

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

GEORGE HENRY MARTIN III,

Defendant-Appellee.

FOR PUBLICATION

July 8, 2003

9:10 a.m.

No. 243008

Oakland Circuit Court

LC No. 02-184542-FH

Updated Copy

August 29, 2003

Before: Owens, P.J., and Bandstra and Murray, JJ.

PER CURIAM.

Defendant Gregory H. Martin, III, pleaded guilty to one count of larceny from a person, MCL 750.357. Defendant entered his plea after the trial court made a preliminary sentence evaluation¹ that he would be sentenced to a "county jail" term, rather than imprisonment in a state prison. Ultimately, the trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to ten months' imprisonment in the Oakland County Jail. The prosecution appeals by leave granted. We affirm.

The prosecution contends that the trial court erred as a matter of law in sentencing defendant to a determinate jail sentence.² We review questions of law de novo. *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002). This standard of review also applies to our interpretation of the several statutes relevant to this case. *People v Jones*, 467 Mich 301, 304; 651 NW2d 906 (2002).

MCL 750.357 authorizes a trial court to sentence a defendant to "imprisonment in the state prison not more than 10 years." MCL 769.10(1)(a) provides that a trial court sentencing a second-offense habitual offender "may place the person on probation or sentence the person to imprisonment for a maximum term that is not more than 1-1/2 times the longest term prescribed

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

² In contrast, an "indeterminate sentence" is one with a minimum and maximum term of imprisonment. Article 4, § 45 of the Michigan Constitution states that our Legislature "may provide for indeterminate sentences as punishment for crime and for the detention and release of persons imprisoned or detained under such sentences."

for a first conviction of that offense or for a lesser term." Thus, for violating MCL 750.357, defendant faced a maximum term of fifteen years' imprisonment.

Because the instant offense occurred after January 1, 1999, the trial court was required to sentence defendant under the legislative sentencing guidelines, MCL 777.1 *et seq.* MCL 769.34. Indeed, MCL 777.16r provides that the legislative sentencing guidelines apply to a violation of MCL 750.357. Here, the appropriate sentencing guidelines range was five to twenty-eight months' imprisonment. MCL 769.34(4) provides, in part, as follows:

(c) If the upper limit of the recommended minimum sentence exceeds 18 months and the lower limit of the recommended minimum sentence is 12 months or less, the court shall sentence the offender as follows absent a departure:

(i) To imprisonment with a minimum term within that range.

(ii) To an intermediate sanction that may include a term of imprisonment of not more than 12 months.

Although inartfully drafted, this statutory provision gives the trial court discretion to either sentence a defendant to a term of imprisonment within the guidelines range or impose an intermediate sanction.³

Because defendant's sentencing guidelines range was five to twenty-eight months' imprisonment, MCL 769.34(4)(c)(ii) plainly authorized the trial court to sentence defendant to a term of imprisonment within the sentencing range; a term of imprisonment of not more than twelve months; or any other intermediate sanction. MCL 769.31(b) defines "intermediate sanction" as "probation or any other sanction, other than imprisonment in a state prison or state reformatory, that may be lawfully imposed." The subsection lists specific examples of an intermediate sanction, such as "[p]robation with jail," MCL 769.31(b)(iv), and "[j]ail," MCL 769.31(b)(viii). Therefore, whether based on MCL 769.34(4)(c)(ii) or MCL 769.31(b)(viii), the trial court did not err as a matter of law in imposing a ten-month term of imprisonment in jail.

³ In contrast, MCL 769.34(4)(a) provides that where the upper limit of the sentencing guidelines range is eighteen months or less, the trial court must impose an intermediate sanction, absent substantial and compelling reasons to depart from the guidelines. If the scoring of defendant's prior record variables had been twenty less—which would have been the case but for his concurrent and subsequent convictions of other offenses—defendant's sentencing range would have been zero to thirteen months' imprisonment. If so, the trial court would have been required by MCL 769.34(4)(a) to impose an intermediate sanction. In fact, MCL 769.34(4)(a) provides that an "intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less." It logically follows that where, as here, the scoring of the variables suggests a more serious violation, our Legislature did not mandate an intermediate sanction, but instead allowed the trial court discretion to either impose an intermediate sanction or adhere to the ordinary requirement of imprisonment in the state prison.

However, as noted above, the prosecution contends that the trial court erred in imposing a *determinate* jail sentence for this felony offense. Indeed, we have held that a determinate jail sentence for a felony is improper under MCL 769.8, which provides that where a "punishment prescribed by law for that offense may be imprisonment in a state prison, the court imposing sentence shall not fix a definite term of imprisonment" See *People v Austin*, 191 Mich App 468, 469-470; 478 NW2d 708 (1991); see also *People v Weaver*, unpublished opinion per curiam of the Court of Appeals, issued January 14, 2000 (Docket No. 213501). However, those decisions involved sentences imposed under the permissive judicial sentencing guidelines, rather than sentences imposed under the mandatory legislative sentencing guidelines. By expressly providing for "intermediate sanctions" in a subcategory of cases with a relative lack of severity, our Legislature plainly created an exception to MCL 769.8 by enlarging the trial court's sentencing discretion including imposing "intermediate sanctions" for offenses that otherwise might have required imprisonment in state prison. MCL 769.34(4)(c)(ii). Thus, while our Legislature enacted a statutory sentencing scheme that provides greater uniformity for sentences involving the most serious offenses and offenders, it also provided trial courts with greater discretion regarding sentences for offenses and offenders on the other end of the continuum. Therefore, were we to apply *Austin* and similar cases to our current sentencing scheme, we would negate our Legislature's attempt to provide the trial court with the discretion to sentence less serious offenders to intermediate sanctions.

In addition, we reject the prosecution's assertion that a determinate sentence was not an appropriate "intermediate sanction" because it could not "lawfully be imposed" under MCL 750.357, which expressly provides for imprisonment in a state prison. By its own terms, MCL 769.31(b)(viii) provides that "jail" is a lawful "intermediate sanction." Accordingly, the trial court's ruling did not negate any statutory language, but merely recognized that our Legislature created an exception in less serious cases. In other words, the trial court's ruling gave proper effect to MCL 769.34(4)(c). Consequently, the trial court did not err as a matter of law in imposing a determinate jail sentence. *Riddle, supra* at 124; *Jones, supra* at 304.

Affirmed.

/s/ Donald S. Owens
/s/ Richard A. Bandstra