

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARNOLD RAYMOND THOMAS,

Defendant-Appellant.

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UNPUBLISHED

March 15, 2007

No. 270899

Tuscola Circuit Court

LC No. 05-009407-FH

Before: Markey, P.J., and Murphy and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of felon in possession of a firearm, MCL 750.224f, and resisting and obstructing a police officer, MCL 750.81d(1). Defendant was sentenced as a second-offense habitual offender, MCL 769.10, to 21 months to 5 years' imprisonment for the firearm conviction and a concurrent 21 months to 3 years' imprisonment for the resisting and obstructing conviction. We affirm defendant's convictions, but vacate defendant's sentence and remand for resentencing under the properly scored guidelines.

Defendant submitted a pro per supplemental brief that this panel accepted. Defendant makes various claims of prosecutorial misconduct, but there is no record support for any of defendant's accusations. A great deal of the supplemental brief is devoted to claims that the arresting police officer lied and was not worthy of belief; however, this Court will not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). We have carefully examined all of the issues raised in the supplemental brief, and the claims do not warrant reversal.

Defendant next challenges the scoring of offense variables (OVs) 1 and 19. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Defendant first claims that he was improperly scored 15 points for OV 1. We agree. OV 1 scores points for a defendant's aggravated use of a weapon and provides that 15 points are to

be scored when “[a] firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon.” MCL 777.31(1)(c). While the evidence supports a finding that there was a firearm within defendant’s reach, no evidence was offered to establish that it was ever in defendant’s hand, much less that defendant pointed it at or toward the arresting officer. The officer did not testify that he ever saw the gun pointed at him, and he only found out that there was a gun near defendant after defendant was handcuffed and in custody.

Ten points for OV 1 would not be an appropriate score because the officer was not “touched by any other type of weapon.” MCL 777.31(1)(d). We need not determine whether OV 1 should have been scored at zero or five points because either way the same scoring cell or minimum sentencing range on the grid would apply. MCL 777.66; MCL 777.21(3)(a).<sup>1</sup>

Properly scored, defendant’s guidelines range goes from zero to 21 months to zero to 13 months. MCL 777.66; MCL 777.21(3)(a). Thus, the minimum sentence of 21 months was outside the guidelines range and no reasons were articulated by the court in support of this departure. MCL 769.34(3). Further, because the guidelines range is now less than 18 months, the trial court must impose an intermediate sanction “unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections.” MCL 769.34(4)(a).<sup>2</sup> No such reasons were articulated on the record. Therefore, defendant is entitled to resentencing.

We reject defendant’s argument that he was improperly scored 15 points for OV 19. MCL 777.49(b) provides that 15 points is scored when “[t]he offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice[.]” The statute does not provide that a certain amount of force is required to score 15 points. The arresting officer testified that when asked to put his arms behind his back, defendant resisted by flexing the muscles in his arms and shoulders. The officer had to force defendant’s arms behind his back in the physical tussle. We also note that earlier there was a struggle between the officer and defendant over a phone. Defendant’s actions constitute active force applied against the actions of the officer in his attempt to effectuate an arrest, something integral to the administration of justice. This supports the trial court’s score of 15 points for OV 19.<sup>3</sup>

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<sup>1</sup> Defendant originally received a total prior record variable (PRV) score of 17 points, setting his PRV level at C, and a total OV score of 30 points, setting his OV level at III. This resulted in a minimum sentencing range of zero to 21 months. Taking away 15 points from the total OV score, based on our holding, leaves 15 total OV points and places defendant at level II, resulting in a minimum sentencing range of zero to 13 months. MCL 777.66; MCL 777.21(3)(a). Even if 5 points were scored for OV 1, giving a total of 20 OV points, defendant would remain at level II, with the same minimum sentencing range of zero to 13 months. MCL 777.66; MCL 777.21(3)(a).

<sup>2</sup> “An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.” MCL 769.34(4)(a).

<sup>3</sup> Given that we have substantively addressed the scoring of OVs 1 and 19, it becomes  
(continued...)

We affirm defendant's convictions, but vacate defendant's sentence and remand for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Jane E. Markey

/s/ William B. Murphy

/s/ Kirsten Frank Kelly

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(...continued)

unnecessary to address defendant's claim that counsel was ineffective for failing to timely object to the court's scoring of these variables.