

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

DARIN MIKAL COMSTOCK,

Defendant-Appellee.

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UNPUBLISHED

July 12, 2002

No. 233410

Isabella Circuit Court

LC No. 00-009226-FH

Before: Hood, P.J., and Saad and E. M. Thomas\*, JJ.

PER CURIAM.

The prosecutor appeals by leave granted a judgment of sentence entered following defendant's plea-based convictions of operating under the influence of liquor, third offense, MCL 257.625(10), and resisting and obstructing a police officer, MCL 750.479. Sentencing defendant as a second felony offender, MCL 769.10, the trial court placed defendant on five years' of probation with one year to be spent in jail. The court then awarded defendant credit for twenty-one days voluntarily served in a residential substance abuse treatment program, plus three days' associated good time credit, and ordered him to spend five days in jail. For the remainder of the one-year term, defendant was ordered placed on an alcohol monitor in lieu of jail time. We vacate the sentence and remand for resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

We first address the prosecutor's argument that the court erred in failing to require defendant to perform any community service. The argument involves questions of law and statutory construction that this Court reviews de novo. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998); *People v Chavis*, 246 Mich App 741, 743; 635 NW2d 67 (2001).

MCL 257.625(10)(c) provides:

(c) If the [OUIL] violation occurs within 10 years of 2 or more prior convictions, the person is guilty of a felony and shall be sentenced to pay a fine of not less than \$500.00 or more than \$5,000.00 and either of the following:

(i) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

(ii) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. Not less than 48 hours of the imprisonment imposed under this subparagraph shall be served consecutively.

The Legislature alone has the power to fix the minimum and maximum punishment for all crimes. *People v Morgan*, 205 Mich App 432, 433; 517 NW2d 822 (1994). Absent legislative authority, the courts have no discretionary power to deviate from mandatory sentences required by statute. *People v Palm*, 245 Mich 396, 403-404; 223 NW 67 (1929). The word “shall” indicates mandatory rather than discretionary action. *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994). Thus, we agree with the prosecutor that the trial court was required to impose a sentence that included 60 to 180 days of community service. Because defendant was not ordered to perform community service, we must remand for resentencing.

We also agree with the prosecutor that the twenty-one days defendant spent in voluntary residential substance abuse treatment does not satisfy the mandatory minimum jail time requirement of the felony OUIL statute, or stated otherwise, that defendant is not entitled to sentence credit for the twenty-one days spent in voluntary residential treatment. The trial court effectively gave defendant a thirty-day jail sentence with credit for twenty-five days served. MCL 769.11b, the sentence credit statute, provides:

Whenever any person is hereafter convicted of any crime within this state and has served any time in jail prior to sentencing because of being denied or unable to furnish bond for the offense for which he is convicted, the trial court in imposing sentence shall specifically grant credit against the sentence for such time served in jail prior to sentencing.

The trial court in this case based its decision to credit defendant’s time in the residential substance abuse program on *People v Sheryl Miller*, 182 Mich App 692; 452 NW2d 882 (1990). There, this Court, citing *People v Stange*, 91 Mich App 596; 283 NW2d 806 (1979), ordered the defendant to be granted credit for presentence time spent in a residential drug treatment program. We decline to follow *Miller* for two reasons. First, its reasoning was largely undermined by this Court’s conclusion in *People v Scott*, 216 Mich App 196, 198; 548 NW2d 678 (1996), that *Stange* was wrongly decided. More importantly, in *People v Whiteside*, 437 Mich 188, 202; 468 NW2d 504 (1991), our Supreme Court, albeit in the context of sentence credit for a probation violation, held that that “the term ‘jail,’ as used in the sentence credit statute, when read in light of the probation revocation statute, does not extend to or include participation in a private rehabilitation program,” and observed that while a residential rehabilitation program “may impose discipline and a structured environment, it is not a ‘jail’ as that term is commonly used and understood. The purpose of such a program is treatment and rehabilitation, rather than incarceration.”

This Court employed similar reasoning in *Scott*, *supra* at 199-200, a case that did not involve a probation violation. Based on *Whiteside* and *Scott*, we conclude that the trial court erred in equating time spent in residential treatment with jail time for purposes of awarding sentence credit. We further note that, even if defendant’s time in treatment was the equivalent of jail time, it was not “served” because of an inability to post bond and hence fell outside the scope of the sentence credit statute. See *Scott*, *supra* at 199. Defendant was not entitled to credit for

the twenty-one days spent in residential treatment and the three days' associated good time credit. We therefore vacate defendant's sentence and remand for resentencing.

Convictions affirmed, sentence vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ Harold Hood

/s/ Henry William Saad

/s/ Edward M. Thomas