# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ALLEN ALEXANDER,

Defendant-Appellant.

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UNPUBLISHED
January 21, 1997

No. 186963
LC Nos. 91-004898
91-005641

Before: MacKenzie, P.J., and Wahls and Markey, JJ.

PER CURIAM.

In lower court no. 91-004898, a jury convicted defendant of one count of unlawfully driving away an automobile (UDAA), MCL 750.413; MSA 28.645, and receiving or concealing stolen property over $100, MCL 750.535; MSA 28.803. In a consolidated case, lower court no. 91-005641, the same jury convicted defendant of a second count of receiving stolen property and the misdemeanor of fleeing and eluding a police officer, MCL 750.479a; MSA 28.747(1). Defendant then pled guilty as a fourth habitual offender, MCL 769.12; MSA 28.1084. Defendant appeals as of right. We affirm defendant's sentence but remand for preparation of an updated or supplemental sentencing information report.

Initially, the trial court sentenced defendant to a term of three to five years' imprisonment for each of the UDAA and stolen property convictions and to a term of six to twelve months' imprisonment for the fleeing and eluding conviction. The trial court then set aside these sentences and sentenced defendant to a term of twelve to twenty years' imprisonment as an habitual offender. Defendant appealed to this Court. In docket no. 148931, this Court affirmed defendant's convictions. *People v Alexander*, unpublished opinion per curiam of the Court of Appeals, issued November 10, 1993 (Docket No. 148931). However, this Court held that defendant's habitual offender plea applied only to lower court docket no. 91-004898, and not to lower court docket no. 91-005641. *Id.* Accordingly, this Court remanded to the trial court for resentencing. *Id.* This Court instructed the trial court to reinstate the concurrent sentences imposed for the underlying offenses. *Id.* However, this Court ordered that the trial court resentence defendant with regard to the habitual offender sentence in

light of the principle of proportionality adopted in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

On remand, the trial court reinstated the original sentences in lower court no. 91-005641 of three to five years' imprisonment for one count of UDAA and six to twelve months' imprisonment for fleeing and eluding. In lower court no. 91-004898, the trial court reinstated the original sentences of three to five years' imprisonment for the other count of UDAA and the stolen property convictions. Also in lower court no. 91-004898, the trial court then reinstated the sentence of twelve to twenty years' imprisonment for defendant's habitual offender conviction. It is from this habitual offender sentence which defendant now appeals.

Defendant argues that the trial court erred by reimposing the same sentence for the habitual offender conviction on remand. We disagree. The power of the lower court on remand is to take such action as law and justice may require so long as it is not inconsistent with the judgment of the appellate court. *People v Fisher*, 449 Mich 441, 446-447; 537 NW2d 577 (1995).

In remanding for a resentencing, this Court stated:

> With regard to the habitual offender sentence imposed in lower court no. 91-004898, we decline to address its proportionality at this time since the trial court's misapplication of the habitual offender statute rendered the sentence invalid. Instead, we vacate the sentence and remand for resentencing. On remand, the trial court shall apply the habitual offender statute to both substantive offenses in lower court no. 91-004898 in light of the principle of proportionality adopted in People v Milbourn, 435 Mich 630; 461 NW2d 1 (1990). [*People v Alexander*, unpublished opinion per curiam of the Court of Appeals, issued November 10, 1993 (Docket No. 148931).]

On remand, the trial court articulated its reasons for imposing its sentence for the habitual offender conviction as follows:

> The guidelines for the offense for which he was convicted there, the top was 40 months. I sentence under the habitual to 144 to 240 months. That certainly is three times, a little more than three times of the top of the guidelines.
>
> But, it's my recollection, at least in this sentencing is that Mr. Alexander has demonstrated a course of conduct here, you know, that goes way back to 1979 and '80 as a juvenile, and all the way through, including his adult record which indicated, I think, about now about six or seven different felony convictions that the sentence I had imposed had in mind. We have a habitual statue [sic] and there are persons who come under that who demonstrate a consistent violation of the law, that the purpose of that statute is to put them away, you know for that particular reason. Otherwise why have a habitual offender statute if it's not going to mean anything.

> So, in each of the cases that are re-instated I will re-instate the sentence that I imposed initially of 144 months to 240 months as under the habitual, but to apply separately to each of those. Separate sentences as is required.

Despite its use of the phrase "re-instate," the trial court's comments made it clear that it recognized that this proceeding was a resentencing. The fact that the trial court articulated similar reasons to those it articulated during the initial sentencing did not violate this Court's directive. Indeed, this Court did not vacate the trial court's original sentencing because the trial court had used inappropriate reasoning or because the sentence was disproportionate. *People v Alexander*, unpublished opinion per curiam of the Court of Appeals, issued November 10, 1993 (Docket No. 148931). Rather, the trial court had made an error of law in applying the sentence to lower court no. 91-005641. *Id.* Accordingly, the trial court did not err here in imposing the same sentence on remand.

Defendant argues that the habitual offender conviction was disproportionate. We disagree. Review of habitual offender sentences is limited to considering whether the sentence violates the *Milbourn* principle of proportionality without reference to the guidelines. *People v Zinn*, 217 Mich App 340, 349; 551 NW2d 704 (1996). In light of the circumstances surrounding the offense and the offender, we believe that the trial court did not abuse its discretion in sentencing defendant. *Id.*

Defendant argues that the trial court erred by refusing to order an updated sentencing information report (SIR). We agree in part. It is true that a trial court is required to fill out an SIR for the underlying offense. *Id.*, p 350. In addition, as a general rule, a trial court must use a new or reasonably updated presentence report in resentencing a defendant. *People v Triplett*, 407 Mich 510, 511; 287 NW2d 165 (1980); *People v Martinez (After Remand)*, 210 Mich App 199, 202; 532 NW2d 863 (1995). However, in the case of a resentencing pursuant to a defendant's conviction as an habitual offender, the preparation of an SIR "is done to aid in the development of guidelines for habitual offender sentencings, rather than to aid the sentencing court in determining the habitual offender's sentence." *Zinn*, *supra*, p 350. Accordingly, we remand to the trial court solely for the administrative task of completing an updated or supplemental SIR. *People v Yeoman*, 218 Mich App 406, 423; 554 NW2d 577 (1996); *Zinn*, *supra*, p 350.

In light of our disposition, defendant's final argument that he must be resentenced before a different judge is moot.

Defendant's sentence is affirmed, and the case is remanded for preparation of an updated or supplemental SIR. Jurisdiction is not retained.

/s/ Barbara B. MacKenzie
/s/ Myron H. Wahls
/s/ Jane E. Markey