

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MERLIN LEE STONER,

Defendant-Appellant.

FOR PUBLICATION

December 2, 2021

9:00 a.m.

No. 355317

Monroe Circuit Court

LC No. 19-245435-FH

Before: GLEICHER, P.J., and K. F. KELLY and RONAYNE KRAUSE, JJ.

PER CURIAM.

After Merlin Lee Stoner pleaded guilty to carrying a concealed weapon (CCW), MCL 740.227, the court sentenced him as a fourth-offense habitual offender, MCL 769.12, to 48 to 240 months’ imprisonment. We granted Stoner’s delayed application for leave to appeal, *People v Stoner*, unpublished order of the Court of Appeals, entered December 2, 2020 (Docket No. 355317), to consider one issue: whether the trial court properly assessed 25 points for Offense Variable (OV) 12. The court did not. We vacate Stoner’s sentence and remand for resentencing based on correctly scored guidelines.

I. BACKGROUND

On September 3, 2019, Stoner approached three people outside a gas station, pointed a handgun at the group, and said, “[Y]ou better watch yourself.” Soon thereafter, Stoner again approached the group, this time holding the gun in the air above his head. Stoner then drove away. The prosecution charged Stoner with one count of CCW, three counts of assault with a dangerous weapon (felonious assault), and five other firearm offenses. In exchange for dismissal of the other charges, Stoner pleaded guilty to the single CCW charge. As the factual basis for his plea, Stoner admitted that he carried a concealed weapon without a permit on the day in question.

Without objection, the sentencing court adopted the probation department’s recommendation of assessing 25 points for OV 12. OV 12 is governed by MCL 777.42, which provides:

(1) [OV] 12 is contemporaneous felonious criminal acts. Score [OV] 12 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) Three or more contemporaneous felonious *criminal acts* involving *crimes* against a person were committed.....25 points

(b) Two contemporaneous felonious criminal acts involving crimes against a person were committed.....10 points

* * *

(d) One contemporaneous felonious criminal act involving a crime against a person was committed.....5 points

* * *

(g) No contemporaneous felonious criminal acts were committed.....0 points

(2) All of the following apply to scoring [OV] 12:

(a) A felonious criminal *act* is contemporaneous if both of the following circumstances exist:

(i) The *act* occurred within 24 hours of the *sentencing offense*.

(ii) The act has not and will not result in a separate conviction. . . . [Emphasis added.]

With the 25-point score for OV 12, Stoner’s total OV score of 50 points placed him in OV level V. Stoner’s unchallenged prior record variable (PRV) score of 120 placed him in PRV level F. As a fourth-offense habitual offender, Stoner’s recommended minimum sentencing guidelines range was 22 to 76 months. The court sentenced Stoner within that range.

Stoner subsequently sought resentencing, arguing that OV 12 was improperly scored. Specifically, Stoner contended that he committed only one *act* of pointing a gun at a group of three people, not three separate criminal acts of pointing a gun at three separate people. With no criminal acts contemporaneous to the sentencing offense of CCW, Stoner contended that OV 12 should be assessed zero points. Stoner acknowledged that his one criminal act did result in three separate charges of assault, but those charges had been dismissed as part of the plea agreement.

The trial court denied Stoner’s motion for resentencing because at the time Stoner committed CCW, he pointed his gun at three separate people. The connected assault charges were dismissed, but were factually supported, the court noted. Accordingly, the court found that Stoner had committed three separate criminal acts against a person that would not result in separate convictions that could be considered for scoring OV 12.

II. ANALYSIS

We review for clear error a trial court's factual determinations at sentencing and ensure that the findings are supported by a preponderance of the evidence. *People v Carter*, 503 Mich 221, 226; 931 NW2d 566 (2019). "Whether the facts, as found, are adequate to warrant the assessment of points under the pertinent OVs . . . is a question of statutory interpretation" that we review de novo. *Id.*

In relation to MCL 777.42, the Supreme Court has clarified that "[b]ecause the Legislature used the word 'act' in one portion of MCL 777.42(2)(a)(i) and the phrase 'sentencing offense' later in the same sentence, we must presume it intended to draw a distinction between the two." *Carter*, 503 Mich at 227 (citing the statute's reliance on the number of "felonious criminal *act[s]* occur[ring] within 24 hours of the *sentencing offense*"). *Carter* relied on this Court's earlier opinion in *People v Light*, 290 Mich App 717, 725-726; 803 NW2d 720 (2010), and held

a determination of whether an offender has engaged in multiple "acts" for purposes of OV 12 does not depend on whether he or she could have been charged with other offenses for the same conduct. What matters, instead, is whether the "sentencing offense" can be separated from other distinct "acts." [*Carter*, 503 Mich at 227.]

In *Carter*, the defendant was convicted of one count of assault with intent to do great bodily harm (AWIGBH) for shooting three times at an apartment door behind which hid his intended victim and the victim's family. *Id.* at 224. The question at sentencing was "whether each separate pull of the trigger constitute[d] a separate 'act' " for purposes of scoring OV 12. *Id.* at 223. The Court noted that the term "sentencing offense" had been defined in the context of scoring OVs "as 'the crime of which the defendant has been convicted and for which he or she is being sentenced.'" *Id.* at 227 (citation omitted). In *Carter*, the sentencing offense was the single AWIGBH conviction. *Id.* The Court "therefore examined the record to determine whether factual support for defendant's AWIGBH conviction was established on the basis of all three gunshots or only one." *Id.* at 227-228. The Court reviewed the evidence and the prosecutor's arguments and concluded that "the prosecution relied on all three gunshots as evidence of defendant's intent to commit murder or inflict great bodily harm." *Id.* at 229. Therefore, "a finding that two of the gunshots were not part of the sentencing offense cannot be supported by the evidence." *Id.* The Supreme Court reversed this Court's decision to distinguish two of the gunshots from the third, which this Court treated as the sentencing offense. *Id.* However, the Court acknowledged that other factual scenarios might arise that could lead to an opposite conclusion. *Id.* at 229-230.

In *Light*, 290 Mich App at 719, the defendant stole a six-pack of beer and \$300 from a grocery store while armed with a knife. The prosecutor charged the defendant with armed robbery, but he pleaded guilty to unarmed robbery. At sentencing, the defendant objected to the assessment of five points for OV 12. *Id.* at 720. The court overruled the objection and found that the defendant "had committed two or more contemporaneous felonious acts":

The trial court used the carrying of a concealed weapon as one of the two contemporaneous felonious criminal acts because of the knife that [the defendant] carried and then used to commit the robbery. For the second contemporaneous act, the trial court considered both larceny from a person and larceny in a building. [*Id.*]

This Court agreed that larceny from a person was a necessarily included lesser offense of robbery and that larceny from a building was a cognate offense, as determined by the trial court. *Id.* at 725. However, this Court rejected the OV 12 scoring analysis on factual grounds:

[F]or OV 12 scoring purposes, [the defendant's] physical act of wrongfully taking [the victim's] money while inside a grocery store is the same single act for all forms of larceny—robbery, larceny from a person, and larceny in a building. Therefore, even though the trial court sentenced [the defendant] for unarmed robbery, [the] sentencing offense included all acts “occur[ring] in an attempt to commit the larceny, or during commission of the larceny, or in flight or attempted flight after the commission of the larceny, or in an attempt to retain possession of the property.” [MCL 750.530(2).]

Here, the robbery completely subsumed the larceny. The fact that the larceny occurred in a building, and thus could have subjected [the defendant] to multiple convictions, does not change the outcome. Even though the trial court did not convict [the defendant] of either form of larceny, both offenses form the basis of [the defendant's] “sentencing offense” of unarmed robbery. Because [the defendant's] sentencing offense was unarmed robbery, neither form of larceny could be used as the contemporaneous felonious act needed to increase [his] OV 12 score. In other words, the language of OV 12 clearly indicates that the Legislature intended for contemporaneous felonious criminal acts to be acts other than the sentencing offense and not just other methods of classifying the sentencing offense. [*Id.* at 725-726.]

What *Carter* and *Light* make clear is that under MCL 777.42 only the number of underlying criminal *acts* is to be considered when scoring OV 12, not the number of *crimes* that may be charged from those acts. To read the statute otherwise would “render the statutory language nugatory.” *Light*, 290 Mich App at 722. If the Legislature intended for the number of crimes against a person instead of the underlying acts forming the basis of those crimes to be considered when scoring OV 12, it would not have modified the word “acts” with the word “involving,” nor would it have distinguished “act” from “sentencing offense” or “crime.”

Since a criminal act is distinct from the crimes that may arise therefrom for purposes of scoring OV 12, the question becomes whether Stoner's conduct of pointing the gun at the group constituted one act or multiple acts, regardless of the number of resulting crimes. It has long been established that an individual who fires a gun at a crowd may be guilty of assault upon each person within that crowd. *Carter*, 503 Mich at 229 n 28, citing *People v Rahe*, 92 Mich 165, 166; 52 NW 625 (1892). Thus, it is also true that pointing a gun at a group of people may give rise to multiple felonious assault charges, as happened here.

A comparison to *Carter* aids our analysis. In *Carter*, the defendant pulled the trigger three times in rapid succession. Depending on the factual context, this could constitute three separate acts or only one. *Carter*, 503 Mich at 227-230. Because the prosecution in *Carter* relied on all three gunshots to support a single AWIGBH act during its closing argument, however, the Court did not need to consider the issue further. None of the three shots could be separated from the sentencing offense, making the conduct ineligible for consideration under OV 12. *Id.* at 229.

Although the Court limited its holding to the facts of that case, it indicated that there may be “circumstances under which multiple gunshots may constitute separate ‘acts.’ ” *Id.* at 230. Similarly, there may be circumstances in which pointing a gun at a group of people may constitute separate acts. Perhaps, for example, if the defendant specifically pointed the gun at each individual in the group. The prosecution and the sentencing court seemed to advance this theory below.

At the resentencing motion hearing, the prosecution argued that “wav[ing] a gun around at three people” constitutes three separate acts because each individual in the group would feel threatened. The trial court similarly reasoned that each victim could have thought Stoner was pointing the gun at him or her. The trial court therefore determined that Stoner did “point[] the gun at three individual people,” constituting three separate felonious acts for OV 12 purposes.

Under a clearer factual record, these arguments may have been persuasive, but we are limited to the record presented below. *People v Canter*, 197 Mich App 550, 557; 496 NW2d 336 (1992); MCR 7.210(A). The record in this case does not indicate that Stoner specifically targeted any of the three individuals in the group, as the prosecution and the trial court suggested. Instead, the record only indicates that Stoner “pointed [the gun] at them,” referring to “the trio” as a whole. The record indicates that Stoner continued to approach the group “while holding the gun in the air above his head,” as opposed to pointing the gun towards the group or any of its individual members. It was error to consider this to be three separate “acts” or “crimes” based on the presence of three individuals. At most, the court could find one additional “act” based on Stoner’s second armed approach of the group.

Considering Stoner’s second approach as one “contemporaneous felonious criminal act,” the trial court could have properly assessed five points for OV 12. MCL 777.42(1)(d). This would reduce Stoner’s total OV score to 30 and his OV Level to III. The recommended minimum sentencing guidelines range for a Class E felony for a fourth-offense habitual offender in cell III-F is 14 to 58 months. When a scoring error alters the guidelines recommended minimum sentence range, a defendant is entitled to resentencing on the basis of properly scored guidelines, even if the defendant’s actual minimum sentence falls within the corrected guidelines range. *People v Francisco*, 474 Mich 82, 88-91; 711 NW2d 44 (2006); MCL 769.34(10). Accordingly, Stoner is entitled to resentencing based on corrected guidelines.

We vacate Stoner’s sentence, and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Kirsten Frank Kelly
/s/ Amy Ronayne Krause