STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant, v CONNIE LEE PENNEBAKER, Defendant-Appellee.	FOR PUBLICATION September 13, 2012 9:00 a.m. No. 304708 Oakland Circuit Court LC No. 2011-235701-FH Advance Sheets Version

Before: CAVANAGH, P.J., and SAAD and DONOFRIO, JJ.

SAAD, J.

On March 3, 2011, defendant, Connie Lee Pennebaker, pleaded guilty of operating a motor vehicle while intoxicated, with an occupant less than 16 years old, MCL 257.625(7)(a), and stipulated that it was her second offense, subject to sentence enhancement, MCL 257.625(7)(a)(*ii*). The trial court sentenced defendant to 18 months' probation and 30 days in the electronic-monitoring work-release program. On August 18, 2011, this Court entered an order that denied the prosecution's application for leave to appeal. *People v Pennebaker*, unpublished order of the Court of Appeals, entered August 18, 2011 (Docket No. 304708). However, on November 21, 2011, the Michigan Supreme Court remanded the case to this Court for consideration as on leave granted. *People v Pennebaker*, 490 Mich 910 (2011).

I. FACTS AND PROCEEDINGS

At approximately 6:30 p.m. on December 31, 2010, police officers stopped defendant's vehicle while she was driving her two grandchildren, both of whom were under 16 years old. Defendant had been drinking since 2:00 p.m., and estimated that she had consumed approximately a half pint of vodka. A breathalyzer test showed that defendant had .13 grams of alcohol per 100 milliliters of blood. Defendant admitted that the alcohol had substantially affected her mental, physical, and driving abilities, and she also admitted that she was convicted in 2007 of operating a motor vehicle while impaired.

As noted, defendant pleaded guilty of operating a motor vehicle while intoxicated, second offense. At sentencing on June 2, 2011, the prosecutor asked the court to sentence defendant to 30 days in jail without work release as set forth in the plea agreement. On the record, the trial judge observed that defendant had been under the direct supervision of the court since March 10, 2010. According to the trial judge, defendant had participated in the required counseling, she had stopped using benzodiazepines, her daily tests for drugs and alcohol had been negative, and

she had received wholly positive reports from her case manager at Community Corrections. Because of these efforts, the trial court opined that defendant "earned the right to enter the work release program[.]" The judge explained:

> And I'll state for the record that I had an opportunity actually yesterday, the Sheriff's Department presented to the Judges of the Circuit Court their electronic monitoring work release program wherein they described the monitoring that is imposed upon defendants. And we were advised that it is considered a custodial program, that she remains in the custody of the Sheriff's Department and, therefore, it would not be a suspension to allow her to enter the work release program.

The parties agree that the program would allow defendant to serve her sentence at home, while wearing an electronic tether. Thus, although the prosecutor argued that both statutory and caselaw prohibit a court from sentencing defendant to a tether program under these circumstances, the trial court sentenced defendant to 30 days in the electronic monitoring work-release program, community service, probation, fines and vehicle immobilization.

II. ANALYSIS

The prosecutor correctly argues that the trial court erred, as a matter of law, by sentencing defendant to the work-release program in lieu of the statutorily required 30-day incarceration as mandated by MCL 257.625(7)(a)(*ii*)(B). We review de novo the interpretation of a statute as a question of law. *People v Flick*, 487 Mich 1, 8-9; 790 NW2d 295 (2010). And, although in general, "[t]he imposition of a sentence is reviewed for an abuse of discretion," *People v Underwood*, 278 Mich App 334, 337; 750 NW2d 612 (2008), when, as here, there is a clear statutory direction regarding sentencing, then this is not a matter of trial court discretion, but rather a failure to comply with a legislative mandate which requires reversal.

As a preliminary matter, we recognize that prior to sentencing, defendant took consistent steps to abide by all requirements imposed by the court. Moreover, though the record lacks details about the electronic-monitoring program offered to defendant, we take judicial notice of the significant problem of jail overcrowding in many of Michigan's counties, and we recognize the good efforts of the sheriff's department in taking affirmative and conscientious steps to alleviate this burden on both law enforcement and the taxpaying community. Despite these laudable efforts, however, under the facts of this case we hold that Oakland County's electronic-monitoring work-release program does not fulfill the mandatory 30-day incarceration requirement of MCL 257.625(7)(a)(*ii*)(B).

MCL 257.625(7) provides, in relevant part:

> A person, whether licensed or not, is subject to the following requirements:
>
> (a) He or she shall not operate a vehicle [when that person has a blood alcohol level of .08 grams or more per 100 milliliters of blood] while another person who is less than 16 years of age is occupying the vehicle. A person who violates this subdivision is guilty of a crime punishable as follows:

* * *

(*ii*) If the violation occurs within 7 years of a prior conviction or after 2 or more prior convictions, regardless of the number of years that have elapsed since any prior conviction, a person who violates this subdivision is guilty of a felony and shall be sentenced to pay a fine of not less than $500.00 or more than $5,000.00 and to either of the following:

(A) Imprisonment under the jurisdiction of the department of corrections for not less than 1 year or more than 5 years.

(B) Probation with imprisonment in the county jail for not less than 30 days or more than 1 year and community service for not less than 60 days or more than 180 days. Not less than 48 hours of this imprisonment shall be served consecutively. This term of imprisonment shall not be suspended.

As our Supreme Court explained in *Flick*, 487 Mich at 10-11:

> The overriding goal of statutory interpretation is to ascertain and give effect to the Legislature's intent. The touchstone of legislative intent is the statute's language. The words of a statute provide the most reliable indicator of the Legislature's intent and should be interpreted on the basis of their ordinary meaning and the overall context in which they are used. An undefined statutory word or phrase must be accorded its plain and ordinary meaning, unless the undefined word or phrase is a "term of art" with a unique legal meaning. When we interpret the Michigan Penal Code, we do so according to the fair import of [the] terms, to promote justice and to effect the objects of the law. [Quotation marks and citations omitted.]

The plain language of MCL 257.625(7)(a)(*ii*) and MCL 257.625(7)(a)(*ii*)(B) provide that, here, the trial judge did not have discretion to sentence defendant to less than 30 days in jail. MCL 257.625(7)(a)(*ii*) states that a defendant "shall be sentenced . . . to either of the following." This unequivocally means that the trial court *must* sentence defendant to one of the two options, a term in prison or not less than 30 days in jail and community service. The "use of the term 'shall' . . . indicates mandatory rather than discretionary action." *People v Grant*, 445 Mich 535, 542; 520 NW2d 123 (1994). MCL 257.625(7)(a)(*ii*)(B) further states that "[t]his term of imprisonment shall not be suspended." This language unequivocally means that the trial court must sentence a defendant to a minimum of 30 days in the county jail.

As this Court opined in *People v Morgan*, 205 Mich App 432, 433; 517 NW2d 822 (1994):

> Under our system of state government, the Legislature makes the law, the Governor executes it, and the courts construe and enforce it. *People v Palm*, 245 Mich 396; 223 NW 67 (1929). The Legislature alone is conferred with the power to fix the minimum and maximum punishment for all crimes. *People v Smith*, 94 Mich 644; 54 NW 487 (1893). A sentence outside statutory limits is invalid. *People v Whalen*, 412 Mich 166; 312 NW2d 638 (1981).

The placement of an electronic-monitoring device on defendant is not "imprisonment in the county jail" as required by the statute. *People v Britt*, 202 Mich App 714, 717; 509 NW2d 914 (1993). The Court in *Britt* observed:

> Electronic tethers were not intended to form the bounds of confinement. Rather, the electronic tether is simply a surveillance device for monitoring a defendant's presence in his residence during curfew hours. [*Id*.]

"The tether program is a restriction, not a confinement, and is not 'jail' as that term is commonly used and understood." *People v Reynolds*, 195 Mich App 182, 184; 489 NW2d 128 (1992). The panel in *People v Smith*, 195 Mich App 147, 152; 489 NW2d 135 (1992), perhaps explained the distinction most directly:

> Under no circumstances can we reasonably conclude that confinement in one's home or apartment is the equivalent of confinement "in jail." This is so even where, as here, the conditions of home confinement require the person confined to go directly to work, to return home immediately from work, and to be at home at all times unless approval is given by a probation officer. Home detention does not include the highly structured setting of a prison or jail. One cannot remain on the phone for extended periods, invite friends for extended visits, order a pizza, watch television during periods of one's own choosing, or have free access to the refrigerator in jail.

Contrary to defendant's arguments, an at-home electronic-monitoring program is also not equivalent to traditional work-release programs. Pursuant to MCL 801.251, the Legislature has specifically allowed courts to release inmates from jail during necessary and reasonable hours for work, substance abuse treatment, counseling, and other statutorily authorized activities. However, this statute contemplates that inmates will return to jail during hours when they are not engaged in the statutorily-permitted activities. Indeed, the statute specifies that a court "may grant to the person the *privilege of leaving* the jail during necessary and reasonable hours" *Id*. (emphasis added). The Legislature has also given the sheriff and trial judges the authority to reduce prisoner population by means of work-release programs. MCL 801.55. However, the work-release programs must be "authorized by law." MCL 801.55(e). As discussed, the statute at issue, MCL 257.625(7)(a)(*ii*)(B), does not authorize any sentence less than imprisonment in jail for 30 days for a person convicted under that subsection. Again, the plain language of MCL 257.625(7)(a)(*ii*)(B) mandates that defendant serve at least 30 days in the county jail, and a tether does not amount to imprisonment in jail.

As previously noted, we are mindful of the serious nature of jail overcrowding in Michigan, including Oakland County, and the program the sheriff designed to handle this problem is a thoughtful method designed to deal with this difficult issue. However, it is for the Legislature to decide whether to alter the minimum and maximum punishment for this crime which, in this case, involved not only intoxicated driving, but the transportation of minors and a prior operating a motor vehicle while intoxicated conviction. Unless and until the Legislature decides to change the required penalty for MCL 257.625(7)(a)(*ii*), the plain language of the statute and our caselaw compel us to reverse the trial court's sentence because it ignores the clear legislative mandate.

Reversed and remanded for resentencing. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Mark J. Cavanagh
/s/ Pat M. Donofrio