

**MICHIGAN FELONY SENTENCING  
& COLLATERAL CONSEQUENCES SEMINAR  
JULY 2008**

**GENERAL SENTENCING ISSUES  
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**I. REPEAT OFFENDERS**

**“Heidi’s Law” – Use of prior OUILs over 10 years old**

MCL 257.625 was amended [effective 1-3-07] to provide that an individual convicted of OUI for the third time is guilty of a felony, regardless of when the prior offenses occurred, eliminating the former limitation that the prior convictions must occur within 10 years of the current offense.

Isabella Circuit Judge Paul Chamberlain granted the defense motion to quash the use of prior convictions that occurred more than 10 years before the effective date [1-3-07] of the amendment to MCL 257.625 that eliminated the former limitation that prior convictions must occur within 10 years of the current offense, finding that as applied to use prior convictions pre-dating 1-3-97 the amended statute violated constitutional ex post facto provisions and such prior convictions were time-barred and could not be considered for purposes of charging the defendants with felonies. *People v Perkins*, Case No. 07-576-FH and *People v Lesage*, Case No. 07-1120-FH. Judge Chamberlain relied in part upon *People v Russo*, 439 Mich 584 (1992). The Court of Appeals has granted leave to appeal to the prosecution. Court of Appeals No. 281959.

***Stoudemire/Preuss* Rule for Habitual Offender Enhancement**

The Supreme Court has granted oral argument on whether the Court “correctly held” in *People v Stoudemire*, 429 Mich 262 (1987), and *People v Preuss*, 436 Mich 714 (1990), “that multiple convictions arising out of a single criminal incident may count as only a single prior conviction for habitual offender purposes [.]” *People v Gardner*, 477 Mich 1096 (2007).

**II. SENTENCE BARGAINING**

**Sentence Agreements** – may be rejected by court. If the court determines it wants to impose more severe sentence, the defendant has the right to withdraw the plea; if the court determines it wants to impose a less severe sentence, then the prosecution may withdraw the bargain. The court is to advise the parties what sentence it would impose before offering plea withdrawal. *People v Siebert*, 450 Mich 500 (1995).

Where the defendant-prisoner pled guilty in reliance on a sentence agreement for a sentence within the guidelines that called for an intermediate sanction, the trial court erred in imposing a prison sentence, and the defendant is entitled to enforcement of the bargain. *People v Muttscheler*, \_\_\_ Mich \_\_\_ (2008) (#s 136101, 136199, 6-18-08).

**Sentence Recommendations** – may be rejected by court. If the court determines it wants to impose a more severe sentence, then the defendant has the right to withdraw the plea. The court must advise the defendant of what sentence it would impose before offering plea withdrawal. *People v Killebrew*, 416 Mich 189 (1982).

**CAUTION:** *The Michigan Supreme Court has proposed amendments to MCR 6.302 to allow plea agreements to include an agreement on a specific sentence disposition or sentencing range, including an agreement on the applicability of a particular sentencing provision or factor of the sentencing guidelines. The proposed amendment would eliminate the right of a defendant to plea withdrawal if the court determines not to sentence in accord with a sentence recommendation. 408 Mich 1236 (2008).*

**Cobbs Evaluations** - a trial court may, upon the request of a party but not on its own initiative, place on the record a preliminary evaluation of what sentence would be appropriate for the charged offense. A defendant who pleads in reliance on such an evaluation may withdraw the plea if the judge later determines that the appropriate sentence must exceed that initial evaluation. *People v Cobbs*, 443 Mich 276 (1993). The court is not to specify what sentence it would impose before offering plea withdrawal. *People v Williams*, 464 Mich 174 (2001).

### III. “TANNER” RULE

The two-thirds rule of *People v Tanner*, 387 Mich 683 (1972), was enacted as law, effective with offenses committed on or after 1-1-99. See MCL 769.34(2)(b).

The sentences of 18 years 9 months to 25 years imprisonment for armed robbery and carjacking do not violate the 2/3rds rule of MCL 769.34(2)(b) where the minimum sentences were within the properly scored statutory guidelines and the statutory maximum for these offenses is life imprisonment. *People v Powe*, 469 Mich 1032 (2004). *But see People v Floyd, below.*

The minimum sentences of 62 years exceeded 2/3rds of the 80 year maximum sentences and violate MCL 769.34(2)(b) and *People v Tanner*. On remand the

court shall resentence the defendant in accordance with *People v Thomas*, 447 Mich 390 (1994) which provides that the remedy for a *Tanner* violation is to reduce the minimum sentences. *People v Floyd*, \_\_\_ Mich \_\_\_ (2008)(#135940, 6-27-08).

#### **IV. BOOT CAMP ELIGIBILITY**

In addition to any other terms of probation, a sentencing court may order a defendant placed on probation for most felony offenses punishable to complete the special alternative incarceration program run by the MDOC, generally known as the "boot camp." SAI as a condition of probation is prohibited for defendants convicted pursuant to MCL 750.72, 750.73, 750.75, 750.145c, 750.520b, 750.520c, 750.520d, 750.520g; or an attempt to commit any of those offenses. Eligibility requirements include: no prior prison sentence, sentence guidelines upper range of 12 months or more if the guidelines apply, and no physical or mental handicap which would prevent participation. *See generally* MCL 771.3b.

Defendants sentenced to a term of imprisonment for certain offenses may also be eligible to participate in the SAI program, providing the sentencing judge does not prohibit participation. There is no age limitation, but the defendant must be serving his or her first or second prison term, and cannot be sentenced as an habitual offender. Placement is statutorily prohibited for a number of offenses; and is limited even where authorized to instances where the minimum sentence imposed is for 36 months or less, except for breaking and entering occupied where the minimum sentence imposed must be 24 months or less. *See generally* MCL 791.234a [amended by 2008 PA 158 effective 5-4-08].

#### **V. PRESENTENCE INFORMATION**

Although a defendant must be afforded an adequate opportunity to rebut any matter as inaccurate in a presentence report, the rules of evidence do not apply and the trial court did not err in overruling an objection to hearsay in the report and in testimony given by a detective at sentencing where the defendant had an adequate opportunity to respond to the hearsay accusations. *People v Uphaus (On Remand)*, 278 Mich App 174 (2008).

Prior Record Variable 5 reflecting that the defendant had a prior misdemeanor conviction was erroneously scored on the basis of a prior charge of possession of marijuana for which the defendant was assigned to 7411 status because the defendant was discharged and those proceedings dismissed and MCL 333.7411 specifically provides that a discharge and dismissal does not constitute a conviction and is not an adjudication of guilt. *People v James*, 267 Mich App 675 (2005).

A sentencing judge may not consider in any fashion a prior successful 7411 case in determining sentence. See *People v Dexter Cooper*, Opinion Granting in part Motion for Relief from Judgment, Genesee File No. 98-2306-FC, leave to appeal granted to the prosecution, Court of Appeals No. 280024.

## **VI. CONSECUTIVE SENTENCING**

A possession of marijuana conviction, punishable by the subsequent-offender provision of MCL 333.7413(2), does not constitute “another felony” for purposes of the consecutive sentencing provision of MCL 333.7401(3), which at the time of the offense required consecutive sentencing, because the sentence enhancement statutes do not create new offenses but merely authorize the court to increase the length of time that a defendant may serve and so did not convert the misdemeanor possession of marijuana conviction into a felony. *People v Wyrick*, 474 Mich 947 (2005).

Although an offense is not “pending” for purposes of consecutive sentencing where a defendant has been sentenced to probation, where the defendant had pled guilty to violation of probation and was awaiting sentencing when he committed the instant offenses, the disposition of the prior offense was again “pending” and consecutive sentencing was again authorized by MC 768.7b(2). *People v Johnson*, unpublished opinion of 11-27-07 (Court of Appeals #271442).

## **VII. SEXUAL DELINQUENCY**

Where the defendant was convicted in 2003 of indecent exposure as a sexually delinquent person, the sentence would be controlled by the sentencing guidelines rather than the indeterminate term of 1 day to life set forth in MCL 750.335a. The imposition of probation by the trial court constituted a downward departure from the sentencing guidelines and is invalid because the trial court failed to articulate substantial and compelling reasons to support that departure. *People v Buehler*, 477 Mich 18 (2007).

MCL 750.335a was amended (effective 2-1-06) to provide that for an individual convicted of indecent exposure who was at the time a sexually delinquent person, the offense is punishable by imprisonment for an indeterminate term, the minimum of which is 1 day and the maximum of which is life. The penalty provision previously provided that such an offense “may be punishable by an indeterminate term, the minimum of which shall be 1 day and maximum of which shall be life.” This amendment arguably eliminates the application of the sentencing guidelines by establishing a mandatory sentence, a question specifically not decided by either the Court of Appeal or Supreme Court in *Buehler*, above.

## VIII. CREDIT

### A. Where the defendant is on parole.

The defendant who committed a new offense while on parole is not entitled to credit for time served prior to sentencing because this is not time served as a result of an inability to post bond or a denial of bond, but rather a parole detainer. *People v Filip*, 278 Mich App 635 (2008).

Where the defendant was sentenced for an offense committed while on parole and that sentence was vacated as an unwarranted departure from the sentencing guidelines, the defendant at resentencing is entitled to credit for time served on that void sentence since the original date of sentencing. *People v McDaniel*, 480 Mich 1162 (2008).

### B. When sentence is reduced under the jail overcrowding act.

The rule of *People v Resler*, 210 Mich App 24 (1995) that jail credit must be granted for a period of release pursuant to sheriff's good-time credits will not be extended to similarly grant credit for the amount of time a sentence is reduced under the jail overcrowding act. *People v Grazhidani*, 277 Mich App 592 (2008).

## IX. FINANCIAL PENALTIES

### Ability to Pay is Relevant to:

Attorney Fees - *People v Dunbar*, 264 Mich App 240 (2004); *People v DeJesus*, 477 Mich 996 (2007).

The Supreme Court heard oral argument on January 9, 2008, as to the consideration of an offender's ability to pay attorney fees as a condition of probation and "whether the constitutional underpinnings of *People v Dunbar*, 264 Mich App 240 (2004), are sound." *People v Carter*, 480 Mich 938 (2007). Weeks later on February 8, 2008, the Supreme Court denied leave to appeal in the same case despite a ten-page dissenting opinion by Justice Corrigan. *People v Carter* 480 Mich 1063 (2008). Justice Corrigan believed that the trial court need not consider a defendant's ability to pay either court costs or attorney fees unless there is an objection at sentencing with a claim of indigency.

See *People v Trapp*, \_\_\_ Mich \_\_\_ (2008)(#136056, 6-11-08):

"On order of the Court, the application for leave to appeal the ... order of the Court of Appeals is considered and, ... in lieu of granting leave to appeal, we REMAND this case to the Court of Appeals for consideration, as on leave granted, of the issue whether the Berrien Circuit Court, before ordering reimbursement of attorney

fees of court-appointed counsel pursuant to MCL 769.1k(1)(b)(iii) (effective January 1, 2006), was required to comply with the procedural safeguards set forth in *People v Dunbar*, 264 Mich App 240, 251-256 (2004), and in particular the requirement that it consider the defendant's current and future financial circumstances and ability to repay the fees."

Excessive Fines - *People v Antolovich*, 207 Mich App 714 (1994).

Probation/Parole Oversight Fees -MCL 771.3c(1); MCL 791.236a(1); MCL 762.13(5).

Court Costs imposed as a condition of probation - MCL 771.3(5).

### **Ability to Pay Is Not Relevant to:**

Restitution - *People v Lueth*, 253 Mich App 670 (2002).

#### **A. Costs**

If not authorized by a particular statute, general costs may only be imposed pursuant to MCL 769.1k or 769.3 or MCL 771.3 or MCL 769.34(6).

Application of MCL 769.1k which became effective on 1-1-06, after the defendant's conviction and sentence, could not be used to impose the costs ordered because it enhanced the amount of costs recoverable from a defendant and its retroactive application would violate the *Ex Post Facto* Clause. *People v Sironen*, unpublished opinion of 7-31-07 (Court of Appeals #267820).

Where the defendant was convicted of accosting and soliciting and sentenced to prison, the imposition of court costs of \$1,280.00 was authorized by MCL 769.34(6). *People v McCormick*, unpublished opinion of 5-10-07 (Court of Appeals #266329). See also *People v Blake*, unpublished opinion of 3-27-07 (Court of Appeals #266094); *People v Buie*, unpublished opinion of 10-23-07 (Court of Appeals #270414) [first-degree criminal sexual conduct].

Court costs as a condition of probation may be imposed to reimburse the expenses incurred by the prosecutor in presenting an expert witness at trial. *People v Brown*, \_\_\_ Mich App \_\_\_ (Docket No. 271164, 5/22/08).

The trial court did not err in finding an ability to pay costs where the defendant could have worked full time but chose instead to go to school full time. *People v Brown, supra*.

## **B. Fines**

Imposition of the maximum possible \$25,000 fine upon conviction of delivery of less than 50 grams of cocaine, for the isolated sale of one gram with no profit to the defendant, was excessive on the facts under Const 1963, art 1, sec 16. *People v Antolovich*, 207 Mich App 714 (1994).

Where the defendant was convicted of delivery of less than 50 grams of cocaine, in fact 2.46 grams, the trial court's imposition of the maximum possible fine authorized by statute of \$25,000 was not unconstitutionally excessive where the defendant sold under circumstances suggesting no other motive than profit and had a long history of criminal activity. *People v Rosenberg (On Remand)*, unpublished opinion of 7-19-07 (Court of Appeals #262673).

## **C. Restitution**

Full restitution is proper despite the existence of a civil settlement between the victim and the defendant that included a negotiated settlement amount and release from further claims. *People v Bell and Aldridge*, 276 Mich App 342 (2007).

Restitution amount must be based on actual loss to the complainant, not the amount paid by the insurer (often paid as replacement value). *People v Bell*, 276 Mich App 342 (2007); *In re McEvoy*, 267 Mich App 55 (2005).

In a case of unlawfully driving away an automobile, the trial court erred in imposing restitution as requested by the victim for a total loss of the vehicle where the vehicle was accidentally crushed in the police impound lot because of an error involving paperwork, because that destruction did not directly result from the defendant's criminal conduct. On remand the prosecution shall be afforded the opportunity to present evidence to establish the extent of damage that occurred as a result of the defendant's driving and use of the vehicle. *People v Smith*, unpublished opinion of 10-18-07 (Court of Appeals #271215).

In a case of larceny in a building, the trial court improperly assessed restitution in the amount of \$4,350.40 to a funeral home and the State of Michigan as reimbursement for providing the victim's funeral subsequent to her death, where the victim's death was completely related to the crime and neither the funeral home nor the State of Michigan were victims as described in the Crime Victim's Rights Act despite the fact that the defendant caused the victim's poverty and the inability of her estate to pay these costs. *People v Rodrigues-Ostland*, unpublished opinion of 8-21-07 (Court of Appeals #267941).

## *CONSECUTIVE SENTENCING STATUTES*

### **Consecutive sentences must be imposed:**

- (1) when an inmate commits a crime during incarceration, or an escapee commits a crime during an escape, and that new crime is punishable by imprisonment in a state penal institution, MCL 768.7a.
- (2) when a prisoner escapes, or attempts to escape prison, MCL 750.193.
- (3) when a person escapes jail or attempts to escape while serving a felony sentence or awaiting disposition on a felony charge, MCL 750.195 and 750.197.
- (4) when a person on parole commits a new felony and is convicted and sentenced to a term of imprisonment, MCL 768.7a.
- (5) when a person who has been charged with a felony commits a major controlled substance offense while the first felony charge is pending, MCL 768.7b.

NOTE: A "major controlled substance offense" is defined by MCL 761.2.

- (6) for a major controlled substances offense committed before 3-1-03, where a term of imprisonment is imposed for commission of another felony, MCL 333.7401(3).
- (7) for felony firearm, MCL 750.227b, [consecutive to underlying felony].

### **Consecutive sentences may be imposed:**

- (1) when a person who has been charged with a felony commits another felony while the first charge is pending, MCL 768.7b, unless the subsequent offense is a major controlled substance offense, MCL 768.7b(1) and (2).
- (2) when a term of imprisonment is imposed for any other offense arising from the same transaction as a first-degree "home invasion", MCL 750.110a.
- (3) for "carjacking" to any other sentence imposed for a conviction that arises out of the same transaction, MCL 750.529a.
- (4) for "taking weapons from peace officers or corrections officer," to any term of imprisonment imposed for another violation arising from the same transaction, MCL 750.479b.
- (5) when a term of imprisonment is imposed for owning, possessing or using a vehicle, building, structure, place, or area knowing it is to be used as a location for manufacturing a controlled substance, or owning or possessing laboratory equipment knowing it is to be used to manufacture a

controlled substance, when that term is consecutive to a term of imprisonment for a violation of law arising out of the same transaction, MCL 333.7401c(5).

- (6) when a term of imprisonment is imposed for committing or attempting to commit a crime that involves a violent act or a threat of a violent act against another person while wearing body armor, consecutive to any term of imprisonment for the crime committed or attempted, MCL 750.227f(1).
- (7) when a term of imprisonment is imposed for using a computer to commit, attempt to commit, conspire to commit or solicit another person to commit a crime, consecutive to any term of imprisonment imposed for conviction of the underlying offense, MCL 752.797(4).
- (8) when a term of imprisonment is imposed for using the internet or a computer to commit, conspire to commit, or attempt to commit criminal sexual conduct, child abuse activity, solicitation of a minor, kidnapping when the intended victim is a minor, stalking, or certain explosive violations, consecutive to any term of imprisonment for the substantive felony, MCL 750.145d(3).
- (9) when a term of imprisonment is imposed for bribery of a juror, referee, trustee, etc., consecutive to a term of imprisonment imposed for any other crime including any other violation of law arising out of the same transaction, MCL 750.119(3).
- (10) when a term of imprisonment is imposed for juror intimidation, consecutive to a term of imprisonment imposed for any other violation of law including any violation of law arising out of the same transaction, MCL 750.120a(6).
- (11) when a term of imprisonment is imposed for obstructing a criminal investigation or evidence tampering, consecutive to a term of imprisonment imposed for any other crime including any other violation of law arising out of the same transaction, MCL 750.483a(10).
- (12) when a term of imprisonment is imposed for witness bribery or intimidation, consecutive to a term of imprisonment imposed for any other crime including any other violation of law arising out of the same transaction, MCL 750.122(11).
- (13) when a term of imprisonment is imposed for OUIL causing death, or manslaughter or murder where death results from the operation of a motor vehicle, consecutive to a term of imprisonment for one of those same offenses arising out of the same transaction, MCL 769.36.
- (14) when a term of imprisonment is imposed for a violation of MCL 333.7401(2)(a) committed after 3-1-03, consecutive to any term of imprisonment imposed for the commission of another felony, MCL 333.7401(3).

- (15) when a term of imprisonment is imposed for assaulting a police or conservation officer, firefighter, emergency medical service personnel, sheriff, constable, police officer of a college or university, or any federal officer, consecutive to a term of imprisonment imposed for another violation arising from the same transaction, MCL 750.81d.
- (16) a term of imprisonment for poisoning food, medicine, or water supply, consecutively to a term of imprisonment for any other violation of law arising out of the same transaction, MCL 750.436.
- (17) a term of imprisonment for assaulting, obstructing or endangering a medical examiner, township treasurer, judge, magistrate, probation officer, parole officer, prosecutor, city attorney, court employee, court officer, or any other officer in the performance of his duties, consecutively to a term of imprisonment for a violation arising out of the same criminal transaction, MCL 750.479.
- (18) a sentence for impersonating a police officer with the intent to commit a crime, consecutive to a sentence imposed for another offense arising out of the same transaction. MCL 750.215.
- (19) a term of imprisonment for first-degree criminal sexual conduct, consecutively to any term of imprisonment for any other criminal offense arising from the same transaction, MCL 750.520b(3) [eff 8-28-06].
- (20) a term of imprisonment for violation of lifetime electronic monitoring of criminal sexual conduct offenders, consecutively to any term of imprisonment imposed for another violation arising from the same transaction, MCL 750.520n [eff 8-28-06].
- (21) a term of imprisonment for felony embezzlement, consecutive to a term of imprisonment for any other criminal offense, if the victim is a nonprofit or charitable organization, a person 60 years of age or older, or a vulnerable adult, MCL 750.174 [eff 3-30-07].

### **CREDIT STATUTES**

- (1) MCL 330.2042 – requires that time spent in custody during competency evaluations and treatment be credited against any sentence imposed on the defendant in the pending criminal case or in any other case arising from the same transaction. See *People v Gravlin*, 52 Mich App 467 (1974).
- (2) MCL 769.11a – provides that time spent in jail and/or prison on a void sentence that is set aside be credited against a new sentence imposed for a conviction "based upon facts arising out of the earlier void conviction." For example in *People v Bush and Harding*, 187 Mich App 316 (1991), time served for a conviction of assault with intent to commit murder that was vacated upon the subsequent death of the victim, had to be credited against the sentence for a subsequent conviction of felony murder. At a resentencing for the same offense, any time served on the original void sentence must be credited against the new sentence. *People v Lyons*, 222 Mich App 319 (1997).
- (3) MCL 769.11b – requires that the defendant receive credit for any time served prior to sentencing as a result of being denied bond or being unable to post bond.
- (4) MCL 762.12 – requires that time spent in custody as a youthful trainee be credited against any sentence imposed after revocation of that status.
- (5) MCL 771.7 – provides that in cases where a juvenile has been prosecuted as an adult but initially on probation, and that probation is revoked and the juvenile sentenced as an adult to the Department of Corrections, credit must be granted for all the time served on probation.

### **CREDIT INTERPRETATIONS**

- (1) A defendant is not entitled to credit for time spent on tether as a condition of probation against a sentence after probation revocation. *People v Reynolds*, 195 Mich App 182 (1992).
- (2) A defendant is entitled to credit for time served in boot camp as a condition of probation. *People v Hite*, 200 Mich App 1 (1993).
- (3) A defendant is not entitled to credit for time simply spent on probation against a sentence after probation revocation, *People v Lacy*, 54 Mich App 471 (1974), **except** where a juvenile prosecuted as an adult is initially placed on probation and is subsequently sentenced to prison after probation revocation. MCL 771.7.
- (4) A defendant who serves a jail term on probation and is subsequently sentenced to prison after revocation of probation is also entitled to credit for sheriff's good-time earned while serving that jail term. *People v Resler*, 210 Mich App 24 (1995).

- (5) There may even be instances where a defendant is entitled to credit even for time he or she is not incarcerated, but should have been, where the defendant's liberty is due to government error. See *People v Levandoski*, 237 Mich App 612, 621, n 5 (1999).