

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SHERMAN ALANDO GRANDBERRY,

Defendant-Appellant.

UNPUBLISHED

June 19, 2007

No. 271160

Oakland Circuit Court

LC No. 06-207136-FH

Before: Fitzgerald, P.J., and Sawyer and O'Connell, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree home invasion, MCL 750.110a(3). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to 4 to 30 years in prison. Defendant appeals as of right. We affirm.

Defendant's sole argument on appeal is that his guidelines scoring of prior record variable (PRV) 5, MCL 777.55, should be reduced from ten to five points. We disagree.

Prior record variable 5 concerns earlier misdemeanors, in the form of criminal convictions or juvenile adjudications. Subsection (2)(a) limits misdemeanors or adjudications to be counted to those stemming from offenses against a person or property, concerning controlled substances or weapons, to which subsection (2)(b) adds offenses involving operation of a vehicle under the influence of controlled substances or alcohol. Subsection (1)(c) prescribes that ten points should be scored for three or four such convictions or adjudications, and subsection (1)(d) prescribes that five points should be scored for two such convictions or adjudications. MCL 777.50 prohibits the use of a conviction or adjudication from which the defendant was discharged at least ten years before he or she committed a subsequent offense.

Defendant's presentence investigation report (PSIR) identifies a total of 11 prior convictions, of which the trial court apparently regarded three as applicable for purposes of scoring PRV 5. Defendant concedes that the fourth and ninth of the 11 convictions were properly counted, but takes issue with the tenth, on the ground that he was convicted in violation of his right to counsel.

Defendant's PSIR in fact indicates that an attorney was present for the conviction in question, but defendant cites various other documents as indicating otherwise. See *People v Carpentier*, 446 Mich 19, 31; 521 NW2d 195 (1994) (a defendant collaterally challenging a prior

conviction bears the initial burden of establishing that the conviction was obtained without counsel or a proper waiver thereof). The trial court did not feel obliged to determine whether defendant in fact had had the assistance of counsel in the matter, on the ground that because the result was a sentence of probation, with no incarceration, no right to appointed counsel had attached. We agree with the trial court.

The federal and state Constitutions guarantee a criminal defendant the right to the assistance of counsel. US Const, Ams VI and XIV; Const 1963, art 1, § 20. Earlier convictions that were obtained in violation of the constitutional right to counsel may not be used to enhance a criminal sentence. *United States v Tucker*, 404 US 443, 449; 92 S Ct 589; 30 L Ed 2d 592 (1972).

However, “a defendant accused of a misdemeanor is entitled to appointed trial counsel only if ‘actually imprisoned.’ ” *People v Reichenbach*, 459 Mich 109, 120; 587 NW2d 1 (1998). Accordingly, “if the conviction did not *actually* result in imprisonment, the conviction may be used for enhancement purposes regardless of the involvement of counsel.” *People v Clement*, 254 Mich App 387, 396 n 3; 657 NW2d 172 (2002) (emphasis in the original).

Defendant points out that *Reichenbach*, *supra*, and related cases concerned sentence enhancement connected with convictions for driving while intoxicated, and argues that those cases should not apply to guidelines scoring situations, but puts forward no logical basis for any such distinction. Defendant describes certain unpublished opinions of this Court as having focused on whether counsel was present for misdemeanor convictions, without regard for whether a term of incarceration resulted, for purposes of guidelines scoring, but does not suggest that those cases actually stated that the question of incarceration was irrelevant. Moreover, the unpublished decisions of this Court are not precedentially binding under principles of stare decisis. MCR 7.215(C)(1).

For these reasons, we decline the invitation to hold that a misdemeanor conviction taking place without the assistance of defense counsel, but that did not result in a sentence of incarceration, may not be considered for purposes of scoring PRV 5.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Peter D. O’Connell