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In the Michigan Supreme Court

Appeal from the Michigan Court of Appeals
Hon. James Redford, Jane Beckering, and Michael J. Kelly

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

HAMIN LORENZO DIXON,

Defendant-Appellant.

Supreme Court No. 162221

Court of Appeals No. 349631

Chippewa County Circuit Court
Case No. 17-003294-FH

APPELLANT'S SUPPLEMENTAL REPLY BRIEF IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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INTRODUCTION

There is no dispute that cell phones can be used for illicit purposes, and that the Michigan Legislature had legitimate reasons for prohibiting their possession in prison facilities. That is not the issue in this case.[1] Rather, this case is about the proper method of sentencing an inmate who violates or attempts to violate that prohibition. In particular, Mr. Dixon contends that many inmates who possess cell phones in prison facilities do so for entirely innocuous purposes, such as staying in touch with friends or family. See Jane C. Christie, Comment, *Disconnected: The Safe Prisons Communications Act Fails to Address Prison Communications*, 51 JURIMETRICS J. 17, at 33–40 (2010). While this type of conduct is clearly illegal under Michigan law, it is not of a type that "threaten[s] the security of a penal institution," as required for the 25-point sentencing enhancement in OV 19. Rather, when properly construed, the 25-point enhancement requires proof that that the defendant engaged in dangerous conduct beyond simply possessing a cell phone, such as arranging for the phone to be smuggled into the facility, acquiring it by force, or using it to coordinate criminal activity in the outside world. To hold otherwise — as the Court of Appeals did in this case — allows the prosecution to carry its burden based on speculative inferences of a type this Court has previously rejected. See *People v Dorrington*, 221 Mich 571, 574–575; 191 NW 831 (1923).

[1] One might be mistaken on this point after reading the prosecution's brief, which spends much of its time discussing cases about whether a statute or regulation prohibits (or legally can prohibit) the possession of cell phones or other ordinarily innocuous behaviors within a prison. See Pros Supp Br at 4, 6–7. For the reasons described below, Mr. Dixon does not believe the cited cases are relevant to the present case.

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ARGUMENT

A. For purposes of OV 19, a defendant "threaten[s] the security of a penal institution" if he or she creates a significant risk that an inmate will escape, cause physical harm to an inmate or corrections officer, or commit a crime in the outside world.

Mr. Dixon's supplemental brief provides a detailed textual analysis of the 25-point enhancement in OV 19, describing four key principles for its application. Def Supp Br at 9–13.[2] The brief then distills those principles into a single test: that the 25-point enhancement "applies in the prison context only when a defendant's conduct creates a significant risk that an inmate will escape, cause physical harm to an inmate or corrections officer, or commit a crime in the outside world." *Id.* at 2.

The prosecution's supplemental response brief seems to largely — or perhaps entirely — accept this textual analysis. As evidence of this, the brief's concluding section approvingly quotes the test articulated above and states that Mr. Dixon "acknowledges" it as the appropriate standard to apply in this case. Pros Supp Br at 10.

To the extent the prosecution's reading of the statute differs at all from Mr. Dixon's, the disagreement appears to relate to the degree of risk that a defendant must create in order to "threaten[] the security of a penal institution." At times, the prosecution seems to accept Mr. Dixon's view that the statute requires creation of a "significant risk." Pros Supp Br at 6, 9, 10. At other times, the prosecution suggests that it is sufficient to establish only a "possible risk." *Id.* at 4–5.

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[2] This brief uses the abbreviation "Def Supp Br" to refer to defendant Dixon's supplemental brief in support of the application for leave to appeal, and "Pros Supp Brief" to refer to the prosecution's response.

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If there is any difference between these two articulations of the appropriate test, the "significant risk" articulation is the better one. As described in Mr. Dixon's supplemental brief, the requirement of a significant elevation of risk — as opposed to a trivial or hypothetical increase — follows from the text, purpose, and structure of the guidelines. Def Supp Br at 12–13. Perhaps most importantly, dictionary definitions of the word "threaten" indicate a common understanding that a threat makes an adverse occurrence "***likely***" to occur, not merely possible. *The Oxford English Dictionary* (online edition); *Cambridge Advanced Learner's Dictionary & Thesaurus* (4th ed, 2014). The definitions that the prosecution cites for its alternative view are not as persuasive, because they either pertain to a different form of the base word (*i.e.*, "threat" rather than "threaten") or a different sense of the word (*i.e.*, the literal sense of making a threating statement, as opposed to the figurative sense of posing a danger). See Pros Supp Br at 5.

Moreover, the prosecution has no response for the structural arguments outlined in Mr. Nixon's brief. To quickly recap those arguments, when one compares the wording of OV 19 with similar sentencing guidelines from other states, it becomes apparent that the Legislature did not intend for the 25-point enhancement to apply to all contraband offenses that occur in a penal institution. Def Supp Br at 12–13. If it had, it could have said so clearly and directly. Instead, the words the Legislature chose indicatee the need to evaluate the severity of the risk posed by the defendant's conduct, and to apply the 25-point enhancement only in cases where the risk is most significant. *Id.* This understanding is consistent with the overall structure of the guidelines, under which the 25-point enhancement in OV 19 is one of the most severe in the entire sentencing scheme. If OV 19 is read to apply to offenses that

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create only an incidental or hypothetical risk of harm, it would be disproportionately harsh when compared to other guidelines. *Id.* at 13. For these reasons, this Court should adopt Mr. Dixon's proffered test and hold that the 25-point enhancement applies only when the defendant creates a "significant risk" that an inmate will escape, cause physical harm to an inmate or corrections officer, or commit a crime in the outside world.

B. Because cell phones are not inherently dangerous and have legitimate uses, the mere act of possessing one does not, in and of itself, threaten the security of a penal institution.

While the parties largely agree on OV 19's applicable legal test, they disagree on how it applies to contraband cell phones. Like the Court of Appeals, the prosecution argues for a *per se* rule under which possession or attempted possession of a cell phone is automatically assessed 25 points, regardless of the surrounding circumstances. Pros Supp Br at 3. Mr. Dixon argues for a more individualized approach under which the trial court must assess the actual risk posed by the defendant's conduct. Mr. Dixon further argues that this Court's decision in *People v Dorrington* precludes the trial court from simply inferring that an inmate who possesses a cell phone will use it for illicit or dangerous purposes. Def Supp Br at 16–18. In other words, in order to apply OV 19 based on the risk that the cell phone might be used for further criminal activity, the prosecution must produce some evidence — above and beyond the mere fact of possession — that such use is likely to occur.

The prosecution's brief ojects to three aspects of Mr. Dixon's argument. First, the prosecution questions the relevance of a defendant's intended use of the cell phone, citing an unpublished Court of Appeals opinion for the proposition that OV

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19 is not a specific intent-statute. Pros Supp Br at 5. Mr. Dixon does not argue to the contrary, but instead expressly notes that this Court does not need to address this issue to resolve the case. Def Supp Br at 17 n 8. There might well be circumstances in which a defendant's conduct is so inherently dangerous that it "threaten[s] the security of a penal institution" regardless of whether the defendant intended to create such a threat. But that is not the case here. Possessing a cell phone is not an inherently dangerous or risky activity, as millions of Americans do it every day without risking harm to others. The risk of harm only arises when an individual forms a conscious intent to use the phone in a harmful manner. Accordingly, in the particular circumstance at issue in this case, a trial court cannot properly evaluate the risk posed by the defendant's conduct without assessing the defendant's underlying intent. Any attempt to do so turns OV 19's individualized inquiry into a rubber stamp in favor of the prosecution.

Second, in addition to questioning whether the defendant's intent is ever relevant under OV 19, the prosecution argues that the intent inquiry in *People v Dorrington* should not apply in the prison context. Pros Supp Br at 6. The thrust of the prosecution's argument seems to be that items that are ordinarily harmless can be put to harmful use within a prison, and that legislatures and prison officials have good reason for prohibiting them. *Id.* at 6–9. This is undoubtedly true, but also beside the point. The Court in *Dorrington* did not question whether the everyday objects found on the defendant in that case (*i.e.*, house keys, an alarm clock, a battery, and knitting needles) could ever be used to commit burglary. See *Dorrington*, 221 Mich at 574–576. Rather, the Court considered whether evidence that the defendant possessed such items is sufficient to prove that the defendant ***intended*** to use them

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for illicit purposes. *Id.* In rejecting the prosecution's argument, *Dorrington* holds that it is impermissible for a trial court to simply infer illicit intent from the possession of objects "that bear a harmless character." *Id.* There is no legitimate reason why the same would not be true within the context of a prison. While legislatures have good reason to prohibit the possession of cell phones by prison inmates as a matter of prophylactic crime prevention, that does not mean that all inmates who possess cell phones do so with the intent to commit further crimes. In order to properly apply OV 19 in an individualized manner, the trial court must separate the defendants who do from those who don't, because only the former pose a significant risk to the security of the prison. There is no reason why the Court's decision in *Dorrington* should not control this inquiry.

Third, aside from the legal arguments discussed above, the prosecution argues that a ruling in favor of Mr. Dixon would result in poor public policy, leading to increased crime committed by prison inmates. Pros Supp Br at 1, 9–10. To the extent this argument is relevant to the Court's analysis, the prosecution's concerns are overstated. For one, if this Court were to disagree with the decision below, possessing a cell phone within a penal institution would still be a felony offense, punishable by a consecutive sentence of up to 5 years. See MCL 800.285(1). That fact alone would serve as a significant deterrent for inmates who consider acquiring or using cell phones, regardless of the potential guideline range. Moreover, even under the standard that Mr. Dixon advocates, the trial court could still score 25 points under OV 19 when the prosecution produces evidence of harmful conduct beyond mere possession. This evidence might include text messages, social media communications, or recorded voicemessages to or from known criminal associates. It

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might also include evidence of harmful conduct relating to the acquisition of the phone. Thus, even without the Court of Appeals' *per se* rule, the most harmful cell phone possession offenses would still be subject to the 25-point enhancement under OV 19.

C. A defendant convicted under MCL 800.283a should receive an OV 19 score of 0 where (as here) there is no evidence that he participated in smuggling the phone, acquired the phone by force, or intended to use the phone for illicit purposes.

So far, the discussion has focused only on the first question presented in the Court's April 9 order granting oral argument on the application: "Whether attempted violation of MCL 800.283a necessarily requires a score of 25 points for Offense Variable (OV) 19." However, the Court also asked a follow up question: "If not, whether there is sufficient evidence to score OV 19 at 25 points on this record."

The prosecution's response brief does not appear to argue that the 25-point enhancement can be applied in this case in the absence of the Court of Appeals' *per se* rule. See Pros Supp Br 1–10. As explained in Mr. Dixon's supplemental brief, the trial court did not make any factual findings regarding the applicable offense variable score other than accepting the factual basis for the plea. See JA41–51. Accordingly, if this Court concludes that OV 19 requires an individualized inquiry into the facts surrounding an inmate's possession of a cell phone, it should remand the case to the trial court for resentencing with a 0-point score under OV 19.

RELIEF SOUGHT

For the reasons stated above and in his opening supplemental brief, Mr. Dixon respectfully requests that this Court grant the application for leave to appeal, vacate the judgment of the Court of Appeals, and remand the case to the trial court for resentencing under a proper calculation of the applicable guideline range.

Respectfully Submitted,

Dated: July 6, 2021

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