

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

No.

-vs-

STEVEN MICHAEL CARTER,

Defendant-Appellee.

Court of Appeals No: 270195
Lower Court No. 05-011783

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DEFENDANT-APPELLEE'S RESPONSE BRIEF IN OPPOSITION
TO APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

FILED

SEP 10 2007

CORBIN R. DAVIS
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COUNTER STATEMENT OF JUDGMENT APPEALED FROM
AND OPPOSITION TO RELIEF SOUGHT

While it is true that the People-Appellant has filed leave to appeal with this Court the July 3, 2007 decision of the Court of Appeals, this Court should deny the application because it does not present an issue of any jurisprudential significance.

The Court of Appeals ruling as outlined in the opinion does not pose any conflict with state law, is not clearly erroneous, does not result in manifest injustice because the law was correctly applied by the Court of Appeals and finally, does not present a legal issue of significance to the public or this States' jurisprudence. This Court has already denied leave in a similar opinion. *People v Dejesus*, 477 Mich 996, 725 NW2nd 669 (2007).

While a habitual second offender notice had been filed, there is no indication that it was the trial courts decision to sentence Mr. Carter as a habitual offender. Therefore, the lower court's ruling as it relates to sentencing did exceed the guidelines by one month.

The Court of Appeals did not ignore any legal principles in it's ruling. The Court of Appeals fully observed and adhered to case law of this Court, as well as the United States Supreme Court and both Federal and State Constitutions. Further, the ruling of the Court of Appeals does not perpetuate needless additional expenditure of judicial time and resources, or needless cost and risk to the public safety because trial courts just need to address the ability to pay at the time of sentencing. Further, the Court of Appeals did not ignore any strictures of the plain error rule when the Court of Appeals correctly decided this matter and the Defendant never forfeited any claim since the matter was addressed as an appeal as of right.

Defendant-Appellee requests that this Court deny the People's application for leave to appeal because it lacks merit and does not contain any jurisprudentially significant issues.

MCR 7.302(D)(1)

COUNTER STATEMENT OF QUESTIONS PRESENTED

I.

AS CORRECTLY RULED IN PUBLISHED OPINIONS THE COURT OF APPEALS FOLLOWED THE SOUND PRINCIPLE THAT AN INQUIRY INTO A DEFENDANT'S ABILITY TO PAY AT THE PRESENT TIME AS WELL AS THE ABILITY TO EARN FUTURE WAGES NEED TO BE ADDRESSED BY THE TRIAL COURT PRIOR TO IMPOSING SUCH FINANCIAL CONSTRAINTS ON A DEFENDANT AND THEREFORE DID THE COURT OF APPEALS CLEARLY ERR IN REMANDING THE MATTER TO THE TRIAL COURT TO CONDUCT SUCH AN INQUIRY?

The trial court was not presented with this issue.
The Court of Appeals answered "NO"

Defendant-Appellee answers "NO"

People answer, "Yes"

II.

SINCE THERE WAS NO INDICATION BY THE TRIAL COURT THAT IT WAS THE COURT'S DESIRE TO SENTENCE MR. CARTER AS A HABITUAL OFFENDER THE TRIAL COURT'S SENTENCE OF 12 MONTHS EXCEEDED THE GUIDELINES BY ONE MONTH AND THEREFORE, DID THE COURT OF APPEALS ERR IN RULING THAT THE SENTENCE EXCEEDED THE GUIDELINES?

The trial court was not presented with this issue.
The Court of Appeals answered "NO"

Defendant-Appellee answers "NO"

People answer, "Yes"

COUNTER STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Following a jury trial in the 3rd Circuit Court-Criminal Division for the County of Wayne, Defendant-Appellee, Steven Carter, was found guilty of criminal sexual conduct in the 4th degree in violation of MCLA 750.520E1B, Judge Vera Massey Jones presiding. The sentencing hearing was conducted on April 27, 2006. Judge Jones imposed a sentence of 12 months in jail with no early release, 24 months probation, along with other fines, costs, terms and conditions.

Specifically, Mr. Carter was ordered to pay \$50.00 as a Crime Victim Assessment fee, \$600.00 in costs, \$45.00 in state minimum costs and \$730.00 in court appointed attorney fees.

There was never any inquiry into Mr. Carter's ability to pay the attorney fees at the time of sentencing, nor was an inquiry made into Mr. Carter's ability to pay the attorney fees in the future.

While Mr. Carter did have a prior felony conviction, it was not a requirement of the trial court nor did the trial court sentence Mr. Carter as a second habitual offender and therefore, a sentence of 12 months did exceed the guidelines by one month.

ARGUMENT

I.

AS CORRECTLY RULED IN PUBLISHED OPINIONS THE COURT OF APPEALS FOLLOWED THE SOUND PRINCIPLE THAT AN INQUIRY INTO A DEFENDANT'S ABILITY TO PAY AT THE PRESENT TIME AS WELL AS THE ABILITY TO EARN FUTURE WAGES NEED TO BE ADDRESSED BY THE TRIAL COURT PRIOR TO IMPOSING SUCH FINANCIAL CONSTRAINTS ON A DEFENDANT AND THEREFORE THE COURT OF APPEALS DID NOT CLEARLY ERR IN REMANDING THE MATTER TO THE TRIAL COURT TO CONDUCT SUCH AN INQUIRY.

The Court of Appeals applied the correct standard of review, applied the law correctly to the facts and rendered the proper legal conclusion. There is nothing in the facts, or in the ruling itself that contain any jurisprudentially significant issues for this Court to address.

In imposing the sentence, as reflected in the order of probation, the trial court also ordered the payment of various fines, costs and attorney fees. The trial court stated that Mr. Carter would be required to pay \$45.00 in state fees, \$50.00 crime victims service fee, \$730.00 in attorney fees and a \$600.00 in costs.

When ordering the payment of fines, costs and attorney fees, the trial court never conducted an inquiry into the financial status of Mr. Carter, nor did the court cite to any specific statutes that authorized the imposition of said costs and attorney fees. The trial court failed to conduct an actual inquiry into Mr. Carter's ability to pay and nonetheless still imposed costs and attorney fees. In *People v Slocum*, 213 Mich App 239, 539 NW2d 572 (1995), the trial court lacked the authority to impose costs in conjunction with a sentence of imprisonment for carrying a concealed weapon. At bar, the trial court ordered Mr. Carter to pay attorney fees. This was reversible error as the Court of Appeals correctly ruled based in part because the trial court never conducted any inquiry or analysis into the ability of Mr. Carter to pay as required by law, now or in the future. *People v Dunbar*, 264 Mich App 240, 251-256, 690 NW2d 476 (2004). In *Dunbar, Id.* The Court reversed the portion of the conviction regarding the payment of attorney fees and remanded for the trial court to address the reasons and criteria of the opinion. The Court of Appeals correctly held in *Dunbar, id* that the trial court's reasons were

insufficient in addressing the ability to pay in the future. At bar, the trial court made no inquiry whatsoever into Mr. Carter's ability to pay in the future and also failed to conduct any inquiry as to Mr. Carter's ability to pay at all. It does not appear that Mr. Carter has the ability to pay. This Court has rejected similar applications for leave to appeal on this very issue. *People v Dejesus*, 477 Mich 996, 725 NW2d 669 (2007).

In conclusion, there was never any inquiry as to the ability of Mr. Carter to pay attorney fees. Therefore the ordered attorney fees should be stricken from the judgment of sentence or simply allow for review by the trial court.

II.

SINCE THERE WAS NO INDICATION BY THE TRIAL COURT THAT IT WAS THE COURT'S DESIRE TO SENTENCE MR. CARTER AS A HABITUAL OFFENDER THE TRIAL COURT'S SENTENCE OF 12 MONTHS EXCEEDED THE GUIDELINES BY ONE MONTH AND THEREFORE, THE COURT OF APPEALS DID NOT ERR IN RULING THAT THE SENTENCE EXCEEDED THE GUIDELINES.

Standard of Review: The interpretation of the sentencing guidelines is reviewed *de novo*. *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003), *clar den* 469 Mich 1224; 668 NW2d 622, *on rem* 258 Mich App 679; 672 NW2d 533 (2003). The Court of Appeals applied the correct standard of review, applied the law correctly to the facts and rendered the proper legal conclusion. There is nothing in the facts, or in the ruling itself that contain any jurisprudentially significant issues for this Court to address.

At bar, the trial court imposed a sentence beyond the guideline range without giving substantial and compelling reasons, a clear violation of the strict authority of the guidelines and case law. MCLA 769.34(2) provides that "the minimum sentence imposed by a court of this state for a felony enumerated in part 2 of chapter XVII committed on or after January 1, 1999 shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed." The sentence imposed in the case at bar was for an offense enumerated in the guidelines that occurred after January 1, 1999. MCLA 769.31 et seq. requires Sentencing Courts to adhere to the sentencing guidelines absent a substantial and compelling reason for a departure. At bar, there were no substantial and compelling

reasons to justify departure from the guidelines and the court did not state any reasons for a departure.

The people argue that there was an error based on the fact that Mr. Carter had a prior felony conviction, and therefore was a habitual offender. It appears that the trial court was aware of Mr. Carter's prior conviction and it certainly was disclosed in the presentence investigation report. The guidelines as calculated by the probation department were 0 to 11 months. The trial court is not obligated to sentence Mr. Carter as a habitual offender with a higher guideline range. According to the record, the trial court imposed a 12-month sentence that does exceed the guidelines by one month. This issue is also waived as not be pursued by the people. If it was the trial court's desire to punish Mr. Carter to the extent the court could under the law, then the court should have sentenced the defendant to a period of 11 months in jail, not 12. The sentence was an illegal sentence since there was no clear statement that Mr. Carter was being sentenced as a habitual offender. Finally, this point may be moot since Mr. Carter is no longer incarcerated as a result of this conviction and he has already served the 12-month sentence anyway. The guidelines were PRV "D", OV "1", on the "G" offense grid, which placed Mr. Carter in the guideline range of (0 to 11) months, an intermediate sanction cell and it appears that the trial court choose not to sentence Mr. Carter as a habitual offender. *People v Stauffer*, 465 Mich 633; 640 NW2d 869 (2002).

RELIEF SOUGHT

WHEREFORE, based on the reasons as set forth above Defendant-Appellee Honorably Requests that this Court deny the People's application for leave to appeal as this Court has done in the past regarding the Dunbar, Supra, rule because it lacks merit, has been previously addressed and rejected by this Court and does not contain any jurisprudentially significant issues and leave in place the sound judgment and decision of the Court of Appeals as it relates to these issues.

Respectfully submitted,


Robert J Boyd III, P-45554

Dated: September 7, 2007