

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE MUTTSCHALER,

Defendant-Appellant.

UNPUBLISHED

March 25, 2008

No. 275411

Baraga Circuit Court

LC No. 05-000913-FH

ON RECONSIDERATION

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

DAVIS, J. (*concurring in part and dissenting in part*).

In light of the prosecutor's concession that defendant could not receive a sentence of longer than 12 months, I agree with the majority to the extent it finds the length of defendant's sentence a violation of the plea agreement. I also agree with the majority's remedy of remanding to the trial court for resentencing in conformance with the plea agreement, or to permit withdrawal of the guilty plea in the event the trial court determines that it cannot follow the agreement. But because of the unusual circumstances under which defendant's crime was committed, I respectfully dissent from the majority's conclusion that defendant's sentence cannot be served in prison.

As the majority states, an "intermediate sanction" ordinarily does not include a prison sentence. *People v Stauffer*, 465 Mich 633, 635-636; 640 NW2d 869 (2002), citing MCL 777.1(d) and 769.31(c). However, defendant's situation in this case is unusual, and it is moreover subject to a unique and specific additional sentencing statute. Because defendant committed the offense at issue while incarcerated in a state penal institution, defendant's consecutive sentence was pursuant to the requirements of MCL 768.7a(1), which explicitly requires consecutive sentencing. This Court has explained that the "purpose of the consecutive sentencing statute is to deter persons convicted of one crime from committing other crimes by removing the security of concurrent sentencing," and the statute "should be construed liberally in order to achieve the deterrent effect intended by the Legislature." *People v Weatherford*, 193 Mich App 115, 118; 483 NW2d 924 (1992). "In view of the purpose of the statute, the legislative intent would be abrogated by allowing inmates to be taken out of the prison setting where their subsequent crimes were committed and moved to the local county jail to complete the consecutive sentence." *Id.*, 118-119.

Therefore, "prisoners who commit crimes while incarcerated as defined in the consecutive sentencing statute," as defendant was here, "must serve any resulting consecutive

sentence in the custody of the Department of Corrections, not the county jail.” *Id.*, 119. Although *Weatherford* addressed the implications of MCL 769.28, rather than MCL 769.31 and MCL 769.34, those statutes share directives stating that in general, prisoners subject to sentences of not more than 12 months are not to be sentenced to prison. *Weatherford* held that the narrow statute, which governs the specific circumstance of a sentence for a crime committed while incarcerated, prevails over the general rule. That holding applies equally here.

It was not a violation of the guidelines under the circumstances to sentence defendant to a consecutive term in prison. It was only a violation of the guidelines to the extent the sentence exceeded the 12-month statutory maximum.

/s/ Alton T. Davis