

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLARK HAROLD WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

April 12, 2005

No. 248911

Monroe Circuit Court

LC No. 02-032284-FH

Before: Whitbeck, C.J., and Zahra and Owens, JJ.

PER CURIAM.

Defendant Clark Williams appeals as of right his jury conviction for felon in possession of a firearm.¹ Williams was sentenced as a third habitual offender² to 3 to 10 years in prison. We affirm.

I. Basic Facts And Procedural History

Williams and his coworker, Christopher Szarek, were working after midnight on June 29, 2002. Earlier in the evening, Szarek had discussed going to the home of Williams' father the next day to do some "shooting on his property." When Szarek finished his shift at approximately 2:30 a.m., Williams suggested that they do some shooting then. Szarek thought there was something "a little different" about Williams and decided to follow him home to ensure that he made it home safely. Szarek told Williams that he would stay overnight and that the two could do some shooting the following day.

When they arrived at the home, Szarek had reservations about doing any shooting at all because the home of Williams' father was more residential than Szarek thought it would be. However, Williams took an assault rifle into the backyard and began firing bullets into the ground in front of him. Szarek convinced Williams to go back inside the home. Minutes later, Williams went into the front yard and began firing the weapon into the gravel in the driveway. The two men again went back inside. Shortly thereafter, Williams went into the back yard and

¹ MCL 750.224f.

² MCL 769.11.

again fired the weapon. Szarek decided to leave once he determined that Williams was finished firing the weapon.

Karl Borso, the Williams' neighbor, heard the gunshots, and Borso's wife called the police. As Borso stepped outside to determine where the gunshots were coming from he heard five more gunshots. Borso then drove down the road in the direction from which he heard the gunshots, and noticed that the lights were on at Williams' father's home. Another neighbor, Ronald Mann, also heard the gunshots. Mann stepped outside of his home and noticed the silhouette of a person walking back and forth from the garage of the home of Williams' father to the end of the driveway. He heard someone yell, "I'm sorry," followed by several gunshots. Mann went back into his house and called the police, who were dispatched to the home of Williams' father.

Sergeant Brett Ortolano and Officer John Bills approached the front door of the home of Williams' father, and Officer William Owens went to the back. Ortolano knocked on the door and announced himself as a police officer. No one answered the door. Ortolano walked around the home toward the garage and looked through the windows to see if anyone was in the home. While in a breezeway, he looked through a window and saw Williams lying on a couch.

Ortolano knocked on the window, announced his presence as a police officer, and asked Williams if he was okay. Williams sat up, looked at Ortolano, and said, "What?" Ortolano stated, "Hey, it's the police, will you come talk to me, are you okay?" Williams said, "Come on in." Ortolano tried to open the door near the window, but the door was locked. Ortolano knocked on the window again and told Williams that the door was locked. He asked Williams to come to the door to talk to him. Williams reached down by his left side and retrieved an "AK-47 style assault rifle." Williams stood up and yelled at Ortolano, "Mother fucker, do you want a piece of this?" Ortolano drew his weapon, a nine millimeter sub-gun, and yelled, "Police, drop the gun, drop the gun, drop the gun." Williams did not respond and pointed his weapon at Ortolano. Ortolano fired his weapon at Williams, then went to his vehicle to reload.

Williams came out of the home several minutes later and screamed at the officers, "You guys fucked up, you shot me." The officers approached Williams to subdue him and Williams yelled, "Shoot me, shoot me mother fucker, shoot me." After numerous requests for Williams to lie on ground, he complied. Williams was bleeding from his chest area. Officer James Butler, who was also on the scene, began to administer first aid to Williams. Williams remained agitated as officers continued to point their weapons at him. Williams rolled over and got back on his feet, and the officers told Williams to get back on the ground. When Williams did not comply, Owens used pepper spray to subdue him. Ortolano took Williams to the ground and Butler handcuffed him. Rescue personnel arrived and took Williams to the hospital.

A jury convicted Williams of being a felon in possession of a firearm and the trial court sentenced him to 3 to 10 years' imprisonment.

II. The Sentencing Court's Factual Findings And Offense Variable Scoring

A. Standard Of Review

We review for clear error the trial court's factual findings at sentencing.³ However, the proper construction or application of statutory sentencing guidelines presents a question of law that we review de novo.⁴ A sentencing court has discretion in determining the number of sentencing guideline points to be scored provided that evidence of record adequately supports a particular score.⁵ A scoring decision for which there is any evidence in support will be upheld.⁶

B. *Apprendi* And Its Progeny Do Not Apply

Williams contends that the trial court erroneously scored his offense variables by considering facts that the jury rejected in violation of his due process rights. He argues that sentencing factors relied on by the trial court during sentencing must be submitted to the jury and proven beyond a reasonable doubt. However, the standard for findings of fact at sentencing are not the same as findings of fact at or during trial. Because the prosecution must prove controverted factual assertions underlying the scoring of the sentencing guidelines by a preponderance of the evidence rather than beyond a reasonable doubt, situations may arise wherein although the factfinder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing.⁷

Williams also contends that Michigan's sentencing scheme violates *Apprendi v New Jersey*⁸ and its progeny,⁹ which held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt."¹⁰ Although the United States Supreme Court struck down determinate sentencing schemes as unconstitutional infringements on the role of the jury as factfinder in *Blakely v Washington*, the Court expressly stated that indeterminate sentencing schemes were not affected by its holding.¹¹ Because Michigan employs a constitutional indeterminate sentencing scheme,

³ MCR 2.613(C); *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004).

⁴ *Id.*

⁵ *Id.*

⁶ *People v Perez*, 255 Mich App 703, 712-713; 662 NW2d 446 (2003), vacated in part on other grounds, 469 Mich 415; 670 NW2d 655 (2003); *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

⁷ *Id.*

⁸ *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000).

⁹ See *United States v Booker*, ___ US ___, 125 S Ct 738; ___ L Ed 2d ___ (2005); *Blakely v Washington*, 542 US ___, 124 S Ct 2531, 2532; 159 L Ed 2d 738 (2004).

¹⁰ *Apprendi*, *supra* at 490.

¹¹ *Blakely*, *supra* at 2537, 2540, 2543.

the Supreme Court's analysis in *Apprendi* and *Blakely* is not controlling.¹² A recent panel of this Court confirmed the Michigan Supreme Court's holding that *Blakely* does not apply to sentences imposed in Michigan.¹³ The United States Supreme Court's recent decision in *Booker* extending *Blakely*'s holding to the Federal Sentencing Guidelines¹⁴ does not change this result because the Federal Sentencing Guidelines are also a determinate sentencing scheme.

Therefore, factual findings for sentencing purposes require a mere preponderance of the evidence.¹⁵ Information relied upon may come from several sources, including some that would not be admissible at trial.¹⁶ The trial court followed this standard and found facts by a preponderance of the evidence. Therefore, we conclude that the trial court's sentencing does not violate the Fifth and Sixth Amendments of the United States Constitution.

C. Offense Variables Were Properly Scored

Williams contends that improper scoring of offense variable (OV) 1 resulted in a departure from the correct statutory sentencing guideline range. Specifically, Williams contends that he cannot be scored under this variable because of his acquittal on the felonious assault charge. However, the trial court properly considered the facts underlying the acquittal when scoring the guidelines and fashioning a sentence.¹⁷ The trial court assessed Williams fifteen points for OV 1, indicating that he pointed a gun at or toward a victim or the victim had a reasonable apprehension of an immediate battery.¹⁸ The scoring of the guidelines need not be consistent with the jury's verdict.¹⁹ The trial court's determination that Williams pointed a weapon at the police officer was amply supported by the evidence. The trial court properly considered testimony that Williams grabbed the AK-47 and pointed it at the police officer. Evidence at trial showed that police officers saw Williams reach down by his side, retrieve a weapon, and point it at a police officer. The record also indicates that as Williams drew the weapon, he yelled at the police officer and asked him if he wanted "a piece of this." The evidence also showed that a neighbor and another officer heard the police officer yell that Williams had a gun. As the trial court correctly stated, it was allowed to consider this at sentencing in order to "fashion an appropriate sentence" for Williams. Therefore, the trial court did not err in scoring OV 1.

¹² *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

¹³ See *People v Wilson*, ___ Mich App ___, ___ NW2d___ (Docket No. 250804, issued March 8, 2005) (citing *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004)).

¹⁴ *Booker*, *supra* at 756.

¹⁵ *Perez*, *supra* at 713.

¹⁶ *Id.*

¹⁷ *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

¹⁸ MCL 777.31(1).

¹⁹ See *Perez*, *supra* at 712-713.

Williams also contends the trial court improperly scored OV 9. The trial court assessed Williams ten points for OV 9, indicating that there were two to nine victims. Testimony at trial indicated that neighbors were placed in danger when Williams decided to discharge the gun. In addition, officers who responded to the scene were placed in danger. Because evidence on the record supported the scoring decision, we will uphold it.²⁰

Williams further contends that the trial court improperly scored OV 12. Williams was assessed ten points under OV 12, indicating that he engaged in “[o]ne contemporaneous felonious criminal act involving a crime against a person. . . .”²¹ The act that formed the basis for the scoring decision in this case was the felonious assault against the police officer, for which Williams was acquitted. However, factfinding for the purposes of sentencing is not wholly derivative of factfinding attendant to trial proceedings, but takes place later and is governed by the preponderance of the evidence standard.²² The trial court found that there was evidence that Williams pointed a gun at a police officer. The record clearly supports the trial court’s sentencing decision. The record indicates that Williams raised a weapon and pointed it at the police officer. Williams also asked the police officer if he wanted a “piece of this” as he stood and raised the weapon. Therefore, the trial court properly scored this variable.

Williams also contends that the trial court improperly scored OV 19. The trial court assessed Williams ten points under OV 19 for attempting to interfere with the administration of justice.²³ “Interference” constitutes the obstruction of justice, which entails every willful act of corruption, intimidation, or force that tends to impair the law.²⁴ The Michigan Supreme Court has held that the phrase “interfered with or attempted to interfere with the administration of justice” encompasses more than the actual judicial process. Law enforcement officers are an integral component in the administration of justice, regardless of whether they are operating directly pursuant to a court order.²⁵ The investigation of crime is critical to the administration of justice.²⁶

At sentencing, the trial court found by a preponderance of the evidence that Williams’ lack of cooperation with officers during their investigation and during police officers’ attempt to treat him was interference with the administration of justice. Evidence presented at trial supported the trial court’s sentencing decision. The record indicates that Williams screamed at several officers when he exited the home. When officers approached Williams, he yelled, “Shoot me, shoot me . . . , shoot me.” Williams did not initially comply with the police officers’ request that he lie on the ground. Even after complying with their request, Williams later

²⁰ See *id.* at 712-713; *Elliott, supra* at 260.

²¹ MCL 777.42(1)(d).

²² *Perez, supra* at 713.

²³ MCL 777.49.

²⁴ *People v Barbee*, 470 Mich 283, 286; 681 NW2d 348 (2004).

²⁵ *Id.* at 287-88.

²⁶ *Id.* at 288.

became agitated and rolled over to get back on his feet. The police eventually pepper sprayed and handcuffed him. Therefore, the trial court properly scored Williams at sentencing regarding OV 19.

In light of our decision, it is unnecessary to reach Williams' contention that he is entitled to resentencing before a new judge on remand.

Affirmed.

/s/ William C. Whitbeck

/s/ Brian K. Zahra

/s/ Donald S. Owens