

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SALLY ANN BENNETT,

Defendant-Appellant.

UNPUBLISHED

November 18, 2008

No. 277682

Saginaw Circuit Court

LC No. 01-020409-FH

Before: Fitzgerald, P.J., and Bandstra and O’Connell, JJ.

BANDSTRA, J. (*concurring*).

I concur with the decision of the majority affirming defendant’s sentence. However, I question whether the trial court could properly consider defendant’s previous welfare fraud convictions in light of the majority’s conclusion that they ran afoul of the ten year rule established by statute. See MCL 777.50(1). The Legislature has determined that sentencing courts are “not [to] use any conviction . . . that precedes a period of 10 or more years” between that conviction and the next offense, when scoring prior record variables. *Id.* Further, sentencing courts are “not [to] base a departure on an . . . offender characteristic already taken into account” by the guidelines. MCL 769.34(3)(b). Thus, the trial court may have erred in considering prior offenses that the Legislature has determined are simply not to be counted against a defendant as a basis for departing from the guidelines. The guidelines have “taken [them] into account” by determining that they simply should not be considered.

Nonetheless, these prior sentences were not the trial court’s only reason for imposing the departure sentence. Upon review of the entire record, I conclude that “the trial court would have departed and would have departed to the same degree on the basis of” other properly considered substantial and compelling reasons. *People v Babcock*, 469 Mich 247, 260; 666 NW2d 231 (2003). Accordingly, I would affirm on that basis.

/s/ Richard A. Bandstra