

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH HONORABLE,

Defendant-Appellant.

UNPUBLISHED

April 20, 2001

No. 228397

Kent Circuit Court

LC Nos. 99-006968-FH;

99-006969-FH;

99-006970-FH

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Before: Hoekstra, P.J., and Whitbeck and Cooper, JJ.

PER CURIAM.

Defendant Joseph Honorable pleaded guilty of three counts of breaking and entering a building with intent to commit larceny.<sup>1</sup> The trial court sentenced him to concurrent terms of 3½ to 10 years' imprisonment for each conviction, which exceeded the sentence recommended under the guidelines. We granted Honorable's application for leave to appeal and now affirm.

I. Basic Facts And Procedural History

In June 1999, the prosecution charged Honorable, a minor, with seven counts of breaking and entering at various stores in Grand Rapids between May 20 and June 1, 1999. In July 1999, after Honorable waived a "first phase" hearing, the family court waived jurisdiction to the regular trial division of the circuit court. The dispositional order also discharged the attorney initially appointed to represent Honorable. Later that month, the trial court appointed attorney Richard Zambon to represent Honorable.

The prosecutor filed a separate information for each charge. On the date set for trial, Honorable pleaded guilty to three counts of breaking and entering in exchange for dismissal of the four other charges. As a factual basis for the pleas, Honorable admitted that he acted as a "lookout" on three different occasions.

The probation agent who interviewed Honorable to prepare the presentence investigation report (PSIR) asked Honorable his version of the offenses, to which Honorable reportedly replied, "I broke into small stores and I was a lookout." The PSIR the probation agent subsequently prepared also included the probation agent's analysis of criteria for determining if

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<sup>1</sup> MCL 750.110; MSA 28.305.

Honorable should be sentenced as an adult. With regard to the first criterion, the probation agent asserted that the instant offenses should be considered most serious because Honorable was involved with a group of approximately eight juveniles who, police estimated, had committed one hundred breaking and entering offenses in the Grand Rapids area. Honorable had admitted to participating in approximately fifteen or sixteen of these crimes.

With regard to the second criterion, a defendant's culpability, the probation agent concluded that Honorable was particularly culpable because he admitted to participating in approximately fifteen or sixteen of the crimes and the investigating detective indicated that Honorable should be considered a ring leader.

With regard to the third criterion, a defendant's prior record, the probation agent indicated that Honorable was on probation for retail fraud offenses and had charges pending in the family court for "UUA" and runaway at the time of the instant offenses. Further, according to the probation agent, Honorable was non-compliant with the terms of his probation and had curfew problems. After considering other criteria, the probation agent recommended that Honorable be sentenced as an adult. A sentencing information report using the statutory sentencing guidelines was also prepared for each conviction. The minimum sentence range for each offense was ten to twenty-three months in prison.

The trial court conducted the sentencing hearing in December 1999, at which time Zambon did not object to the PSIR or how the offense was scored under the sentencing guidelines. Zambon asked the trial court to impose a sentence within the guidelines. During allocution, Honorable stated that he had made mistakes but was ready to change his life. The prosecutor did not recommend a particular sentence. The trial court found that it was unlikely that Honorable was involved in all the offenses that his group committed, but commented that

by defendant's own acknowledgment, we're talking about involvement in several, several instances of breaking and entering, and by that I mean, we have initially here charged against him, I think, seven different counts, and the people he was involved with were involved in numerous other counts, probation presentence report talks about up to 70 or thereabouts.

The trial court concluded that the "guidelines simply, in my mind, do not adequately take into account the severity of your offenses here." Consequently, the trial court imposed concurrent sentences of 3½ to 10 years' imprisonment on Honorable for each count, with credit for the 184 days he had already served. The trial court also prepared a sentencing guidelines departure form, which stated:

Substantial & compelling reasons for upward departure is the large number of contemporaneous B&Es def't and his accomplices were involved in. Guidelines reflect substantially smaller # for the score given. It would be disproportionate not to take into account the sheer # of B&Es def't has involved in. Guidelines simply fail to do so.

In May 2000, Honorable, through his appellate attorney, moved for resentencing and an evidentiary hearing regarding whether his trial attorney, Zambon, was ineffective by allowing

Honorable to utter a “confession” at the plea hearing that he had committed other breaking and entering offenses and was guilty of all charged crimes. Honorable alleged that Zambon was ineffective because he did not object to the scores for two offense variables under the guidelines, OV 14 and OV 16. Honorable’s motion claimed that the PSIR inaccurately stated his arrest as June 2, 1999, rather than May 30, 1999, and that it was highly unlikely that he could have committed the crimes for which the prosecutor dismissed charges against him because of the times when they were committed. Further, he argued that his sentences were disproportionate under *People v Milbourn*<sup>2</sup> and that his ability to review criteria for adult sentencing was harmed by his stipulation for a waiver from the family division of the circuit court to the adult trial division of the circuit court. The prosecutor opposed resentencing and holding an evidentiary hearing.

When the trial court conducted a hearing on the motion later that month, Honorable’s appellate attorney stated that Honorable had told her that he did not make the statement in the PSIR about acknowledging his involvement in fifteen or sixteen breaking and entering offenses. She suggested that, because Honorable’s speech was difficult to understand, the probation agent simply misunderstood what he had said. She reiterated that it was unlikely that he had committed the four offenses for which the prosecutor had dismissed the charges against Honorable. The trial court indicated that whether Honorable was guilty of all seven charges was not important and Honorable had been given an opportunity at sentencing to correct any misconception about the information considered at sentencing. Further, in response to Honorable’s argument that his offense had been misscored under the guidelines, the trial court (incorrectly) stated that the “old guidelines, not the new guidelines” were used at sentencing. When denying relief, the trial court stated:

I want to make clear on the record I’m not assuming he committed all these 70. I take your – what you presented here, that there may be good reason that he’s not guilty of a couple. I don’t know, maybe he was, maybe he wasn’t, but the basis of my sentencing was involvement in other charged or uncharged breaking and enterings, and whether he was guilty of all of them or not, it was not, to me, the issue. It was a clear belief that he was involved in several others, whether they were charged or uncharged it didn’t matter, whether they were specific ones or not, but that was the bottom line to me, and I still feel that today.

Although denying the motion for resentencing or an evidentiary hearing, the trial court applied an additional three days’ sentence credit, to which Honorable was clearly entitled.

On appeal, Honorable argues that Zambon committed several serious errors. As a result, he claims, he was prejudiced in the form of a disproportionately lengthy sentence.<sup>3</sup>

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<sup>2</sup> *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

<sup>3</sup> Although Honorable mentions the possibility that his sentence is disproportionate to the crime he committed, he confined his arguments on appeal to effective assistance of counsel and has not separately raised the proportionality issue.

## II. Ineffective Assistance Of Counsel

### A. Legal Standards

A defendant is entitled to effective assistance of counsel during sentencing to take advantage of “the opportunity afforded for presentation to the Court of facts in extenuation of the offense, or in explanation of the defendant's conduct; to correct any errors or mistakes in reports of the defendant's past record; and, in short, to appeal to the equity of the Court.”<sup>4</sup> “Effective assistance of counsel is presumed” and “[t]he defendant bears a heavy burden of proving otherwise.”<sup>5</sup> To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel’s performance was deficient, i.e., “show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.”<sup>6</sup> This necessarily entails proving prejudice to the defendant, which means that there is “a reasonable probability that, but for counsel’s unprofessional errors, the result would have been different.”<sup>7</sup> Because the trial court did not grant Honorable’s motion for an evidentiary hearing, our review is limited to errors apparent on the record unless he demonstrates the need for an evidentiary hearing in this appeal.<sup>8</sup>

### B. Defense Counsel’s Remarks At the Plea Hearing

Honorable first argues that his trial attorney was ineffective because, at the plea hearing, he suggested that Honorable was involved in several uncharged breaking and entering offenses. As a result, he argues, he was prejudiced because the trial court relied on this unfounded assertion that was contrary to his interest to sentence him to a minimum prison term that exceeded the range recommended under the statutory sentencing guidelines. However, Zambon’s remarks were not aimed at incriminating Honorable. Rather, they referred to the plea agreement Honorable entered into with the prosecutor. Evidently, Honorable pleaded guilty to three breaking and entering offenses in return for the prosecutor’s agreement to drop the four other charges and not to charge him for additional related or similar offenses. We see no reason to conclude that Zambon’s remarks fell below a level of reasonable practice, given that he made the remarks so that the trial court would accept Honorable’s guilty pleas in light of the full agreement struck in return for those pleas. Further, the trial court’s comments on the record at sentencing did not reveal that it was relying on defense counsel’s remarks concerning Honorable’s possible involvement in other uncharged offenses, made four months earlier, when imposing sentencing.

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<sup>4</sup> *People v Dye*, 6 Mich App 217, 219; 148 NW2d 501 (1967), quoting *Gadsden v United States*, 96 US App DC 162, 165; 223 F2d 627 (1955).

<sup>5</sup> *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

<sup>6</sup> *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

<sup>7</sup> *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

<sup>8</sup> See *People v Avant*, 235 Mich App 499, 507-508; 597 NW2d 864 (1999).

Honorable also claims that Zambon was ineffective at the plea hearing because he waived a preliminary examination and mistakenly referred to the offenses charged in this case as crimes that are automatically waived to the adult trial division of the circuit court.<sup>9</sup> However, he has not explained how either of these alleged errors could have possibly affected the actual sentence imposed in this case. As far as we can tell from the record, these alleged errors might be remotely relevant if Honorable were seeking to withdraw his plea by arguing that there was insufficient evidence of his guilt of the charged offenses or if he were to challenge the regular trial division of the circuit court's jurisdiction over him. However, he has never sought to withdraw his plea, much less claimed that there was insufficient evidence of his guilt, which might have been determined at a preliminary examination. In fact, he specifically declined the opportunity to have a preliminary hearing. He has not argued that the regular division of the circuit court lacked jurisdiction over him, nor that Zambon could be considered ineffective for Honorable's previous attorney's decision not to challenge waiver in this case. In short, Honorable has not demonstrated ineffective assistance of counsel with these arguments focusing on proceedings that did not directly concern sentencing.

### C. OV Scoring

Honorable next argues that Zambon was ineffective because he did not object to the way the offense variables were scored. Honorable claims that the trial court misscored his offenses at ten points under OV 14.<sup>10</sup> Ten points apply under OV 14 if a defendant was "a leader in a multiple offender situation[.]"<sup>11</sup> The instructions accompanying this variable specifically state that the trial court should consider the whole offense and that there may be more than one leader in an offense involving three or more people.<sup>12</sup> That Honorable acted with others is not in dispute. Whether there were three or more people involved in each offense is not completely clear. Nor are we certain what evidence specifically supported the trial court's conclusion regarding Honorable's leadership role. The only mention of leadership in the record is the probation agent's conclusion that Honorable was a leader. If the probation agent had *any* information supporting his conclusion on this issue, he did not include it in the PSIR and we cannot find it in the record. The plea hearing transcript and other materials in the record do not reveal what sort of relationship Honorable had with the other juveniles committing these offenses, much less that he had a leadership role among these individuals. Thus, we think it possible to conclude that Zambon did not discharge his duty to object to the score under this variable in a timely fashion.<sup>13</sup> Nevertheless, while this score may have been an error, Zambon's failure to object to this error does not constitute error requiring reversal because the trial court's determination that a sentence above the range recommended in the guidelines was appropriate was the reason Honorable received this longer sentence, not the scoring error itself.

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<sup>9</sup> See *People v Conat*, 238 Mich App 134, 140-141; 605 NW2d 49 (1999), referring to offenses enumerated in MCL 764.1f(1); MSA 28.860(6)(1).

<sup>10</sup> MCL 777.44; MSA 28.1274(54).

<sup>11</sup> MCL 777.44(1)(a); MSA 28.1274(54)(1)(a).

<sup>12</sup> MCL 777.44(2); MSA 28.1274(54)(2).

<sup>13</sup> MCL 769.34; MSA 28.1097(3.4).

In other words, had the trial court indicated that it intended to sentence Honorable within the guidelines, then the range recommended under the guidelines using this scoring error would have been the reason why Honorable received a longer sentence. A proper calculation of OV 14 would have placed Honorable at OV Level II instead of OV III, which would have resulted in a recommended minimum sentence of five to twenty-three months in prison, rather than a recommended minimum sentence of ten to twenty-three months in prison. However, the trial court sentenced Honorable to a minimum forty-two-month prison sentence, higher than the minimum sentences recommended for a class D offense with a prior record variable of twenty-five to forty-nine points, regardless of whether the OV level was II or III. Any objection Zambon could have made to the scoring under this issue, while proper, would have had no effect on the sentence the trial court ultimately imposed. Thus, Honorable has not demonstrated the requisite prejudice from this error to earn a new trial.

Honorable also contends that Zambon was ineffective for failing to object when the trial court scored his offenses at five points under OV 16, which is proper if there is evidence that the “property obtained, damaged, lost, or destroyed”<sup>14</sup> in the offense “had a value of \$1,000.00 or more but not more than \$20,000.00[.]”<sup>15</sup> The instruction accompanying OV 16 indicates that the trial court has discretion to aggregate the value of property when there are multiple offenders or victims and may consider “property involved in uncharged offenses or charges dismissed under a plea agreement.”<sup>16</sup> The PSIR indicates that in case number 99-06968, Honorable and his companions took approximately \$170 in cash and caused damage costing approximately \$400 and in case number 99-06969 they took \$125 in cash and caused damage amounting to \$188. How much Honorable and his companions stole in case number 99-06970 and the amount of damage they caused during that breaking and entering was never determined. None of these three offenses involved property stolen or damaged with a value that exceeded \$1,000 documented in the trial court record. While it would have been appropriate for the trial court to consider the other property stolen or damaged in the cases encompassed by the plea bargain, the record does not indicate the value of any such property. As with OV 14, if the trial court had assessed fewer points for OV 16, Honorable would have been placed in OV level II, rather than OV level III, and a lower sentence would have been recommended under the guidelines. However, as we explained above, the guidelines did not form the basis for the sentence the trial court imposed in this case. Therefore, assuming that all the property the trial court could have aggregated when scoring this variable did not exceed \$1,000 in value, Honorable has failed to demonstrate the necessary prejudice from Zambon’s failure to object to this scoring.

#### D. Inaccuracies In The PSIR

Honorable contends that Zambon was ineffective by representing to the trial court that the information in the PSIR was accurate when, in fact, it included inaccurate information regarding his arrest date, which is relevant to sentence credit, and his admission to the probation agent that

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<sup>14</sup> MCL 777.46(1); MSA 28.1274(56)(1).

<sup>15</sup> MCL 777.46(1)(c); MSA 28.1274(56)(1)(c).

<sup>16</sup> MCL 777.46(2)(c); MSA 28.1274(56)(2)(c).

he was involved in approximately fifteen or sixteen other breaking and entering offenses. We dispense with this first argument summarily because, at the hearing on Honorable's post-conviction motion, the trial court recognized and corrected the error concerning the amount of sentence credit to which he was entitled. Thus, Zambon's failure to notice this inaccuracy and bring it to the trial court's attention at sentencing was harmless because Honorable now has all the sentence credit he earned.

Honorable's claim concerning his supposed admission to the probation agent that he had committed these many other crimes is ultimately unpersuasive.<sup>17</sup> The trial court heard Honorable speak when they engaged in the plea colloquy. Had the trial court believed that Honorable was so difficult to understand that the probation agent misunderstood what he said, it would have granted the motion for the evidentiary hearing and explored the issue further. The transcript of the plea hearing submitted in this appeal indicates that Honorable spoke with sufficient clarity to allow the court reporter to take his testimony without any reminders to speak more loudly or to enunciate, which suggests that his speech was not so difficult to understand that Zambon knew or should have known of a problem Honorable had communicating with the probation agent. Moreover, without an offer of proof of what Zambon would state regarding his knowledge of the probation agent's misinterpretation of Honorable's "admission" to fifteen or sixteen additional crimes if he were called to testify at an evidentiary hearing, we have no reason to believe that he had any reason to doubt the veracity of the assertions in the presentence investigator's report. Indeed, the transcript from sentencing indicates that the investigation discussed the report with Honorable and Honorable had not indicated that anything in the report was incorrect. Thus, even though the trial court plainly relied on the statement in the PSIR that Honorable had committed these other crimes,<sup>18</sup> Honorable has failed to demonstrate that Zambon committed an error when he failed to object to their existence. Nor has he proved the need for an evidentiary hearing on this matter.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ William C. Whitbeck  
/s/ Jessica R. Cooper

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<sup>17</sup> We note that the proper time to challenge the accuracy of the PSIR is at or before sentencing, or as soon as the alleged inaccuracy could have been discovered reasonably. MCR 6.429(C). However, Honorable's challenge to the inaccuracy in the report is indirect in this case in the sense that his argument on appeal focuses on Zambon's failure to object within these procedural constraints. Thus, we have not relied on preservation of a sentencing issue to resolve this part of the appeal.

<sup>18</sup> Relying on Honorable's admission was proper. *People v Fleming*, 428 Mich 408, 417-418; 410 NW2d 266 (1987).