

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHADRICK HOLLINGSWORTH,

Defendant-Appellant.

UNPUBLISHED
February 27, 2007

No. 265370
Genesee Circuit Court
LC No. 05-016364-FH

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession of a controlled substance, less than 25 grams, MCL 333.7403(2)(a)(v). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to 46 months' to 15 years' imprisonment. He appeals as of right. We vacate defendant's sentence and remand for resentencing.

I

Defendant first argues that the trial court erred when it scored five points for offense variable (OV) 15, MCL 777.45. Defendant did not object to the scoring of OV 15 at his sentencing; thus, this issue is not preserved. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). However, a defendant is entitled to be sentenced based on accurate information. *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006). And, if there is a scoring error, and the error changes the appropriate guidelines range, the defendant is entitled to resentencing based on accurate information. *Kimble, supra* at 309-311.

The interpretation and application of the statutory sentencing guidelines is a question of law, which this Court reviews de novo. *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). We review a sentencing court's scoring of points under the sentencing guidelines for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). As long as there is some evidence of record in support, we will uphold the trial court's scoring decision. *Id.*

A sentencing court must assess five points for OV 15 when “[t]he offense involved the delivery or possession with intent to deliver marihuana or any other controlled substance . . . or possession of controlled substances . . . having a value or under such circumstances as to indicate trafficking.” MCL 777.45(1)(g). The statute defines “trafficking” as “the sale or delivery of controlled substances . . . on a continuing basis to 1 or more other individuals for further distribution.” MCL 777.45(2)(c).

The definition of “trafficking” includes the phrases “on a continuing basis” and “for further distribution.” MCL 777.45(2)(c). In construing a statute, we presume that every word has some meaning and will avoid an interpretation that renders a part of the statute surplusage or nugatory. *People v Perkins*, 473 Mich 626, 638; 703 NW2d 448 (2005). Thus, “on a continuing basis” and “for further distribution” cannot be ignored, but must be found to support scoring of the OV. Considering the plain, unambiguous language of the statute, *People v Lange*, 251 Mich App 247, 255; 650 NW2d 691 (2002), the record does not support that defendant in this case, was involved in trafficking.

Defendant was charged with possession only, not possession with intent or delivery. Thus, defendant was not convicted of a crime involving trafficking or an inference of trafficking. Moreover, the record does not show that defendant possessed cocaine under circumstances that indicate trafficking. Defendant possessed a couple rocks or .36 grams. The rocks were in one, tied off baggie, and were not individually wrapped rocks, suitable for resale. Further, there was no testimony or indication at trial that defendant provided the drugs to anyone else or planned to provide them. He was alone in the car, and the arresting officer did not observe a drug transaction. And, a narcotics officer, who has substantial experience in drug trafficking, testified only to defendant’s possession of the drugs. Further, there is no evidence that defendant sold or delivered cocaine or any other substance on a continuing basis for further distribution.

The prosecution argues that the scoring of OV 15 should be affirmed because defendant possessed .36 grams of crack cocaine when his PSIR stated he did not use cocaine himself. Thus, there is an inference that defendant possessed the drugs to distribute. We disagree. The PSIR states that defendant had used cocaine once within the previous year, as well as when he was 30 years old, and when he was 22 years old. Thus, there was evidence in the record that defendant had, in fact, used cocaine himself, and a factual finding otherwise is clearly erroneous.

The scoring of five points for OV 15 was plain error, which affected defendant’s substantial rights and resulted in prejudice, specifically a miscalculation of the applicable recommended minimum sentence range under the legislative guidelines. An error in the calculation of the sentencing guidelines range that increases defendant’s sentence is plain error affecting substantial rights. *Kimble, supra* at 312-313; *People v Brown*, 265 Mich App 60, 66-67; 692 NW2d 717 (2005), rev’d on other grounds 474 Mich 876 (2005).

Defendant contends that if the five points for OV 15 were not scored, he would have been placed in a lower offense variable level category, and his minimum sentence range would have

been two to thirty-four months, not five to forty-six months.¹ MCL 777.21(3)(c) and MCL 777.68. Because defendant's minimum sentence exceeds the guidelines range, the scoring error affected his substantial rights. *Kimble, supra* at 312-313. We agree that he is entitled to resentencing. *Id.* at 313.

II

Defendant also argues that the trial court abused its discretion by sentencing him to the maximum allowed under the habitual offender statute without "individual justification" for the sentence. Having determined above that defendant is entitled to resentencing, we need not address this claim. In any event, we find no abuse of discretion. The record indicates that the trial court relied on the guidelines in sentencing defendant. We find no abuse of discretion in the trial court's imposition of the statutory maximum pursuant to MCL 769.12(1)(b). *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997).

III

Defendant argues, in the alternative, that he is entitled to resentencing on the basis of ineffective assistance of counsel by his attorney's failure to object to the trial court's improper scoring of OV 15. Having found above that defendant is entitled to resentencing, we need not address this argument. Nonetheless, we briefly note our agreement.

To claim ineffective assistance of counsel on appeal, a defendant must raise the issue below by filing a motion for an evidentiary hearing or a new trial. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Because defendant failed to do either, we will consider the issue only to the extent that counsel's claimed mistakes are apparent on the record. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998). To establish a claim of ineffective assistance of counsel, defendant must show that his counsel's performance was deficient under an objective standard of reasonableness, and there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different and therefore, he was denied a fair trial. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004).

We find that counsel's failure to object to the scoring of OV 15 fell below an objective standard of reasonableness. The scoring of five points for "trafficking" was plain error, and counsel's failure to object to that plain error ultimately resulted in a minimum sentence that exceeds the upper limit of the appropriate guidelines sentence range. *Kimble, supra* at 314. Under these circumstances, defendant is likewise entitled to resentencing on the basis of ineffective assistance. *Id.*

¹ Plaintiff does not dispute this contention, but argues merely that if this Court remands this case for resentencing, plaintiff should be entitled to present further evidence to support the scoring of OV 15. Because plaintiff fails to indicate what evidence, if any, would be presented on remand, and because the appellate standard of review requires that this Court consider whether any evidence supports the scoring at issue, we find a remand for the presentation of additional evidence inappropriate.

We remand for resentencing in accordance with this opinion. We do not retain jurisdiction.

/s/ Donald S. Owens

/s/ Janet T. Neff

/s/ Helene N. White