-8-4, Ala. Code 1975. He was sentenced to 15 years' imprisonment; however, that sentence was split and he was

CR-13-0892

ordered to serve 3 years' imprisonment, followed by 2 years' supervised probation. The sentence was also suspended for one year, after which time the sentence would be reviewed by the circuit court. On or about March 7, 2014, the State filed a motion to resentence Oliver, claiming that Oliver had been improperly sentenced to 15 years' imprisonment for a Class C felony when the maximum sentence allowed by law for such an offense is 10 years' imprisonment.

The circuit court held a hearing on the motion to resentence Oliver. At the hearing, the State argued that Oliver's sentence was illegal because the maximum sentence allowed by law for a Class C felony is 10 years' imprisonment. The circuit court found that Oliver's sentence was an illegal sentence and was void. When considering a new sentence, the circuit court acknowledged that, under the presumptive sentencing standards, the recommended sentence for Oliver's conviction for second-degree theft of property is a nonprison sentence. (R. 3.) See Presumptive and Voluntary Sentencing Standards Manual, pp. 41-48. However, the circuit court departed from the presumptive sentencing standards and, instead, sentenced Oliver to 13 months' imprisonment in a

Department of Corrections facility, which is a prison sentence. (R. 11.)

In Clark v. State, [Ms. CR-13-0121, Oct. 3, 2014] ____ So. 3d ____ (Ala. Crim. App. 2014), this Court noted the following:

"The Alabama Sentencing Reform Act of 2003 ('the Act'), as amended effective October 1, 2006, created voluntary sentencing standards to, among other things, assist trial judges in determining the most appropriate sentence for convicted felony offenders. See § 12-25-31(a)(1), Ala. Code 1975. At the time the Act was passed, a trial judge had the discretion to sentence a defendant either pursuant to the voluntary sentencing standards or pursuant to the [Habitual Felony Offender Act]. See State v. Crittenden, 17 So. 3d 253, 259 (Ala. Crim. App. 2009).

"In 2012, the Legislature enacted § 12-25-34.2, Ala. Code 1975, effective May 15, 2012, to implement presumptive sentencing standards in place of the voluntary sentencing standards. See Act No. 2012-473, Ala. Acts 2012. Section 12-25-34.2(b), Ala. Code 1975, provides:

"The voluntary sentencing standards as provided for in Section 12-25-34, as applied to nonviolent offenses shall become presumptive sentencing standards effective October 1, 2013, to the extent the modification adopted by the Alabama Sentencing Commission become effective October 1, 2013. The standards shall be applied by the courts in sentencing subject to departures as provided herein. To accomplish this purpose as to the existing initial voluntary sentencing standards, the

Alabama Sentencing Commission shall adopt modifications to the standards, worksheets, and instructions to the extent necessary to implement this provision including, but not limited to, defining aggravating and mitigating factors that allow for departure from the presumptive sentencing recommendations. The commission's modifications shall be presented to the Legislature in the commission's annual report within the first five legislative days of the 2013 Regular Session.'"

___ So. 3d at ___. Additionally, § 12-25-34.2(c), Ala. Code 1975, provides that

"[d]urational and dispositional departures from the presumptive sentencing standards shall be subject to appellate review. Along with the modifications provided for in subsection (b), the Alabama Sentencing Commission shall recommend a narrowly defined scope of appellate review applicable to departures from presumptive sentencing recommendations. The scope of appellate review shall become effective upon approval by an act of the Legislature enacted by bill."

Pursuant to the departure procedures for the presumptive sentencing standards, a sentencing court may depart from either a dispositional or a durational sentence recommendation "in exceptional cases, upon a finding of aggravating and/or mitigating factors." Presumptive and Voluntary Sentencing Standards Manual, p. 24. However, if the sentencing court decides to depart from a sentence recommendation in the

presumptive sentencing standards, "the aggravating and/or mitigating factors found as reasons for any departure must be stated in the written sentencing order" Presumptive and Voluntary Sentencing Standards Manual, p. 25. As Oliver stated at the hearing below and now contends on appeal, the circuit court in this case improperly departed from the presumptive sentencing standards without stating the aggravating factors it had found to support the departure.

Accordingly, because the circuit court did not follow the proper departure procedures, this case is due to be remanded to the circuit court with directions for that court to amend its resentencing order to include its reasons for departing from the presumptive sentencing standards or, if the court deems necessary, to resentence Oliver in accordance with those standards. Due return shall be made to this Court within 42 days of the issuance of this opinion.

REMANDED WITH DIRECTIONS.

Windom, P.J., and Welch, Kellum, and Joiner, JJ., concur.