STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 5, 2009
v	No. 287737 Mecosta Circuit Court
CHRISTOPHER BURNELL THOMPSON, Defendant-Appellant.	LC No. 07-005951-FH

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of operating a motor vehicle while under the influence of a controlled substance, third offense, MCL 257.625(1)(a) and (9)(c), driving on a suspended operator's license, second offense, MCL 257.904(1) and (3)(b), and third-degree fleeing a police officer, MCL 257.602a(3)(a). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve concurrent terms of imprisonment of eight to 50 years for the OUIL and fleeing convictions, and to 365 days for the operating on a suspended license conviction. Defendant appeals as of right. We affirm.

On the night of December 14, 2006, police officers, in their patrol car, observed defendant driving his vehicle over the centerline. When the officers turned to follow, defendant sped up, and continued driving at approximately 90 miles per hour even after the officers activated their overhead lights and siren, then went off the main road onto a private road, after which defendant left the car while it was still moving and ran away. An officer caught up with defendant and wrestled him to the ground, whereupon defendant fought for a few seconds before being subdued by a Taser. The police found several beer cans in defendant's car. Defendant did not cooperate when the police wished to administer sobriety tests. The police obtained a warrant to have defendant's blood drawn, and the result of the draw was a blood alcohol level of 0.18.[1]

The presentence investigator reported that defendant accepted no responsibility and showed no remorse for his crimes, and tried to blame others for his extensive criminal history. At sentencing, the prosecuting attorney read from a written statement from defendant asserting

[1] Well over the proscribed "0.08 grams or more per 100 milliliters of blood . . . ." MCL 257.625(1)(b).

defendant's right to drive with impunity, and that defendant "owes nothing to the public as he has . . . injured no one nor trespassed on the private rights of another." An assistant prosecutor testified that in the course of pre-trial proceedings, defendant "indicated that it was his right to travel by way of driving on the roadways and he wasn't going to stop doing that."

On appeal, defendant argues that the trial court erred in its scoring of Offense Variable (OV) 12, in imposing the two sentences of eight to 50 years' imprisonment, and in denying defendant sentencing credit for time he spent in jail before sentencing. Defendant frames each issue as violations of his constitutional rights to Due Process and Equal Protection.

I. Offense Variable 12

In scoring the offense variables in the sentencing guidelines, the trial court assessed one point for OV 12, which concerns contemporaneous felonies. MCL 777.42(1)(f) prescribes one point when "[o]ne contemporaneous felonious criminal act involving any other crime was committed."

Defendant argues that the trial court, in scoring the OUIL offense, used the fleeing offense as the basis for finding a single contemporaneous felony, which is not permitted by MCL 777.42(2)(a)(*ii*).

However, on appeal, a party may not challenge the scoring of the sentencing guidelines or the accuracy of the information used in imposing a sentence within the guidelines range unless the issue was raised at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed with this Court. MCL 769.34(10); MCR 6.429(C); *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001). In this case, these preservation requirements were not satisfied.[2] Defendant asks this Court to review this claim of error under the rubric of ineffective assistance of counsel, which this Court has shown a willingness to do. *Id.* But defendant did not include a challenge to the effectiveness of defense counsel in his statement of the questions presented. This Court is not obliged to entertain arguments that are not germane to the issues set forth in the statement of questions presented. See MCR 7.212(C)(7); *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). For these reasons, we need not consider defendant's substantive challenge to the scoring of OV 12.

The argument is without merit in any event. At sentencing, the trial court agreed with the prosecuting attorney that the evidence indicated that defendant resisted arrest after his attempt to flee the police. This constitutes a felony, MCL 750.81d or MCL 750.479(1)(a), apart from the two of which defendant was convicted.

Defendant alternatively attacks the scoring decision on the ground that the trial court resorted to facts other than those determined by the jury. Defendant relies on *Blakely v*

[2] Defendant did move this Court to remand this case to the trial court, but this Court denied the motion on the ground that it failed to meet the requirements of the applicable court rule. Unpublished order issued January 13, 2009. Accordingly, it was not a proper motion to remand, and thus could not cure the preservation problem.

Washington, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), where the United States Supreme Court held that "every defendant has the *right* to insist that the prosecutor prove to a jury all facts legally essential to the punishment." *Id.* at 313 (emphasis in the original). Defendant's reliance on *Blakely* is misplaced. Our Supreme Court has reiterated that "'the Michigan system is unaffected by the holding in *Blakely* . . . .'" *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), quoting *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). The Court elaborated, "a defendant does not have the right to anything less than the maximum sentence authorized by the . . . verdict, and, therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range." *Drohan*, *supra* at 159. Accordingly, the trial court was and remains entitled to take into account all the facts and circumstances of the crime, as determined by the court from various sources. See *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985).

Defendant acknowledges that our Supreme Court has squarely decided this issue adversely to him in *Drohan*, but asserts that that case was wrongly decided. However, this Court must apply the precedents of our Supreme Court. See Const 1963 art 6, § 1; *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), overruled on other grounds in *Karaczewski v Farbman Stein & Co*, 478 Mich 28, 30; 732 NW2d 56 (2007). For these reasons, we must reject defendant's invocation of *Blakely*, and his disparagement of *Drohan*.

II. Sentencing Departure and Mitigation

Defendant argues that the trial court erred in departing from the guidelines and imposing two eight-year minimum sentences of imprisonment, that the court abused its discretion in imposing the two 50-year maximum sentences, and that the court improperly failed to take into account mitigating circumstances. An abuse of sentencing discretion occurs where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

A. Mitigation

In arguing that the trial court failed to take mitigating information into account, defendant offers few particulars concerning what the overlooked mitigating facts might be.

Defendant asserts that he has strong family support, and suggests that this should boost his rehabilitative potential. The presentence investigation report (PSIR) indicates that defendant is unmarried, has divorced parents along with a sister, and that defendant's father is an alcoholic. We note that there was no acknowledgement of those family members at sentencing, and that, given defendant's extensive criminal history, including a total of six drunk-driving offenses, those family members have had no success so far to the extent they have taken it upon themselves to facilitate defendant's rehabilitation.

Defendant also protests that he is addicted to alcohol, rather astonishingly suggesting that his failure to gain control of his drinking should be deemed a mitigating, instead of an aggravating, factor.

Defendant also protests that the trial court should have ordered an assessment to measure defendant's rehabilitative potential. However, defendant cites no authority that stands for the

proposition that a criminal defendant is entitled such additional procedure. The PSIR well reported defendant's criminal history, and squarely, and negatively, opined on his rehabilitative potential. Defendant again fails to show that some mitigating factor was overlooked.

B. Minimum and Maximum Sentences

The sentencing guidelines recommended a minimum sentence of ten to 46 months' imprisonment for the fleeing conviction, and ten to 48 months' imprisonment for the OUIL conviction. The minimum actually imposed, eight years (96 months) was thus an upward departure.

A sentencing court departing from the guidelines must state on the record its reasons for the departure, and may deviate for only a "substantial and compelling reason . . . ." MCL 769.34(3). This legislative language, in light of its statutory and caselaw history, indicates the legislative intent that deviations from sentencing recommendations follow from only objective and verifiable factors. *People v Babcock*, 469 Mich 247, 257-258, 272; 666 NW2d 231 (2003).

In reviewing a trial court's decision whether to depart from the recommended range under the guidelines, "whether a factor exists is reviewed for clear error, whether a factor is objective and verifiable is reviewed de novo, and whether a reason is substantial and compelling is reviewed for abuse of discretion . . . ." *Babcock*, *supra* at 265.

In this case, the sentencing court explained the departure as follows:

> [Defendant] has objectively and verifiably stated that he is going to continue driving, no one can stop him driving, it's his right to drive; hence, he's going to drive.
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> . . . I have no problem with what [defendant] thinks. My problem is and the Court's problem is that he manifests these thoughts into action. And the actions that he manifests them to is driving without a license . . . . He drives intoxicated. This is his sixth conviction for driving while intoxicated . . . . This is his second conviction of fleeing and eluding.
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> Now, during the trial there was a video shown of [defendant's] automobile in this chase. [Defendant] went down a very narrow road, hilly road, in excess of 90, 95 miles an hour. The police officers testified that they had to exceed a hundred miles an hour to catch him. When they did catch him, he turned into a private yard, . . . jumped out of a moving vehicle, and the vehicle stopped when it hit a tree. I find these reasons are substantial and compelling. . . . It's just out of the ordinary.
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> . . . [D]riving without a license doesn't really sound too bad. [Defendant] takes it to the extreme. He drives drunk, certainly drives recklessly, certainly puts other people in danger.
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> I don't believe the sentencing guidelines adequately reflect the proportionality of the sentence. . . .

> [Defendant] has . . . zero chances of rehabilitation. He does not want to be rehabilitated. He's an extreme danger to society. And he will continue to drive. He acts on his beliefs. And from that action, he does activity that is greatly, greatly dangerous to society.
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> . . . Any one of these reasons would give me reason to impose this sentence.

Defendant argues generally that the court failed to articulate any substantial and compelling reasons for the departure. We disagree. As the trial court noted, the degree of recklessness defendant has long demonstrated, and effectively avowed[3] to continue, presents an exceptional case that keenly grabs the attention of the court. See *Babcock, supra* at 257-258.

Defendant also characterizes his sentence as cruel and unusual punishment,[4] but cites no authority that stands for the proposition that an eight-year minimum sentence, or 50-year maximum, is constitutionally excessive in response to a repeat offender who unapologetically places others at severe risk with his aggressive driving while intoxicated. Because we conclude above that the eight-year minimums properly reflected the seriousness of the crime, we conclude here that it does not constitute cruel and unusual punishment.

As for the maximum sentence, as an habitual offender with three or more prior felonies, defendant was subject to a maximum of life or any lesser period of imprisonment. MCL 769.12(1)(a). The 50-year maximum, then, fell far short of the harshest sentence permitted. In light of defendant's well demonstrated, in fact admitted, danger to society, and considering that he could be paroled or discharged after as little as eight years if defendant persuades the Department of Corrections that he has is sufficiently reformed, we do not deem a maximum sentence of 50 years as excessive.

III. Jail Credit

The trial court reported that defendant was on parole when he committed the instant crimes, and consequently spent 39 days in jail. The court further reported that defendant was discharged from parole as on the 38th day of that period, and so was entitled to only one day of jail credit.

Defendant argues that all of that jail incarceration should be credited against his new sentences. Our Supreme Court had squarely addressed, and rejected that argument:

> In this case, we consider whether a parolee who is convicted and sentenced to a term of imprisonment for a felony committed while on parole is entitled, under Michigan's jail credit statute, MCL 769.11b, to credit for time served in jail after

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[3] This Court may hold a party's admissions, otherwise supported or not, against that party. See *Luptak v Lizza*, 251 Mich App 187, 189-190; 650 NW2d 364 (2002); *People v Riggs*, 237 Mich App 584, 589 n 2; 604 NW2d 68 (1999).

[4] See US Const, Am VIII; Const 1963, art 1, § 16.

> his arrest on the new offense and before sentencing for that offense. We hold that, under MCL 791.238(2), the parolee resumes serving his earlier sentence on the date he is arrested for the new criminal offense. As long as time remains on the parolee's earlier sentence, he remains incarcerated, regardless of his eligibility for bond or his ability to furnish it. Since the parolee is not being held in jail "because of being denied or unable to furnish bond," the jail credit statute does not apply.
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> Further, a sentencing court lacks common law discretion to grant credit against a parolee's new minimum sentence in contravention of the statutory scheme. Finally, the denial of credit against a new minimum sentence does not violate the double jeopardy clauses or the equal protection clauses of the United States or Michigan constitutions. [*People v Idziak,* 484 Mich 549, 552; ___ NW2d ___ (2009), citing US Const, Am V and XIV; Const 1963, art 1, §§ 2 and 15.]

The Court elaborated as follows:

> In sum, under MCL 791.238(2), the parolee is "liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment" and actually resumes serving that term of imprisonment on the date of his availability for return to the DOC, which in this case is synonymous with the date of his arrest. The parolee is not incarcerated "because of being denied or unable to furnish bond for the offense of which he is convicted . . . ." MCL 769.11b. Because the parolee is required to remain in jail pending the resolution of the new criminal charge for reasons independent of his eligibility for or ability to furnish bond for the new offense, the jail credit statute does not apply. [*Idziak, supra* at 566-567.]

In accord with this binding authority, we reject defendant's challenge to the trial court's decision not to award jail credit in connection with time defendant spent incarcerated while still on parole from his earlier sentence.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens