

STATE OF MICHIGAN
IN THE SUPREME COURT

THE PEOPLE OF STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CAPRESE GARDNER,

Defendant-Appellant.

~~Supreme Court
No. 124012~~

Third Circuit Court No. 01-003494-01
Court of Appeals No. 238186

SUPPLEMENTAL BRIEF IN OPPOSITION TO
APPLICATION FOR LEAVE TO APPEAL

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ds

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QUESTION PRESENTED

I.

MCL 768.11 requires that to be considered an habitual-offender third for the purpose of sentence enhancement, a person must have been convicted previously of any combination of two or more felonies. Here, the defendant had been convicted of felonious assault and felony-firearm before being sentenced for his subsequent crimes as a third-time habitual offender. Since the statute does not say what *People v Stoudemire* requires, that two convictions arising out of a single transaction be counted only as one, should this Court overrule *People v Stoudemire* and deny relief to the defendant?

The People answer: YES.

The defendant answers: NO.

STATEMENT OF FACTS

The defendant, Caprese Gardner, was convicted of second-degree murder, felon in possession of a firearm, and felony-firearm for the killing of fifteen-year-old Dawan Bibbs. With the Information in this case, the prosecutor gave the defendant notice that conviction would make him eligible for sentencing as an *habitual-third offender*. The defendant's previous convictions were for felonious assault and felony-firearm, both obtained on February 28, 1988.

The sentencing guidelines recommendation without enhancement was 180 to 300 months or life.¹ As an habitual-second offender the recommendation would have been 180 to 375 months or life.² As an habitual-third offender the recommendation was 180 to 450 months or life, both defense counsel and the prosecutor acknowledged these numbers.³ The trial court sentenced the defendant "within the guidelines" to twenty-five (300 months) to fifty years imprisonment.⁴

¹ Appendix A, sentencing information report.

² Sentencing Guidelines, 2nd Edition.

³ 8/30/01, 6, 11.

⁴ 8/30/01, 12.

ARGUMENT

I.

MCL 768.11 requires that to be considered an habitual-offender third for the purpose of sentence enhancement, a person must have been convicted previously of any combination of two or more felonies. Here, the defendant had been convicted of felonious assault and felony-firearm before being sentenced for his subsequent crimes as a third-time habitual offender. Since the statute does not say what *People v Stoudemire* requires, that two convictions arising out of a single transaction be counted only as one, this Court should overrule *People v Stoudemire* and deny relief to the defendant.

Standard of Review

An appellate court reviews the grant or denial of a motion for relief from judgment for an abuse of discretion.⁵ And review of a trial court's decision to impose an increased sentence pursuant to the habitual offender act is for an abuse of discretion.⁶ Correct interpretation of the offender statute is a question of law this Court reviews *de novo*.⁷

Argument

The defendant demands resentencing, arguing that the prosecutor erred in requesting he be sentenced as an habitual-third offender because his previous two convictions had been one

⁵ *People v Ulman*, 244 Mich App 500, 508 (2001).

⁶ *People v Reynolds*, 240 Mich App 250, 252 (2000).

⁷ *People v Stone*, 463 Mich 558, 562 (2001).

transaction and according to *People v Stoudemire*,⁸ he could have been considered only a second-time habitual offender.

The normal sentencing guidelines range computed for the defendant was 180 to 300 months.⁹ The habitual-third enhancement made the range 180 to 450 months; both defense counsel and the prosecutor acknowledged these numbers.¹⁰ The trial court sentenced the defendant to twenty-five to fifty years imprisonment.¹¹ That 300 month minimum sentence was within the normal guidelines range as well as the habitual-third range. If the defendant's claim were valid, one might argue as harmless error the one committed here in the computation of the habitual sentence guidelines since the sentence imposed falls within the normal, unenhanced guidelines range – a losing argument since this Court in *People v Francisco*¹² stated that resentencing is required when there has been an error in the sentence scoring even if the minimum sentence imposed falls within the corrected sentence guidelines range. So, under normal circumstances, resentencing would be required here to adjust the upper level of the guidelines to the habitual-second enhancement range – 375 months rather than 450 months. But analysis of the law of habitual-offender sentencing discloses a flaw that calls out for correction. If that were done, the defendant's sentence in this case would stand.

⁸ *People v Stoudemire*, 429 Mich 262 (1987).

⁹ Appendix A, sentencing information report.

¹⁰ 8/30/01, 6, 11.

¹¹ 8/30/01, 12.

¹² *People v Francisco*, 474 Mich 82, 89-90 (2006).

I. Statutory Construction

The path to resolving the question presented by this case must begin with reading the statute. This Court has amassed a body of jurisprudence describing how that should be done, exhorting courts to refrain from substituting their own policy decisions for those already made by the legislature.¹³ If the language of the statute is clear and unambiguous it must be enforced as written; judicial construction is not only unnecessary, but not permitted because the court must presume the legislature intended the plain meaning of the language it used.¹⁴ In other words, "the proper role of the judiciary is to interpret and not write the law, courts simply lack authority to venture beyond the unambiguous text of a statute."¹⁵ So, the guiding principle of statutory interpretation is to give effect to the legislature's intent by examining and applying the plain language of the statute; unless there is an ambiguity nothing more is required.

A. The habitual offender statute and *Stoudemire*.

In this case, it is only the section of the statute that describes the qualification for enhancement that is at issue. It reads:

769.11. Punishment for subsequent felony of person convicted of 2 or more felonies; sentence for term of years as indeterminate sentence; restrictions upon use of conviction to enhance sentence

Sec. 11. (1) If a person has been convicted of any combination of 2 or more felonies or attempts to commit felonies, whether the convictions occurred in this

¹³ *People v Stewart*, 472 Mich 624, 631 (2005); *People v Davis*, 468 Mich 77, 79 (2003); *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405 (2000); *People v McIntire*, 461 Mich 147, 156 (1999); *People v Valentin*, 457 Mich 1, 5-6 (1998).

¹⁴ *People v Anstey*, 476 Mich 436, 442-443 (2006); *People v Morey*, 461 Mich 325, 329-330 (1999).

¹⁵ *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312 (2002).

state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows:

Both the title and this qualifying section of the statute refer to "a person... convicted of... two or more felonies" without reference to chronology of the offenses or convictions. But this Court in *People v Stoudemire*¹⁶ construed the equivalent language of the previous habitual-offender statute¹⁷ and determined that previous convictions had to involve separate transactions and had to be considered in chronological order when applying the statute. The *Stoudemire* Court stated a literal reading of the statute did not control its application.¹⁸ Instead that Court looked to the New York statute, found identical language and decided, in light of the similarity, that the New York judicial interpretation best captured the intent of the Michigan Legislature. So, the Court concluded the Michigan Legislature also intended that punishment not be enhanced until the offender had been given an "opportunity to reform" and then evinced his intention to reject reformation by committing another crime. Thus was born the same-transaction analysis wherein multiple convictions arising out of the same transaction counted only as a single conviction.¹⁹

¹⁶ *People v Stoudemire*, 429 Mich 262 (1987).

¹⁷ From 1927 to 1978 the qualifying language of the statute was "a person who after having twice been convicted...."

¹⁸ *Stoudemire* at 266.

¹⁹ *Stoudemire* ignored the fact that the habitual-offender statute in place from 1846 through 1915 focused upon an offender who had served a prison sentence (had an opportunity to reform) before committing a subsequent crime. That statute *mandated* enhancement of the subsequent sentence and again mandated enhancement for a second subsequent sentence, giving effect to a same-transaction scheme. By the time of *Stoudemire*, the legislature had eliminated a mandatory enhancement, giving the sentencing court almost unbridled discretion to consider the individual offender.

B. *People v Preuss*²⁰ – "absurd results" and "legislative history" doctrines.

In *Preuss*, this Court was faced with a defendant who demanded re-sentencing as a third rather than fourth-time-habitual offender. He had committed his three previous breaking-and-entering offenses at different times, but he alleged he was convicted and sentenced on the same date for two of the three convictions.²¹ He argued that because he had not been afforded "an opportunity to reform" as required by *Stoudemire*, his sentence had been mistakenly enhanced.

In considering *Preuss*'s position, the Court did not merely look to the language of the statute and note how far from its plain meaning the *Stoudemire* opinion had strayed in divining its sequential-conviction-same-transaction requirement. Instead, it invoked the "absurd results" doctrine and embarked on an analysis of the shortcomings of the *Stoudemire* rationale. It parsed the habitual-offender statute, noting its evolution and finding a much weaker parallel to the New York statutory scheme than that posited in *Stoudemire*. Significantly, the *Preuss* Court noted the qualifying language of the statute on its face (and even the same language as interpreted by the New York Courts) did not suggest any particular sequence of conviction.²² Nor was there Michigan precedent for requiring that offenses and convictions be sequential.²³ Thus *Preuss* disposed of the need for "an opportunity to reform;" it jettisoned the requirement for sequentiality of previous convictions. But the *Preuss* Court did think it necessary to maintain the "same transaction" construction because the "legislative history" of the statute "suggest[ed]" that it was

²⁰ *People v Preuss*, 436 Mich 714 (1990).

²¹ *Preuss*, at 717-718, n 1.

²² *Preuss*, at 726-727.

²³ *Preuss*, at 731-733.

directed at "repeat" or "persistent" offenders.²⁴ There are good reasons to completely overturn *Stoudemire* now.

First, the absurdity doctrine should be applied, if at all, with great caution and in only rare and exceptional circumstances.²⁵ Because the rule has been used most often by courts as a license to ignore the plain language of a statute, to in effect rewrite the law, it has drawn criticism and fired the debate between textualists and cosequentialists. This Court has repudiated the doctrine as a judicial usurpation of the legislative role.²⁶ Whether or not it remains a valid tool of statutory construction, its use must be limited. As Justice Markman noted, the legislature is presumed to be rational and although it might have constructed a more practical statutory scheme, "a statute that is simply less well-crafted than a judge believes it could have been is not for that reason 'absurd.'"²⁷

The absurd results doctrine was not necessary to the resolution of the *Stoudemire* and *Preuss* cases. The qualifying language of the habitual offender statute is not ambiguous. It does not contain an internal logical or linguistic contradiction. And the *Preuss* Court did not define the absurd result that would occur from enhancing sentences according to the terms of the statute. The language of the statute is clear; it does not support the same-transaction analysis.

²⁴ *Preuss*, at 738.

²⁵ *Cameron v Auto Club Insurance Association*, 476 Mich 55, 80 (2006), concurring opinion by Justice Markman, fn 4, cases cited therein.

²⁶ *People v McIntyre*, 461 Mich 147, 155-158 (1999); *Piccalo v Nix*, 466 Mich 861 (2002); *U. S. Fidelity Ins. & Guar. Co. v Michigan Catastrophic Claims Ass'n*, 274 Mich App 184, 731 NW2d 481, 491 (2007).

²⁷ *Cameron v Auto Club Insurance Association*, 476 Mich 55 (2006), concurring opinion by Justice Markman 84..

Also, because of the clarity of the text it was unnecessary to resort to the use of legislative history to apply the statute. The objective meaning of the qualifying language is plain – it does not contain a same-transaction test. Analysis should have ended there; *Stoudemire* should have been overruled. But the *Preuss*²⁸ Court, in order to justify the requirement, looked to a commission report and a governor's address to the legislature which included the terms "persistent" and "repeat" offenders. Of course, one who commits a crime "subsequent" to other convictions is by definition a repeat or persistent offender whether or not those previous convictions were separate or the same transaction. So, those terms did not add meaning to the statute that called for the creation of the same-transaction test. And the legislature, had it wanted to, could have included the same-transaction test in the statute itself²⁹ – other state legislatures have.³⁰

²⁸ *Preuss, supra* at 722, fns 5 & 7.

²⁹ And the legislature's omission to alter the statute after the *Stoudemire* and *Preuss* decisions should not be construed as acquiescence in those decisions. This Court has stated: "[t]he 'legislative acquiescence' principle of statutory construction has been squarely rejected by this Court because it reflects a critical misapprehension of the legislative process." *People v. Hawkins*, 468 Mich 488, 507 (2003).

³⁰ For example: Ariz Rev Stat Ann §13-604 (1989): "A person who has been tried ...and who stands convicted of a serious offense... and who has previously been convicted of two or more serious offenses *not committed on the same occasion* shall be..."; Cal.Penal Code § 667: "...any person convicted of a serious felony who previously has been convicted of a serious felony... shall receive... enhancement for each such prior conviction *on charges brought and tried separately*"; 720 Ill Comp Stat 5/33B-1 (c): "Any convictions which result from or are connected with the same transaction, or result from offenses committed at the same time, shall be counted for the purposes of this Section as one conviction."; Mo Rev Stat 558.016: "A 'persistent offender' is one who has pleaded guilty to or has been found guilty of two or more felonies committed at different times."; 21 Okla Stat Supp 51(B): "Felony offenses relied upon for enhancement shall not have arisen out of the same transaction or occurrence or series of events closely related in time and location."

II. Conclusion

MCL 769.11 describes a "person convicted of two or more felonies" as an habitual-third offender qualified for sentence enhancement. The statute does not distinguish between two convictions that occur on the same day that arise out of the same transaction and two convictions that occur on the same day that arise from distinct circumstances. It is only the "legislative history" and "absurd results" rules that tether the same-transaction requirement to the statute's operation. And that baggage causes its own inconsistency. The defendant who robs two people by walking from one house to another and pleads guilty to both offenses on the same day may face habitual third enhancement of his sentence for a third conviction.³¹ But a defendant who robs two people at the same time in the same house and pleads guilty to those two crimes on the same day, according to *Preuss*, will not face an equivalent sentence enhancement upon conviction for a third offense. Why? Neither actor is more persistent or more a repeat offender than the other.

As the *Preuss* Court noted, the scheme is "flawed," but it is that opinion, not the statute, that is the source of the problem. This case presents the opportunity to overrule *People v Stoudemire* and give effect to the plain meaning of the statute. The People urge this Court to seize the moment, overrule *Stoudemire*, and deny this defendant relief.

³¹ For example, defendant-Hampton's prior felony offenses occurred on the same date, within the same hour, but in adjacent buildings, two separate victims. With two convictions, his sentence for a subsequent offense conviction could be enhanced; he was an habitual third offender. *People v Hampton*, 439 Mich 860 (1991).

RELIEF

The People request this Honorable Court to overrule *People v Stoudemire* and deny the defendant's requested relief.

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