

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY DOUGLAS CADWELL,

Defendant-Appellant.

UNPUBLISHED

December 20, 2002

No. 236381

Grand Traverse Circuit Court

LC No. 99-008042-FH

Before: Owens, P.J., and Murphy and Cavanagh, JJ.

MEMORANDUM.

Defendant appeals as on leave granted after remand from the Supreme Court his three- to fifteen-year sentence for second-degree home invasion, MCL 750.110a(2). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that the trial court erred in scoring legislative sentencing guidelines variable PRV 5, MCL 777.55. Defendant failed to timely raise this challenge.

MCR 6.429(C) states:

A party may not raise on appeal an issue challenging the accuracy of the presentence report or the scoring of the sentencing guidelines unless the party has raised the issue at or before sentencing or demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. Any other challenge may be brought only by motion for relief from judgment under subchapter 6.500.

The issue of when a guidelines scoring error must be brought to the trial court's attention is a matter of practice and procedure that is governed by the court rule rather than the statute. *People v McGuffey*, 251 Mich App 155, 165; 649 NW2d 801 (2002). There is no reason the alleged inaccuracy could not have been discovered at the time of sentencing, and defendant is foreclosed from raising a challenge to the scoring on appeal. See *Id.*

A timely challenge to the scoring would not have been successful, thus defendant was not denied the effective assistance of counsel in trial counsel's failure to raise the issue. See *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

A sentencing court has discretion in determining the number of points to be scored on a guidelines variable, provided that evidence of record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Scoring decisions for which there is any evidence in support will be upheld. *Id.* If a sentencing issue requires the application of the instructions in the legislative sentencing guidelines, it is a question of law reviewed by this Court de novo. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002).

For purposes of PRV 5 scoring, MCR 777.55(2)(a) instructs the court to count a prior misdemeanor conviction or juvenile adjudication only if it is an offense against a person or property, a controlled substances offense, or a weapon offense. Unlike felonies, the Legislature did not place misdemeanors into categories. In the absence of more specific legislative guidance, it was for the trial court to determine whether defendant's misdemeanor conviction for disorderly jostling, MCL 750.167(1)(k), was a crime against a person. The court noted that the jostling offense involved unconsented touching of other persons. The trial court did not err in finding that this was an offense against a person that should be scored under MCL 777.55.

Affirmed.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Mark J. Cavanagh