

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EARL LEVI DIXON, JR.,

Defendant-Appellant.

UNPUBLISHED

February 5, 2009

No. 282134

Gogebic Circuit Court

LC No. 07-000021-FH

Before: Saad, C.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant appeals his plea-based conviction of attempted possession of a weapon by a prisoner, MCL 800.283(4) and MCL 750.92. The trial court sentenced defendant to 12 months to 30 months in prison. This Court denied defendant's delayed application for leave to appeal, but our Supreme Court remanded the case to this Court for expedited consideration in light of *People v Muttscheler*, 481 Mich 372; 750 NW2d 159 (2008). We reverse and remand.

In *Muttscheler*, the defendant, a prison inmate, was found to have a crude weapon in his cell. The defendant plead guilty to attempted possession of a weapon by a prisoner and the prosecutor agreed to the imposition of a sentence within the applicable sentencing guidelines range. Although defendant's recommended minimum sentence range under the guidelines was 5 to 17 months, the trial court sentenced him to 12 to 30 months in prison. On appeal, our Supreme Court reviewed MCL 769.34(4)(a), which provides:

If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in chapter XVII is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

Noting that a prison sentence is not an intermediate sanction under the above statute, our Supreme Court held, "[b]ecause the parties here agreed to a sentence within the guidelines, the trial court violated the agreement not only by sentencing defendant to prison, but also by imposing an indeterminate sentence, under which defendant could be imprisoned for longer than the 12-month maximum allowed by the intermediate-sanction statute."

Similarly, in the present matter, defendant's plea agreement required the prosecutor to recommend a sentence within the legislative sentencing guidelines. The trial court acknowledged that the guidelines range was two to 17 months, and then sentenced defendant to 12 to 30 months in prison. The prison sentence imposed by the trial court was an upward departure from the guidelines under *Muttscheler* (the defendant being required to serve it in prison, rather than in jail) and the trial court articulated no substantial and compelling reasons for the departure. Remand is thus necessary.

In light of resolution of this issue, we need not address defendant's claim of ineffective assistance of counsel. We note, however, that counsel's performance did not fall "below an objective standard of reasonableness." *Strickland v Washington*, 466 US 668, 688; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Reversed and remanded for resentencing consistent with the requirements in *Muttscheler*. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Deborah A. Servitto