

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

Plaintiff-Appellee,

v

No. 194990

Oakland Circuit Court

ROSCOE C. HUMPHREY, Jr.,

LC No. 88-087725-FC

Defendant-Appellant.

Before: Young, Jr., P.J., and Michael J. Kelly and Doctoroff, JJ.

MICHAEL J. KELLY, J. (concurring)

I concur in the result reached by the majority per curiam opinion and write only to suggest that a scoring error which includes, inappropriately, a felony conviction for armed robbery is not insulated from appellate review by the rule of *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997).

The reason I concur in the majority opinion is that defendant cannot show actual prejudice from the irregularities that support this claim. Defendant's December 17, 1969 felony conviction for armed robbery was not set aside until August 19, 1977 when his delayed motion for new trial was granted in Detroit Recorder's Court. No new trial was ever held because defendant had already served the seven-and-a-half to twenty-year prison sentence which he received for that offense. At the time of sentencing in this case, the trial court, the prosecutor, and defense counsel all knew of the vacated felony conviction. Under these circumstances, I believe the failure to raise that issue either at the time of sentencing or on appeal constitutes harmless error.

Under other circumstances a misscored felony which materially increases the guidelines could create a false or unsupported factual predicate justifying relief under *Mitchell, supra*.

/s/ Michael J. Kelly