

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY CHARLES BUTLER,

Defendant-Appellant.

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FOR PUBLICATION

June 2, 2016

9:00 a.m.

No. 327430

Ogemaw Circuit Court

LC No. 14-004337-FH

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

SAWYER, J.

We are asked to determine in this case whether a prior conviction that is not otherwise scorable under the prior record variables of the sentencing guidelines may, nevertheless, be considered in applying the so-called “10-year gap” rule of MCL 777.50. We conclude that it may.

Defendant was convicted by plea of second-degree home invasion<sup>1</sup> for an offense committed on May 11, 2014. He was sentenced within the guidelines recommendation, as scored by the trial court, to 3 to 15 years in prison. Defendant has an extensive criminal record dating back to 1984. But he acquired no convictions at all from 2001 until 2012, with the exception of a 2006 conviction related to an offense committed in 1993.<sup>2</sup> Depending on whether that 2006 conviction is to be considered in applying the provisions of MCL 777.50, defendant’s prior record level under the sentencing guidelines, and therefore the recommended minimum sentence range, will change significantly.

MCL 777.50 provides in relevant part as follows:

(1) In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the

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<sup>1</sup> MCL 750.110a(3).

<sup>2</sup> It is unclear to us why such an extended period of time passed between the offense and the conviction. But the reason is not relevant to the disposition of this case.

discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

(2) Apply subsection (1) by determining the time between the discharge date for the prior conviction or juvenile adjudication most recently preceding the commission date of the sentencing offense. If it is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and determine the time between the commission date of that prior conviction and the discharge date of the next earlier prior conviction or juvenile adjudication. If that period is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and repeat this determination for each remaining prior conviction or juvenile adjudication until a period of 10 or more years is found or no prior convictions or juvenile adjudications remain.

Under these provisions, if the 2006 conviction is considered, then there is no 10-year period in which defendant went without a conviction and, therefore, PRV 5 would be scored at 20 points for having 7 or more prior misdemeanor convictions.<sup>3</sup> This is how the trial court scored the guidelines. On the other hand, if the 2006 conviction is ignored, then there is a period of over 10 years from his discharge on May 17, 2002, for a 2001 conviction for what the presentence describes as "A&B" until the commission of a felony drunk-driving related offense on September 3, 2012, for which he was convicted of operating while impaired, third offense.<sup>4</sup> In that case, defendant would have no scorable prior misdemeanor convictions and PRV 5 should be scored at 0 points. We believe that the trial court properly scored the guidelines.

We review de novo questions of statutory interpretation of the sentencing guidelines.<sup>5</sup> In interpreting a statute, we first look to the statute's plain language.<sup>6</sup> If the statute's language is clear, we apply it as written.<sup>7</sup> We find the language of MCL 777.50 to be clear and in no need of further interpretation.

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<sup>3</sup> MCL 777.55(1).

<sup>4</sup> MCL 257.625(9)(c).

<sup>5</sup> *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

<sup>6</sup> *People v Wiggins*, 289 Mich App 126, 128-129; 795 NW2d 232 (2010).

<sup>7</sup> *People v Armstrong*, 205 Mich App 230, 243; 851 856 (2014).

Defendant's argument is based upon the fact that the offense for which he was convicted in 2006 is not itself a scorable offense under PRV 5.<sup>8</sup> Defendant argues that, because the two statutes must be read in *pari materia*, only offenses scorable under MCL 777.55 may be considered in applying the 10-year gap rule under MCL 777.50 in determining which offenses may be scored under PRV 5. We disagree.

This Court explained the *in pari materia* rule in *People v Stephan*<sup>9</sup> as follows:

Under this doctrine, statutes that relate to the same subject or share a common purpose are in *pari materia*. Such statutes must be read together as one law, even if they contain no reference to one another and were enacted on different dates. *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998). . . .

The object of the *in pari materia* rule is to further legislative intent by finding an harmonious construction of related statutes, so that the statutes work together compatibly to realize that legislative purpose. *Id.* Therefore, if two statutes lend themselves to a construction that avoids conflict, that construction should control. *Id.* Two statutes that form "a part of one regulatory scheme" should be read in *pari materia*. *In re Complaint of Southfield Against Ameritech Michigan*, 235 Mich App 523, 527; 599 NW2d 760 (1999).

The flaw in defendant's reasoning is that it rests on the presumption that, in order for MCL 777.50 and MCL 777.55 to be read harmoniously, only the same exact convictions may be considered under both sections. Defendant insists that they must be "interpreted consistently with the Legislature's judgment that only certain misdemeanors should be used in assessing the severity of a defendant's criminal history." We do not believe that this is the case.

While both statutes do serve a common purpose of limiting what prior convictions may be considered, the limitations are different and the underlying purpose of the respective limitations are obviously different as well. MCL 777.55(2) serves to limit which prior misdemeanor convictions can be considered at all in scoring PRV 5, regardless whether they occurred a week prior, a year prior, or a decade prior. The limitation is on the type of misdemeanor that the Legislature finds relevant in assessing a defendant's prior criminal history.

MCL 777.50, on the other hand, applies to the scoring of multiple PRVs, 1 through 5. Thus, if a 10-year gap between convictions exists so as to trigger the provisions of MCL 777.50, prior convictions of all sorts will be ignored: prior high severity felonies (PRV 1),<sup>10</sup> prior low

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<sup>8</sup> MCL 777.55(2) limits the scoring of PRV 5 to prior misdemeanors and juvenile adjudications for offenses against persons or property, controlled substance offenses, weapons offenses, as well as various drunk-driving related offenses.

<sup>9</sup> 241 Mich App 482, 497-498; 616 NW2d 188 (2000).

<sup>10</sup> MCL 777.51.

severity felonies (PRV 2),<sup>11</sup> prior high severity juvenile adjudications (PRV 3),<sup>12</sup> prior low severity juvenile adjudications (PRV 4),<sup>13</sup> as well as prior misdemeanors (PRV 5). MCL 777.50 draws no distinctions between the types of crimes previously committed. When a defendant has gone 10 years from the discharge from a conviction until the commission of his or her next offense, all convictions, regardless of the crime, are to be ignored. The prior conviction could be a prior high severity felony, such as second-degree murder,<sup>14</sup> and, as long as the defendant does not commit another crime for at least 10 years after discharge from the murder conviction, that murder conviction would no longer be scorable under PRV 1.

In other words, the provisions of MCL 777.55, along with MCL 777.51 through MCL 777.54, consider the nature of the defendant's prior crimes, whether they are worthy of being scored under the sentencing guidelines, and the points to be assessed based upon the number and severity of those offenses. MCL 777.50, on the other hand, addresses the question whether a defendant's prior criminal history should no longer be considered at all because of a period of time spent as a law-abiding citizen. It reflects a judgment by the Legislature that, if a person is able to go 10 years without a new conviction, he should be able to put his criminal past behind him, even if there is later on a relapse into a life of crime and the defendant obtains a new conviction. In making this judgment, it is not unreasonable for the Legislature to have insisted that the 10-year conviction-free period be exactly that: conviction free. That is, free of *any* convictions, even ones that would not themselves be scorable under the prior record variables. While the Legislature may not consider various minor misdemeanors relevant in assessing points under PRV 5, that does not compel the conclusion that it did not find those crimes relevant in determining whether a person had spent a sufficient period of time conviction free such that a portion of his criminal past may be ignored and left in the past.

In sum, while MCL 777.50 and MCL 777.55 are obviously related, they nonetheless address slightly different issues. Those issues reflect different policy choices made by the Legislature. And those policy choices do not require that the same convictions be considered in order to avoid a conflict between the two statutes, even when read in *pari materia*.

Defendant also makes an argument contrasting the legislative guidelines with the previous judicial guidelines. Specifically, defendant argues that in applying the judicial guidelines' 10-year gap rule, the judicial guidelines referred to "any conviction,"<sup>15</sup> rather than the legislative guidelines reference to a "prior conviction." While that argument might be persuasive if we were comparing current legislative language to previous legislative language and, therefore, the change in language might signal a change in intent, we see no reason to do so

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<sup>11</sup> MCL 777.52.

<sup>12</sup> MCL 777.53.

<sup>13</sup> MCL 777.54.

<sup>14</sup> MCL 777.51(2).

<sup>15</sup> See *People v Reyna*, 184 Mich App 626, 631; 459 NW2d 75 (1990).

merely because the Legislature chose to express itself differently than did the Supreme Court in authoring the judicial guidelines. Indeed, the reasoning of this Court in *People v Reyna*<sup>16</sup> in addressing the corresponding provisions of the judicial guidelines echoes our rationale here:

With these definitions in mind, we do not believe that a conviction for purposes of determining the applicability of the ten-year rule need be a conviction for an offense which may be scored under the guidelines. Rather, we hold that any criminal conviction is sufficient to establish that the defendant did not have a ten-year period free of convictions. In so concluding, we also consider the fact that the guidelines do consider different prior convictions differently depending on the prior record variable involved. For example, the guidelines differentiate a prior high-severity felony (PRV 1) from prior low-severity felonies (PRV 2) as well as treating separately prior high-severity similar felonies (PRV 3) and prior low-severity similar felonies (PRV 4). Thus, it is conceivable that the guidelines would restrict those misdemeanor convictions which may be scored as a prior misdemeanor conviction under PRV 6, while taking a more expansive view of what constitutes a conviction under the ten-year rule. We believe that the emphasis under the ten-year rule is not on what offense was committed, but whether the defendant was able to be completely conviction-free for a period of at least ten years. The simple fact of the matter is that defendant has not been conviction-free for a ten-year period because he committed OUIL within ten years of his discharge from probation on his prior conviction.

While the source of the text being interpreted is different, as well as the wording itself, we believe that the rationale holds equally true today in interpreting the legislative guidelines as it did over a quarter of century ago in looking at the judicial guidelines. Accordingly, we conclude that the trial court properly scored the guidelines.

Affirmed.

/s/ David H. Sawyer  
/s/ Michael J. Kelly

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<sup>16</sup> 184 Mich App at 632.

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GLEICHER, P.J. (*dissenting*).

A defendant's sentence is calculated by scoring offense and prior record variables. Prior record variables appraise a defendant's history of criminal convictions. The higher the PRV score, the longer the potential sentence range. This approach comports with one of the principles of proportionality underlying the legislative sentencing guidelines: a recidivist deserves a harsher penalty than a first offender.

The Legislature carved out two conspicuous exceptions to this maxim. A gap of 10 years or more between the date of an offender's discharge from a conviction and his commission of a subsequent offense wipes the offender's PRV-slate clean. In other words, an offender who achieves a 10-year crime-free period avoids a PRV penalty for his previous criminal record, regardless of the record's length, depth or breadth. In this circumstance, a substantial interval of life-inside-the-law palliates punishment.

And even when convictions *are* scored, the Legislature deems some offenses off-limits for PRV purposes. A misdemeanor counts only if it is classified as an offense against a person or property, a controlled substance or alcohol-related crime, or a weapons-related offense. MCL 777.55(2). In enacting this rule, the Legislature evidently judged that minor misdemeanors should not enhance a PRV score and thereby subject an offender to greater punishment. Why not? Likely it is because minor misdemeanors simply lack relevance to the proportionality principles underlying the sentencing guidelines. The commission of nonviolent offenses unrelated to drugs or alcohol only weakly predicts future dangerousness, and does not reflect an incorrigible propensity for disobeying the law. Leaving such convictions out of the mix does not violate the tenet that repeat offenders merit longer sentences than newcomers to the criminal justice system.

The question presented in this case is whether the Legislature intended that a misdemeanor conviction too minor to be scored by the guidelines nonetheless destroys a defendant's eligibility to benefit from the 10-year gap rule. The majority focuses on the word "conviction" used in the rule's articulation, and defines the word capaciously to encompass *all* convictions, including those otherwise exempt from scoring under the guidelines. In my view, a narrower construction is warranted. Limiting the reach of the term "conviction" to those convictions relevant to PRV calculation comports with the policies that animate the sentencing guidelines in general, and the scoring of PRVs in particular. I respectfully dissent.

## I

Defendant has a long criminal record. He began committing crimes in 1984, when he received probation and 90 days' incarceration after pleading guilty to unlawfully driving away an automobile, MCL 750.413. Between 1984 and 1989, he caught eight additional convictions. Defendant avoided prosecution between 1989 and 1992. In May 1993, he pleaded guilty to malicious destruction of personal property under \$100 and assault and battery. In November of that year he was arrested for "false information to police; seatbelt." Defendant spent 10 days in jail for resisting arrest in 1995. He pleaded guilty to "open intoxication" in 1999 and to assault and battery in 2000. Between September 2000 and September 2012, defendant's record reflects no convictions of any kind.

For unknown reasons, defendant's November 1993 arrest for "false information to police; seatbelt," remained unresolved until 2006, when defendant entered a "plea by mail" to the former charge. This 2006 plea destroyed defendant's 12-year conviction-free gap. But for the delayed 2006 "plea by mail," it is indisputable that defendant's many convictions before 2000 could not have been scored under the PRVs.

The impact of scoring defendant's older crimes is substantial. When the old offenses are counted, defendant's minimum guideline sentencing range for his current offense adds up to 29 to 57 months. Without them, the sentencing range is 12 to 24 months.

## II

The statutes at issue in this case (MCL 777.50 and MCL 777.55) are both located in part 5 of the legislative sentencing guidelines, MCL 777.1 *et seq.* Part 5 addresses the scoring of prior offense variables. The word that separates me from the majority—"convictions"—is not expressly defined in part 5 or anywhere else in the sentencing guidelines, despite that in § 50(4)(a), the Legislature provided two specific examples of "convictions" that fall within the definition.<sup>1</sup> I believe that the best way to locate the Legislature's intended meaning of

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<sup>1</sup> MCL 777.50(4)(a) states:

(4) As used in this part:

(a) "Conviction" includes any of the following:

“convictions” in § 50(2) is to consider the language and design of the statutory provisions in which the word is embedded, in the light of the overall object of the guidelines.

The sentencing guidelines were enacted to facilitate proportionate sentencing, *People v Smith*, 482 Mich 292, 312; 751 NW2d 284 (2008), and “to insure that sentencing decisions are based on a consistent set of legally relevant factors . . . .” *People v Whitney*, 205 Mich App 435, 436; 517 NW2d 814 (1994). Reading the two interrelated statutes *in pari materia*, harmonizing rather than isolating their provisions, compels me to conclude that because defendant’s 2006 plea to a minor misdemeanor was not scorable as a PRV, it should not have been used to disrupt his otherwise “clean” 12-year period.

MCL 777.50 applies generally to the “scoring [of] prior record variables 1 to 5.” MCL 777.50(1). The statute instructs that when scoring PRVs 1 to 5, a court should “not use any conviction that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant’s commission of the next offense resulting in a conviction or juvenile adjudication.” MCL 777.50(1). MCL 777.50 describes the mechanics of the 10-year gap rule as follows:

Apply subsection (1) by determining the time between the discharge date for the prior conviction or juvenile adjudication most recently preceding the commission date of the sentencing offense. If it is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and determine the time between the commission date of that prior conviction and the discharge date of the next earlier prior conviction or juvenile adjudication. If that period is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and repeat this determination for each remaining prior conviction or juvenile adjudication until a period of 10 or more years is found or no prior convictions or juvenile adjudications remain. [MCL 777.50(2).]

Thus, the statute sets the temporal boundaries of the 10-year gap as the defendant’s “prior conviction or juvenile adjudication” and the date of his “sentencing offense.” When 10 years or more separates these events, a defendant may not be penalized for crimes committed before the gap period commenced.

MCL 777.55 describes the scoring of PRV 5, which concerns misdemeanors and misdemeanor juvenile adjudications. The categories “prior misdemeanor convictions” and “prior misdemeanor juvenile adjudications” are defined for the purposes of scoring PRV 5 as follows:

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- (i) Assignment to youthful trainee status under sections 11 to 15 of chapter II.
  - (ii) A conviction set aside under 1965 PA 213, MCL 780.621 to 780.624.



(a) “Prior misdemeanor conviction” means a conviction for a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the conviction was entered before the sentencing offense was committed.

(b) “Prior misdemeanor juvenile adjudication” means a juvenile adjudication for conduct that if committed by an adult would be a misdemeanor under a law of this state, a political subdivision of this state, another state, a political subdivision of another state, or the United States if the order of disposition was entered before the sentencing offense was committed. [MCL 777.55(3).]

Important limits, however, restrict the reach of the broad term “prior misdemeanor conviction” used in § 55(3). Specifically, § 55(2) directs that a court scoring PRV 5 may “count a prior misdemeanor conviction or prior misdemeanor juvenile adjudication *only if* it is an offense against a person or property, a controlled substance offense, or a weapon offense” or if it constitutes a “prior misdemeanor conviction[] . . . for operating or attempting to operate a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive while under the influence of or impaired by alcohol, a controlled substance, or a combination of alcohol and a controlled substance.” (Emphasis added.) I suggest that the Legislature omitted many misdemeanors from PRV consideration both because such convictions have little predictive value, and because by counting them, there is a risk that a sentence may become disproportionate.

Defendant’s 2006 conviction for providing false information to the police, MCL 257.324(1)(h), a misdemeanor under the Michigan Vehicle Code, MCL 257.1 *et seq.*, is an uncountable offense. For precisely the same reasons that the Legislature exempted this crime from scoring under MCL 777.55, it should not serve to close defendant’s otherwise conviction-free, 12-year gap period.

“Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole.” *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). As our Supreme Court recently explained, “[I]n the construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same *general* purpose, should be read in connection with it, as together constituting one law, although they were enacted at different times, and contain no reference to one another.” *Int’l Business Machines Corp v Dep’t of Treasury*, 496 Mich 642, 652; 852 NW2d 865 (2014), quoting *Rathbun v Michigan*, 284 Mich 521, 544; 280 NW 35 (1938) (emphasis added).

MCL 777.50 and MCL 777.55 relate to the same subject, share the same general purposes, and were enacted together. In my view, they must be interpreted *in pari materia*. The *in pari materia* canon of statutory interpretation has deep roots in Michigan’s jurisprudence, and is frequently employed to reconcile apparent inconsistencies and definitional lapses by finding meaning through consideration of related statutes addressing the same subject matter.

The majority uses a different canon—plain meaning—to conclude that “conviction” means exactly that, and no further interpretation bears contemplation. According to the majority, although the two statutes “serve a common purpose of limiting what prior convictions may be

considered, the limitations are different and the underlying purpose of the respective limitations are obviously different as well.” The majority concedes that MCL 777.55(2) limits “the type of misdemeanor that the Legislature finds relevant in assessing a defendant’s prior criminal history,” yet holds that MCL 777.50 “reflects a judgment . . . that the 10-year conviction-free period be exactly that: conviction free.” I don’t disagree that this is one possible interpretation of the term “conviction” as used in § 50(1). It’s just not the most accurate one.

The majority hinges its “plain meaning” analysis on the rationale expressed in *People v Reyna*, 184 Mich App 626, 632; 459 NW2d 75 (1990), in which this Court considered whether an unscorable misdemeanor extinguished the defendant’s ability to utilize the 10-year gap rules set forth in the *judicial* sentencing guidelines. Notably, those guidelines included a specific definition of the word “conviction,”<sup>2</sup> and that definition (appropriately) controlled the Court’s decision. The legislative sentencing guidelines do not include a definition of “conviction,” an omission I find telling.

As did the judicial guidelines, the legislative guidelines include a 10-year gap rule. Had the Legislature intended application of the 10-year gap rule enunciated in MCL 777.50(1) to mirror application of the judicially-created rule, it would have enacted the judicially-created definition of “conviction.” Examining the Legislature’s words in linguistic and historical context signals that the Legislature did not intend to “affirm” *Reyna*. Rather, the Legislature omitted a definition of “conviction” and included only limited examples in MCL 777.50(4)(a).

Our Supreme Court has elucidated regarding the *in pari materia* canon that “[t]he endeavor should be made, by tracing the history of legislation on the subject, to ascertain the uniform and consistent purpose of the Legislature, or to discover how the policy of the Legislature with reference to the subject-matter has been changed or modified from time to time.” *Remus v City of Grand Rapids*, 274 Mich 577, 581; 265 NW 755 (1936). The Legislature adopted a 10-year gap rule but neglected to accompany it with an expansive definition of the word “conviction.” And in the same part of the statute, the Legislature declared certain convictions unworthy of scoring. It makes sense to read the two sections together and to conclude that the commission of minor misdemeanors does not eliminate the value of crime-free periods. “[W]ords are chameleons,” Judge Learned Hand once said, “which reflect the color of their environment.” *Commissioner v Nat’l Carbide Corp*, 167 F2d 304, 306 (CA 2, 1948). The statutory environment in which the Legislature placed § 50(1) does not countenance the use of minor misdemeanors as sentence enhancers. Accordingly, a conviction that cannot be counted because it lacks probity or predictive value should not be counted.

The facts of this case solidify my conclusion. Defendant committed the offense that destroyed his 10-year gap eligibility in 1993, seven years before the start of the 12-year period in which he remained otherwise conviction-free. No one knows why his prosecution for “false information to police; seatbelt” was delayed for 13 years. But given that the essential purpose of the 10-year gap rule is to acknowledge the insignificance of old criminal conduct in predicting

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<sup>2</sup> Under the judicial guidelines, a “conviction” was defined as “criminal charges to which the defendant pleads guilty or is found guilty in a court of law.” *Reyna*, 184 Mich App at 632.

future offending, it makes no sense to resurrect defendant's relatively ancient and unscorable misdemeanor to disrupt the rule's operation.

If one harmonizes the word "conviction" with the rest of part 5 rather than reading it in a vacuum, the term should not reanimate an otherwise irrelevant minor misdemeanor. In the context of the prior record guidelines and in particular MCL 777.55(2), "conviction" should be construed to include only those convictions otherwise relevant in calculating a defendant's sentence. I would remand for resentencing after application of the 10-year gap rule.

/s/ Elizabeth L. Gleicher