

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD JOHN RUTKOWSKI,

Defendant-Appellant.

UNPUBLISHED

November 28, 2006

No. 262543

Allegan Circuit Court

LC No. 04-013951-FH

Before: White, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his sentence of twenty months to fifteen years in prison for breaking and entering with intent to commit larceny, MCL 750.110.¹ We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

A bar defendant had recently worked at was broken into, and approximately \$3000 was stolen. Some days later, defendant, in jail for a probation violation, was overheard instructing his mother to clean out his car to remove incriminating evidence, and to remove a bottle of rum from a woodpile near his apartment. Defendant confessed his involvement in the theft to another inmate, and mentioned making purchases with the proceeds. A bottle of rum was discovered by investigating officers in the location revealed by the informant.

Defendant denied that he robbed the bar. He claimed that he was at home, without a car, on the night of the robbery.

At sentencing, defense counsel noted that defendant had a serious problem with alcohol, and remarked that defendant was at a crossroads and might keep returning to prison if he continued to drink. The trial court stated:

THE COURT: Well, I can't say too much more to you, Mr. Rutkowski. My suspicion is that you're going to spend most of your life in prison. I listened to the trial, you're a bad drunk, you're a bad liar, and you're guilty as sin of what

¹ Defendant was sentenced as a second habitual offender. MCL 769.10.

they say you did here. It's not the first time, it won't be the last as far as I can see unless you change your stripes real quick and I don't hold a lot of hope for you.

But, I'm not inclined to exceed the guidelines just for that.

On appeal, defendant claims that the trial court violated the Michigan Canons of Judicial Ethics and American Bar Association rules by making disparaging and biased remarks about him, and that he is entitled to be resentenced.

We review a sentencing decision for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 633; 461 NW2d 1 (1990). The trial court's remarks reflect what happened at trial, and defense counsel's observations regarding defendant's problems with alcohol. A sentencing court may consider a defendant's false testimony at trial when imposing sentence. *United States v Grayson*, 438 US 41, 50; 98 S Ct 2610; 57 L Ed 2d 582 (1978); *People v Adams*, 430 Mich 679, 701; 425 NW2d 437 (1988). Further, defendant's minimum term was within the guidelines.

In addition, defendant argues that his Fifth, Sixth, and Fourteenth Amendment rights were violated because his prior record was considered but was not found as fact by the jury. *United States v Booker*, 543 US 220, 230; 125 S Ct 738; 160 L Ed 2d 621 (2005); *Blakely v Washington*, 542 US 296, 302; 124 S Ct 2531; 159 L Ed 2d 403 (2004); *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). We disagree.

This issue is controlled by *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), in which our Supreme Court held that Michigan's indeterminate sentence scheme does not implicate the Sixth Amendment. Michigan judges are free to set minimum sentences, within the sentence guidelines, utilizing a defendant's prior record, even though jurors have heard no evidence about that prior record.

Moreover, a defendant's prior record may be utilized by a sentencing judge, without submitting the issue of prior convictions to a jury, without running afoul of the Fifth, Sixth or Fourteenth Amendments. *Booker, supra* at 244; *Blakely, supra* at 301; *Apprendi, supra* at 490; *Jones v United States*, 526 US 227, 249; 119 S Ct 1215; 143 L Ed 2d 311 (1999); *Almendarez-Torres v United States*, 523 US 224, 230; 118 S Ct 1219; 140 L Ed 2d 350 (1998).

The trial court constitutionally considered defendant's prior criminal record in imposing a minimum sentence, within the sentencing guidelines, without submitting the fact of the prior criminal activity to a jury. Defendant is not entitled to resentencing.

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly