STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION May 17, 2012
v	No. 298488 Oakland Circuit Court
HAWK HENRY BRANTLEY, Defendant-Appellant.	LC No. 2008-220825-FC

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

K. F. KELLY, J. (*concurring in part and dissenting in part*).

I agree with the majority that defendant's convictions for first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(e) (armed with a weapon) and larceny from a person, MCL 750.357, must be affirmed. I also agree with the majority that defendant must be remanded for resentencing because the sentencing court erred in assessing 10 points for offense variable (OV) 10, MCL 777.40, where there was no evidence that defendant and the victim were involved in a domestic relationship. However, I write separately to dissent from that portion of the majority's opinion affirming the sentencing court's imposition of lifetime electronic monitoring. Because the plain language of the MCL 750.520n(1) clearly applies only when the victim is less than 13 years of age and the defendant is 17 years old or older, I would vacate the imposition of lifetime electronic monitoring.

I. STANDARD OF REVIEW

"Whether defendant is subject to the statutory requirement of lifetime electronic monitoring involves statutory construction, which is reviewed de novo." *People v Kern*, 288 Mich App 513, 516; 794 NW2d 362 (2010).

> The primary goal of statutory construction is to give effect to the Legislature's intent. The statute's words are the most reliable indicator of the Legislature's intent and should be interpreted based on their ordinary meaning and the context within which they are used in the statute. An unambiguous statute is enforced as written. It is only when statutory language is ambiguous that a court may look outside the statute to ascertain legislative intent. A statutory provision is ambiguous if it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning. [*Id.* at 516-517 (quotation marks and citation omitted).]

II. ANALYSIS

Defendant argues that the plain language of MCL 750.520n does not require lifetime electronic monitoring when the sexual assault victim is an adult. I agree. When MCL 750.520b(2)(d) is read with MCL 750.520n, the clear result is that lifetime electronic monitoring is only required when the victim is less than 13 years old, and the defendant is 17 years old or older.

MCL 750.520b(2) provides:

> (2) Criminal sexual conduct in the first degree is a felony punishable as follows:
>
> (a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.
>
> (b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.
>
> (c) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age, by imprisonment for life without the possibility of parole if the person was previously convicted of a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially corresponding to a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age.
>
> (d) In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n.

MCL 750.520n(1) provides:

> (1) A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring . . ..

The majority concludes that MCL 750.520n(1) "requires the trial court to impose lifetime electronic monitoring in either of two different circumstances: (1) when any defendant is convicted of CSC I under MCL 750.520b, and (2) when a defendant who is 17 years old or older is convicted of CSC II under MCL 750.520c against a victim who is less than 13 years old." The majority comes to this conclusion by comparing the language of MCL 750.520b and MCL 750.520c (CSC II). MCL 750.520c(2) provides:

> (2) Criminal sexual conduct in the second degree is a felony punishable as follows:
>
> (a) By imprisonment for not more than 15 years.

> (b) In addition to the penalty specified in subdivision (a), the court shall sentence the defendant to lifetime electronic monitoring under section 520n if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age.

The majority holds that "while the CSC II statute specifically limits the requirement of lifetime electronic monitoring to defendants who are 17 years old or older and whose victims are younger than 13 years old, the CSC I statute contains no such age-based limitation. We therefore conclude that any defendant convicted of CSC I under MCL 750.520b, regardless of the age of the defendant or the age of the victim, must be ordered to submit to lifetime electronic monitoring."

In reaching its conclusion re-writes the legislation to say something that it does not. The majority would reform the statute to say what the majority believes it ought to say rather than what the legislature has clearly, I believe the majority and unequivocally stated. That is beyond our province as an appellate court.

In *Kern*, this Court was asked to determine whether lifetime electronic monitoring for defendants convicted of second-degree CSC applied only to persons who had been released on parole or from prison. *Kern*, 288 Mich App at 514-515. *Kern* does not answer the question of whether MCL 750.520n(1) requires lifetime electronic monitoring for first-degree CSC only when the victim is less than 13 years old, but *Kern* does buttress my belief that the majority has over-stepped its bounds in looking beyond the clear language of the statute. The result in *Kern* depended on the interplay between the Michigan Penal Code and the Corrections Code. *Id.* at 517-518. We concluded that lifetime electronic monitoring "applies only to persons who have been released on parole or from prison, or both, and, therefore, does not apply to defendant, who was sentenced to five years' probation, with 365 days to be served in jail." *Id.* at 519. Reading the two codes in pari material, we noted:

> MCL 750.520n(1) of the Michigan Penal Code directs that defendants shall be sentenced to lifetime electronic monitoring as provided under MCL 791.285 of the Corrections Code. Because the latter statute only provides for the implementation of a lifetime electronic monitoring program for those defendants who are released on parole or from prison, or both, defendants given probation or sent to jail are not subject to such monitoring. [*Id.* at 522-523.]

We acknowledged that "the Legislature used the terms 'parole' and 'prison' and did not use the terms 'probation' or 'jail.' A court may not engraft on a statutory provision a term that the Legislature might have added to a statute but did not. The Legislature's distinction between 'parole' and 'probation,' and 'prison' and 'jail,' must be respected." *Id.* at 522 (citation omitted). This deference to the legislature must prevail:

> The prosecution persuasively argues that persons convicted of second-degree CSC for conduct committed by an individual 17 years of age or older against an individual less than 13 years old and sentenced to probation or jail time present a similar, if not the same, risk to the public as those sentenced to time in prison and, therefore, should be subject to lifetime electronic monitoring. But

> 'arguments that a statute is unwise or results in bad policy should be addressed to the Legislature.' Whether the Legislature's actions are due to concerns about taxing county resources, a strategic decision that crimes resulting in sentences to jail or probation do not merit the time and expense involved with lifetime electronic monitoring in addition to maintaining the defendant's listing on the Michigan public sex offender registry, or a mere drafting oversight is not for us to decide. While the Legislature may deem it necessary to make changes to the statutory scheme to provide for the monitoring of persons sentenced to probation or jail time, such changes are not within the province of the judicial branch. Because this is a particularly important matter of public interest, we urge the Legislature to review whether it was indeed the intent of that body to exclude from lifetime electronic monitoring individuals convicted of second-degree criminal sexual conduct who are sentenced to probation or jail time. [*Id.* at 524-525.]

Again, while *Kern* may not directly answer the question before us, it certainly guides our statutory interpretation and reminds us that we must defer to the clear unequivocal language utilized by the legislature.

While I recognize that unpublished opinions are not precedentially binding under the rules of stare decisis, MCR 7.215(C)(1), there have been several recent unpublished cases concerning lifetime electronic monitoring sentences where the victim was over the age of 13 and I find their analysis persuasive. In *People v Quintana,* unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket No. 295324) lv den 490 Mich 894 (2011), this Court vacated the defendant's lifetime electronic monitoring sentencing condition because the victim was older than 13 years old:

> We conclude that although the legislature may have intended to subject all individuals convicted first-degree CSC to lifetime electronic monitoring, the legislature's intent is irrelevant to our determination because the statutory language is unambiguous. MCL 750.520b(2)(d) explicitly references MCL 750.520n, which only applies where the victim is younger than 13. For this Court to accept the prosecution's interpretation of MCL 750.520b(2)(d), it would essentially be required to ignore that provision's reference to MCL 750.520n. Stated differently, if the legislature desired to subject all individuals convicted of first-degree CSC to lifetime electronic monitoring, the controlling statute would not have included the language that we emphasize below:
>
> > In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n.
>
> Under the rules of statutory interpretation, we cannot simply disregard the specific language utilized by the legislature. As a result, the portion of the Judgment of Sentence requiring lifetime electronic monitoring is vacated. [*Quintana*, unpub op at 16-17.]

In *People v Bowman*, unpublished opinion per curiam of the Court of Appeals, issued November 9, 2010 (Docket No. 292415), lv den 489 Mich 898 (2011), the defendant was convicted of two counts of *first-degree* CSC. We found no support for the sentencing court's imposition of lifetime electronic monitoring where the victim was over the age of 13:

> Here, it is undisputed that the complainant was 14 years old at the time of defendant's offenses. The prosecution concedes that the trial court erred in imposing the lifetime tether requirement.[1] . Accordingly, we remand to the trial court for it to engage in the ministerial task of removing the lifetime tether provision from defendant's judgment of sentence. [*Id.* at unpub op 5.]

In *People v Hampton*, unpublished opinion per curiam of the Court of Appeals, issued December 20, 2011 (Docket No. 297224), the defendant was convicted of six counts of *first-degree* CSC. We vacated the lifetime electronic monitoring from the defendant's sentence because the victim was over the age of 13:

> The criminal sexual conduct statute instructs that "the court shall sentence the defendant to lifetime electronic monitoring under section 520n." MCL 750.520b(2)(d). Pursuant to MCL 750.520n(1), a "person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring." The goal of statutory construction is to give effect to the Legislature's intent. The Legislature is presumed to have intended the meaning it plainly expressed and clear statutory language must be enforced as written.
>
> Accordingly, the plain language of the statute as written requires the conclusion that defendant is entitled to have the lifetime electronic monitoring portion of his sentence vacated because the victim in this case was 14 and 15 years old at the time of the offenses. The prosecution's argument that the Legislature intended to provide mandatory lifetime electronic monitoring for all persons convicted of first-degree criminal sexual conduct is not supported by the plain language of the statute. [*Id.* at unpub op 10.]

In *People v Floyd*, unpublished opinion per curiam of the Court of Appeals, issued September 20, 2011 (Docket No. 297393), lv den 491 Mich 886 (2012), the defendant was convicted of four counts of *first-degree* CSC. We vacated the lifetime electronic monitoring from the defendant's sentence because the victim was over the age of 13:

> Although the prosecution argues that the Legislature intended to provide mandatory lifetime electronic monitoring for all persons convicted of first-degree

[1] I note that the Oakland County Prosecutor has now taken two different positions on this issue. Whereas in *Bowman* the prosecutor conceded error in imposing lifetime tethering, it now argues to the contrary on this appeal.

> criminal sexual conduct with MCL 750.520b(2)(d), that interpretation is not supported by a plain reading of the statute. Specifically, MCL 750.520b directs the trial court to MCL 750.520n to determine if lifetime electronic monitoring is mandatory. Under MCL 750.520n, lifetime electronic monitoring is only mandatory when the defendant is 17 years of age or older and the victim is younger than 13 years old. See People v. Kern, 288 Mich.App 513, 519; 794 NW2d 362 (2010) ("Standing alone, the terms of MCL 750.520c and MCL 750.520n indicate that all defendants convicted of second-degree CSC for conduct committed by an individual 17 years of age or older against an individual less than 13 years old are subject to lifetime electronic monitoring, without exception."). The victim here was older than 13 at the time of the assaults, therefore, MCL 750.520n does not apply. Accordingly, we vacate the trial court's judgment to the extent that it ordered defendant to be subject to lifetime electronic monitoring. [*Id.* at unpub op p 6.]

A plain reading of MCL 750.520b(2)(d) and MCL 750.520n(1) provides that, even in the case of first-degree criminal sexual conduct, lifetime electronic monitoring is only required when the victim is less than 13 years old and the defendant is 17 years old or older.

I would vacate that portion of defendant's sentence mandating lifetime electronic monitoring.

/s/ Kirsten Frank Kelly