

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN KALON WAINSCOTT,

Defendant-Appellant.

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UNPUBLISHED

October 4, 1996

No. 189015

LC No. 17006932-FH

Before: J.H. Gillis, P.J., and G.S. Allen and J.B. Sullivan, JJ.\*

MEMORANDUM.

Defendant pleaded guilty to violating probation on his underlying conviction of conspiracy to break and enter a building with intent to commit larceny, MCL 750.157a; MSA 28.354(1) and MCL 750.110; MSA 28.305, and was sentenced to three to ten years' imprisonment. He appeals as of right. We remand for resentencing. This case has been decided without oral argument pursuant to MCR 7.214(A).

Defendant argues, and we agree, that his sentence violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Although the sentencing guidelines do not apply to probation violations, the guidelines' scoring for the underlying offense is to be used as a starting point for determining whether the sentence imposed is appropriate. *People v Cotton*, 209 Mich App 82, 83-84; 530 NW2d 495 (1995). Here, the sentencing guidelines recommended a minimum term of 0 to 12 months. The bases for the probation violation—i.e., defendant in the company of a known criminal, in possession of alcohol, and not at home during restricted hours—were not so serious as to warrant the sentence imposed. Hence, defendant is entitled to resentencing.

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\*Former Court of Appeals judges, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.

Remanded for resentencing. We do not retain jurisdiction.

/s/ John H. Gillis

/s/ Glenn S. Allen, Jr.

/s/ Joseph B. Sullivan