

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellant,

v

GERALD LEE BABCOCK,  
  
Defendant-Appellee.

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FOR PUBLICATION  
December 26, 2000  
9:10 a.m.

No. 223624  
Jackson Circuit Court  
LC No. 99-095646-FC

Updated Copy  
February 16, 2001

Before: Talbot, P.J., and Hood and Gage, JJ.

HOOD, J. (*concurring*).

I agree that the trial court failed to articulate substantial reasons for a downward departure from the guidelines, thereby requiring vacation of the sentence and remand for resentencing. I write separately because my interpretation of the rationale of the majority opinion reveals that it does not comport with existing precedent.

In this case, defendant was charged with first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (sexual penetration with a person under thirteen). In exchange for his guilty plea, the prosecutor orally amended the information and allowed defendant to plead guilty of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (sexual contact with a person under thirteen)<sup>1</sup> for acts involving a "cousin" that occurred in April 1999. On November 4, 1999, the trial court sentenced defendant, but found substantial and compelling reasons to depart from the guidelines. Specifically, the trial court stated:

If there's no one to make any further comment, the Court is ready to pass sentence.

In passing sentence, Mr. Babcock, it's this Court's duty not only to punish the person for what they've done, but also to deter others from acting this way, protect society, and possibly reform that person.

I've looked at you and your background here, and I still don't think you fully appreciate what you did here. I still don't think you really—it doesn't really sink in on you, and this is from my observation from your appearance in court and what I read in this report.

I also think, though, that the guidelines in this case are too harsh. And I think there are substantial and compelling reasons for this Court to deviate from the guidelines. And I—in view of the fact that this particular instance—it was a family situation that didn't happen to—something that might not happen again, if you stay away from young girls. I think that treatment on the outside can be better given to you and do more good than putting you in prison. So I don't think you're really a candidate yet for prison. But if you deviate from your probationary sentence that I'm going to impose, Mr. Babcock, there's no question that's where you're going to be going to.

\* \* \*

So the Court is going to deviate because I think the guidelines are too harsh, and you have no prior convictions, and I think that the treatment that can be afforded to you in this community can do more good to rehabilitate you than placing you in a prison environment.

It's therefore the sentence of the Court that you be placed on probation for a period of three years. That your first year of probation is to be in the Jackson County Jail. However, I'm going to suspend most of that. I am going to order that you do 60 days of your jail forthwith, and the balance will be suspended.

The trial court also prepared a written departure statement that provided:

The Court has varied from the guidelines in this sentence because the defendant does not have any prior convictions. He should be able to be treated and rehabilitated better outside the prison system. The guideline [sic] appear to be too severe for the facts of this case.

The prosecutor appeals, by leave granted, from the trial court's conclusion that substantial and compelling reasons exist to radically depart from the statutorily mandated sentence guidelines, that called for a minimum sentence of thirty-six to seventy-one months. Thus, we are only called

on to decide whether there were substantial and compelling reasons for *departing* from the guidelines. I do not believe that a resolution of this issue requires us to decide what law must be applied where sentences are *within* the guidelines. Adherence to resolution of disputed issues is imperative where the majority opinion, in effect, overrules Supreme Court precedent.

The offenses in this matter occurred in April 1999. MCL 769.34(1); MSA 28.1097(3.4)(1) provides that the sentencing guidelines promulgated by order of the Michigan Supreme Court do not apply to this sentence. Rather, the sentencing guidelines enacted by the Legislature were to apply to enumerated felonies committed on or after January 1, 1999. MCL 769.34(2); MSA 28.1097(3.4)(2). MCL 769.34(10); MSA 28.1097(3.4)(10) provides:

If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence. A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals.

The majority examines the language of MCL 769.34(10); MSA 28.1097(3.4)(10) to conclude that appellate scrutiny of sentences is constrained to scoring errors or inaccurate information and that the historic view of nonintervention involving appellate review has been restored. We are obligated to review issues that are properly raised and preserved. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999). This issue of the interpretation and the scope of appellate review to be afforded MCL 769.34(10); MSA 28.1097(3.4)(10) has not been raised, addressed, argued, or even briefed by the parties and, more importantly, is not an issue in the case. The sole issue raised on appeal is whether the trial court had substantial and compelling reasons to depart

downward from the guidelines. We do not render advisory opinions, *People v Wilcox*, 183 Mich App 616, 620; 456 NW2d 421 (1990), and this statutory provision does not warrant an opinion in this case. Therefore, it is inappropriate for the majority to issue an opinion regarding a statutory section that is not an issue before this Court and in the course of that determination abandon evolved Supreme Court precedent.

Rather, MCL 769.34(11); MSA 28.1097(3.4)(11) is at issue in this case and provides:

If, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial court judge for resentencing under this chapter.

Statutory interpretation presents a question of law that we review de novo. *People v Nimeth*, 236 Mich App 616, 620; 601 NW2d 393 (1999). When resolving disputed interpretations of statutory language, it is the function of the reviewing court to effectuate the legislative intent. *People v Valentin*, 457 Mich 1, 5; 577 NW2d 73 (1998). When the language of the statute is clear, the Legislature intended the meaning plainly expressed, and the statute must be enforced as written. *Id.* Technical words and phrases, such as words that may have acquired a peculiar and appropriate meaning in the law, shall be construed and understood according to the appropriate meaning. MCL 8.3a; MSA 2.212(1). We presume that every word has some meaning and must avoid any construction that would render any part of the statute surplusage or nugatory. *People v Borchard-Ruhland*, 460 Mich 278, 285; 597 NW2d 1 (1999). The omission of a provision from one part of a statute that is included in another part of a statute must be construed as intentional. That is, we "cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Farrington v Total Petroleum, Inc*, 442 Mich 201,

210; 501 NW2d 76 (1993). To discover legislative intent, provisions of a statute must be read in the context of the entire statute to produce, if possible, an harmonious and consistent whole. *Weems v Chrysler Corp*, 448 Mich 679, 699-700; 533 NW2d 287 (1995). Statutes are to be construed to prevent absurd results, injustice, or prejudice to the public interest. *People v Stephan*, 241 Mich App 482, 497; 616 NW2d 188 (2000).

Statutory language should be construed in a reasonable manner, keeping in mind the purpose of the statute. *People v Seeburger*, 225 Mich App 385, 391; 571 NW2d 724 (1997). Nothing may be read into a statute that is not within the manifest intent of the Legislature as gathered from the act itself. *In re Juvenile Commitment Costs*, 240 Mich App 420, 427; 613 NW2d 348 (2000). If reasonable minds can differ regarding the meaning of a statute, judicial construction is appropriate. *Id.* The construing court looks to the object of the statute in light of the harm it is designed to remedy and applies a reasonable construction that will accomplish the Legislature's purpose. *Id.* Statutes that relate to the same subject matter or share a common purpose are in pari materia and must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *Stephan, supra*.

In my view, the majority opinion fails to comply with the rules of statutory construction in determining the appropriate standard of review and in concluding that the principle of proportionality has been abandoned. That is, when confronted with the issue of the interpretation of MCL 769.34(11); MSA 28.1097(3.4)(11), the majority does not resort to the rules of statutory construction or legislative intent to determine what standard of review should be applied. Rather, the majority concludes that the Legislature was silent on this issue and resorts to interpretative

case law. However, MCL 769.34(3); MSA 28.1097(3.4)(3) sets forth how the determination regarding substantial and compelling reasons for a departure is made:

A court may depart from the appropriate sentence range established under the sentencing guidelines set forth in chapter XVII if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure. All of the following apply to a departure:

(a) The court shall not use an individual's gender, race, ethnicity, alienage, national origin, legal occupation, lack of employment, representation by appointed legal counsel, representation by retained legal counsel, appearance in propria persona, or religion to depart from the appropriate sentence range.

(b) The court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.

Review of MCL 769.34(3)(b); MSA 28.1097(3.4)(3)(b) reveals that the Legislature has not abandoned the principle of proportionality, but, rather, incorporated the principle into the sentencing guidelines and it is to be taken into consideration when departing from the sentencing guidelines. Reading the entire statute as a whole, I would conclude that it is inappropriate to turn to external resources for determining a standard of review when the statute itself sets forth the bias factors and the principle of proportionality that are to be examined in finding substantial and compelling reasons.<sup>2</sup> Additionally, when viewing the statutes in pari materia, MCL 769.33; MSA 28.1097(3.3), the statute that created the commission that developed the codified sentencing guidelines, expressly provided that the sentencing guidelines would accomplish the principle of proportionality. MCL 769.33(1)(e)(iii); MSA 28.1097(3.3)(1)(e)(iii). Accordingly, I would not turn to outside sources, abandon the principle of proportionality, and adopt from case law an abuse of discretion standard. Rather, I would utilize the rules of statutory construction to conclude that the principle of proportionality is alive and well and is a measure

for use by trial courts in determining departure and the appellate courts which, in turn, examine the criteria utilized by the trial courts.

Furthermore, where reasonable minds differ regarding the meaning of a statute, judicial construction is appropriate. *In re Juvenile Commitment Costs, supra*. The construing court also examines the object of the statute in light of the harm it is designed to remedy and applies a reasonable construction that will accomplish the legislative purpose. *Id.* Review of the purpose of the statute and the legislative history reveals that the Legislature did not intend to return to the historical view of appellate nonintervention in sentencing, but rather codified the majority opinions regarding sentencing issued by the Supreme Court. The House Legislative Analysis for 1994 PA 445 provided that the bill would create a sentencing commission to develop sentencing guidelines that would reduce sentencing disparities and be proportionate to the seriousness of the offense and the offender's prior record. The analysis indicated that the Legislature was familiar with existing precedent regarding the sentencing guidelines. It noted that the bill was created to *complement* the Supreme Court decision in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). House Legislative Analysis, HB 4782, February 24, 1995. Furthermore, it noted the need for legislative guidelines because, in *Milbourn*, there was a reluctance to require strict adherence to the guidelines when the judicially created guidelines did not have a legislative mandate. *Id.* There is no discussion in the legislative history of the need to limit appellate review of sentences despite the harsh criticisms by Justice Boyle and others and the numerous law review articles tracing the history of sentencing and criticizing appellate intervention in sentencing issues.<sup>3</sup>

Furthermore, the Legislature is presumed to be aware of and legislate in harmony with existing laws when enacting new laws. *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993). In the present case, the Legislature appears to have been aware of existing case law regarding Supreme Court precedent in the area of sentencing. Review of MCL 769.34(2)(b); MSA 28.1097(3.4)(2)(b) reveals that it is a codification of *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). Additionally, the legislative history reveals that the Legislature was aware of *Milbourn, supra*, and intended to and expressly did incorporate it into the guidelines. MCL 769.33(1)(e)(iii); MSA 28.1097(3.3)(1)(e)(iii), MCL 769.34(3)(b); MSA 28.1097(3.4)(3)(b). Furthermore, because the Legislature is aware of *Milbourn, supra*, it is aware that the Supreme Court concluded long ago that the Legislature intended to adopt the principle of proportionality. Specifically, in *Milbourn, supra* at 650-651, 659-661, our Supreme Court attributed to the Legislature the intent to adopt the principle of proportionality and the intent that the standard would also govern appellate review:

When the legislative scheme for criminal sentencing is viewed across the spectrum of crimes from misdemeanor traffic violations to cold-blooded murders, two aspects are immediately clear. First, the Legislature has endeavored to provide the most severe punishments for those who commit the most serious crimes. The crime of murder, for example, is punishable by a longer term than is the lesser included crime of assault. Second, offenders with prior criminal records are likewise subject to harsher punishment than those with no prior convictions, as reflected in the general and specific habitual offender provisions of the penal statutes. These two elements combine to form what might be called the "principle of proportionality." As stated over three quarters of a century ago by the United States Supreme Court, "[I]t is a precept of justice that punishment for the crime should be graduated and proportioned to the offense." *Weems v United States*, 217 US 349, 367; 30 S Ct 544; 54 L Ed 793 (1910). . . .

Turning from the legislative felony sentencing scheme in general to the prescribed punishment for individual felonies, we note that the Legislature has, with only a few exceptions, provided a range of punishment for each felony. Because the Legislature in addressing criminal punishment in general has subscribed to the principle of proportionality and because the commission of a



given crime by a given offender may also vary considerably in seriousness, we believe it reasonable to conclude that the Legislature, in setting a range of allowable punishments for a single felony, intended persons whose conduct is more harmful and who have more serious prior criminal records to receive greater punishment than those whose criminal behavior and prior record are less threatening to society.

The Legislature then left to the judiciary, with regard to most crimes, the task of determining the sentence to be imposed upon each offender within given bounds. We believe that judicial sentencing discretion should be exercised, within the legislatively prescribed range, according to the same principle of proportionality that guides the Legislature in its allocation of punishment over the full spectrum of criminal behavior. Thus, a judge helps to fulfill the overall legislative scheme of criminal punishment by taking care to assure that the sentences imposed across the discretionary range are proportionate to the seriousness of the matters that come before the court for sentencing. In making this assessment, the judge, of course, must take into account the nature of the offense and the background of the offender.

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Where there is a departure from the sentencing guidelines, an appellate court's first inquiry should be whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines. A departure from the recommended range in the absence of factors not adequately reflected in the guidelines should alert the appellate court to the possibility that the trial court has violated the principle of proportionality and thus abused its sentencing discretion. Even where some departure appears to be appropriate, the extent of the departure (rather than the fact of the departure itself) may embody a violation of the principle of proportionality. . . .

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. . . [T]he key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range.

Review of the *Milbourn* decision reveals that the Legislature was on notice of the intent ascribed to the graduated punishment scheme as an adoption of the principle of proportionality and the Supreme Court's intent that sentences be reviewed on appeal accordingly. The Legislature has, by its adoption of the guidelines, affirmed the intent ascribed by the Supreme Court in *Milbourn*. Therefore, I would hold that it could not, by its silence, revoke appellate review of sentences for

proportionality, but rather had to, in light of *Milbourn*, make an affirmative statement to abolish that standard of review. Because I conclude that the Legislature did not abolish appellate review of the principle of proportionality, an opinion to the contrary acts in contravention of Supreme Court precedent.

Returning to the sole issue at hand, the trial court concluded that there were substantial and compelling reasons to depart from the guidelines. In reaching that assessment, the court could not consider an offense characteristic or offender characteristic incorporated into the sentencing range unless the court found that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b); MSA 28.1097(3.4)(3)(b). Second-degree criminal sexual conduct is an enumerated felony included in the legislative guidelines. MCL 777.16y; MSA 28.1274(26y). The trial court's reasons for imposing a three-year probationary sentence with sixty days in jail included the "harshness" of the guidelines, the lack of a prior record, and the presence of a family relationship. Prior record variables are incorporated into the guidelines, and the trial court failed to conclude that this variable was given inadequate or disproportionate weight. Rather, the trial court principally seemed to disagree with the "harshness" of the sentence guidelines. However, the trial court's personal disagreement with the guidelines is not a substantial and compelling reason for deviation from the guidelines. Therefore, I agree with the majority that the trial court failed to state substantial and compelling reasons for the departure and that resentencing is required. Finally, with regard to defendant's contention that the plea agreement that allowed him to plead guilty of two counts of second-degree criminal sexual conduct was designed to avoid prison time, there is no record of any plea and sentence agreement

in accordance with *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). Accordingly, defendant's contention is without merit.

In summary, it is not clear to me that the Legislature had totally relegated *Milbourn* to the judicial scrap heap, and I would await guidance from either the Legislature or the Supreme Court before making such a pronouncement. Because it is abundantly clear that the trial court did not articulate substantial and compelling reasons for its drastic downward departure from the guidelines, I agree that we must vacate the sentence and remand for resentencing. Therefore, I concur with the majority's disposition in this case.

/s/ Harold Hood

<sup>1</sup> The plea to the amended charges occurred on September 23, 1999, and an amended information was filed on September 24, 1999.

<sup>2</sup> I also note that the statute directly addresses the Court of Appeals in MCL 769.34(10) and (11); MSA 28.1097(3.4)(10) and (11), and the trial court in MCL 769.34(7); MSA 28.1097(3.4)(7). However, MCL 769.34(3); MSA 28.1097(3.4)(3) places no restriction on the court involved in examining substantial and compelling reasons for departure.

<sup>3</sup> Casenote, *Michigan criminal sentencing*, 73 U Det Mercy L R 653 (1996); Note, *The Michigan sentencing guidelines and the transfer of sentencing discretion by means of proportionality: The fall of the house that Coles and Milbourn built*, 71 U Det Mercy L R 385 (1994); Casenote, *People v Moore: The role of discretion in indeterminate sentencing*, 1989 Det Col L R 1275 (1989).