

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK DEWAYNE McDANIEL,

Defendant-Appellant.

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UNPUBLISHED  
February 21, 2003  
APPROVED FOR  
PUBLICATION  
April 8, 2003  
9:00 a.m.

No. 235094  
Ingham Circuit Court  
LC No. 01-076673-FH

Updated Copy  
May 23, 2003

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

DONOFRIO, J. (*dissenting*).

I concur in part and respectfully dissent in part. I would affirm defendant Derrick D. McDaniel's conviction for the same reasons as the majority; however, I would remand the case to the trial court for resentencing.

Defendant raises a challenge to the scoring of his sentence under the sentencing guidelines. Defendant argues that the trial court mis-scored offense variable 13 (OV 13) regarding his first-degree retail fraud conviction. First-degree retail fraud is a class E felony against property, requiring scoring of OV 13, continuing pattern of criminal behavior. MCL 777.16r; MCL 777.22(2); MCL 777.43(1). In scoring OV 13, the court is required to score ten points where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person or property." MCL 777.43(c). The statute allows consideration of "all crimes within a 5-year period, including the sentencing offense . . . regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

I believe that defendant was incorrectly scored under subsection MCL 777.43(c). The majority agrees with the prosecutor's interpretation of the statute and asserts that "[t]he use of the indefinite article 'a' reflects that no particular period is referred to in the statute." I disagree. The language at issue states that "all crimes within a 5-year period, *including the sentencing offense*, shall be counted." MCL 777.43(2)(a) (emphasis added). Because the word "shall" is used, I find it is impossible for any five-year period that does not include the sentencing offense to be considered. Contrary to the majority's interpretation of the statute, my reading of the statutory language clearly precludes consideration of a five-year period that does not include the

sentencing offense. Crimes outside the five-year period contemplated are already considered in the prior record variables.

My review of defendant's criminal record does not indicate *any* three or more felonies occurring within the immediate five-year period; thus, scoring ten points was inappropriate. This scoring error resulted in an elevated guidelines recommendation. MCL 777.21(3)(c); MCL 777.66.

I believe that defendant has established error that resulted in his incarceration beyond the appropriate minimum range under the guidelines, and I would remand for correction of the guidelines scoring error and resentencing.

/s/ Pat M. Donofrio