

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

CRAIG JEROME JORDAN,

Defendant-Appellee.

UNPUBLISHED

November 15, 2007

No. 272318

Saginaw Circuit Court

LC No. 05-025628-FC

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant pleaded guilty to second-degree murder, MCL 750.317, and first-degree child abuse, MCL 750.136b(2). Defendant was initially sentenced to concurrent prison terms of 25 to 50 years for the second-degree murder conviction and 95 months to 15 years for the first-degree child abuse conviction. Defendant subsequently filed a motion to correct an invalid sentence in the trial court, challenging the scoring of offense variables (OV) 5 and (OV) 10. The trial court upheld the scoring of OV 5, but altered the scoring of OV 10 from 10 points to 0 points. The prosecutor appeals by leave granted the trial court's resentencing of defendant to concurrent prison terms of 22 years 6 months to 50 years for the second-degree murder conviction and 95 months to 15 years for the first-degree child abuse conviction. We vacate the amended sentence and remand to the trial court for reinstatement of defendant's original sentence.

This matter arises following the death of 10-month old, Breahna Tait (dob: 10/16/03) from blunt force head trauma as the result of defendant striking the infant multiple times because she was crying. Breahna was the infant daughter of defendant's girlfriend, Angela Tait. Defendant had been residing with Tait and her daughter for approximately two weeks before Breahna's death. On September 13, 2004, due to the unavailability of her regular childcare, Tait left Breahna with defendant while she went to work. Defendant gave varying statements to police regarding the source of the child's injuries. In the presentence investigation report (PSIR) defendant indicated that he awoke during the night because of the child's crying and entered her room. Defendant reported picking the infant up and going into the bathroom "at which time Jordan reported that the infant spit up on his shoulder." Defendant then reported "taking the child by the head and forcing the child's head with his hand backward forcing the child from his arm onto the sink area" where Breahna "struck her head on the edge of the sink and fell to the floor." Defendant did not apprise anyone of injury to the child and merely placed her back in her crib. In addition, the following day defendant reported that he was using a stereo for weight lifting and the stereo "slipped from his hands and struck the child in the back of her head."

Alternatively, defendant also described to police striking the child in the back of the head with a closed fist “four to five times” because she was crying during the night. The following day, when the child was not responsive, defendant stated that he held the child at the waist and began “shaking her to get her attention.” When the child was not responsive, defendant did not seek or procure medical attention but, instead, phoned Tait at work to return home due to problems with the infant.

Defendant pleaded guilty on July 25, 2005, and was originally sentenced on September 7, 2005. At the sentencing, the trial court specifically invited defendant to state any “comments concerning any inaccuracies that might exist in the [presentence investigation] report itself or any issues with scoring.” Defendant’s counsel replied:

There are no additions, deletions or corrections that need to be made to the narrative portion. Your Honor, I have checked the sentencing guidelines, and they appear to be accurately scored.

On May 16, 2006, defendant filed a motion in the trial court to correct an invalid sentence asserting there was insufficient evidence in the record to support a score of 15 points for “Serious Psychological injury requiring professional treatment to a homicide victim’s family” on OV 5. Defendant also challenged the scoring of 10 points on OV 10 arguing there was no evidence of defendant exploiting or manipulating the victim based on youth. The prosecutor responded that the motion was untimely, citing the time constraints contained in MCR 7.208(B)(1) and MCR 7.212(A)(1)(a)(iii). The prosecutor also contested defendant’s allegations of error in the scoring of the referenced offense variables.

On June 22, 2006, the trial court issued an opinion and order finding OV 10 was improperly scored and changing the score from 10 points to 0 points. The trial court’s ruling was based on its determination that:

The instructions for OB10 [sic] provide that points should not automatically be scored for victim vulnerability just because one or more of the factors addressed by OB 10 [sic] are present in the circumstances surrounding the sentencing offense. The instructions further define “exploit” to mean that a victim is to have been manipulated for the offenders [sic] selfish and unethical purposes.

The trial court did not alter defendant’s sentence for his conviction of first-degree child abuse, but reduced defendant’s sentence on his conviction for second-degree murder to a minimum of 22 years 6 months, with a maximum of 50 years’ imprisonment.

On appeal, the prosecutor contends the trial court erred in resentencing defendant asserting any error was waived at the original sentencing and that the original scoring of 10 points for OV 10 was correct. We review a trial court’s determination on a motion for resentencing for an abuse of discretion. *People v Puckett*, 178 Mich App 224, 227; 443 NW2d 470 (1989). This Court reviews a trial court’s scoring decision by determining “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); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

While not directly addressed by the parties, this Court notes the existence of a procedural error regarding the manner by which defendant sought and procured resentencing in the lower court. Notably, defendant never cited or identified in his motion the court rule authorizing or justifying his delayed request for resentencing.¹ The prosecutor compounded this error by presuming defendant's motion was brought pursuant to MCR 6.429. Momentarily ignoring the issue of whether defendant's sentence was actually "invalid" and accepting the propriety of the filing of defendant's motion under this court rule, we note that defendant failed to adhere to the required timeframes to proceed under the referenced rule. MCR 6.429(B)(1) permits a defendant to file a motion for resentencing within 42 days after entry of judgment. In this instance, defendant did not comply as his motion to correct an invalid sentence was filed in excess of eight months after the trial court imposed his initial sentence.² Because defendant failed to file a timely claim of appeal, it was permissible to file a motion for resentencing within six months as allowed by MCR 6.429(B)(3). However, defendant did not adhere to this time restriction. As a result, defendant was required to pursue an appeal of his sentence before this Court within the 12-month timeframe afforded by MCR 7.205(F)(3) rather than attempt to bring the issue directly back before the trial court. Had this 12-month period expired, defendant would have, as a final option, the opportunity to file a motion for relief from judgment in accordance with the procedures detailed in subchapter 6.500 of the Michigan Rules of Court. MCR 6.429(B)(4). We decline to determine whether defendant would have successfully met the requirements of MCR 6.502 and MCR 6.508 as beyond the scope of the issues presented in this appeal.

Although not raised by either party, we also believe it necessary to address defendant's assertion that his sentence was "invalid." Our Supreme Court in *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997) defined invalid sentences:

A sentence is invalid when it is beyond statutory limits, when it is based upon constitutionally impermissible grounds, improper assumptions of guilt, a misconception of law, or when it conforms to local sentencing policy rather than individualized facts. This Court has also repeatedly held that a sentence is invalid if it is based on inaccurate information.

The trial court did not actually determine or state definitively that the sentence was invalid, but merely concurred that OV 10 was improperly scored and amended defendant's sentence.

¹ Rather, citing to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) defendant implied the trial court engaged in improper judicial fact finding when determining his sentence. We would note that defendant's assertion of error regarding the lower court's original sentencing determination is precluded as Michigan's sentencing scheme has been held to be unaffected by *Blakely* based on Michigan's use of an indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

² Because defendant failed to file a claim of appeal, the timeframes delineated by MCR 6.429(B)(2) are also not applicable.

Defendant's challenge to the scoring of OV 10 did not automatically render the sentence invalid. The sentence, as originally imposed did not exceed statutory limits and was not based on any "impermissible grounds or improper assumptions of guilt." *Miles, supra* at 96. Defendant's affirmative concurrence with the content of the PSIR belies any assertion that the sentence was invalid because it was not based "on individualized facts" or the use of "inaccurate information." As a result, the trial court lacked authority to resentence defendant as "the court may not modify a valid sentence after it has been imposed." MCR 6.429(A); *People v Bingaman*, 144 Mich App 152, 158-159; 375 NW2d 370 (1984).

While not encompassed by this appeal, we note an issue remains regarding whether defendant's sentence was invalid based on a "misconception of law." The 1989 staff comments to MCR 6.429 further defines an "invalid sentence" as referring "to any error or defect in the sentence or sentencing procedure that entitles a defendant to be resentenced or to have the sentence changed." This is consistent with this Court's decision in *People v Wybrecht*, 222 Mich App 160, 167; 564 NW2d 903 (1997), which precludes resentencing absent a "tangible legal or procedural error." At the original sentencing hearing, defendant's counsel clearly and unequivocally expressed his satisfaction and agreement with both the PSIR and the accuracy of the guidelines scoring. This constituted a waiver by defendant and extinguished any claim of error with regard to the scoring of OV 10. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). "Because defendant waived . . . his rights . . . there [was] no 'error' to review." *Id.* at 219. Thus, defendant's sentence was presumptively valid because it fell within the appropriate guidelines range. As a result, given the facts before the trial court when sentencing occurred, defendant has not demonstrated a misconception of the law by the trial court, as the sentence imposed was within the guidelines range as calculated and affirmed by defendant.

Finally, we find that the initial scoring of OV 10 was proper. A trial court's scoring of a sentencing variable is reviewed by this Court for an abuse of discretion and to determine whether the evidence of record supports the assigned score. *Hornsby, supra* at 468. "Scoring decisions for which there is any evidence in support will be upheld." *Id.* (citation omitted).

Defendant argued that the trial court improperly scored 10 points for OV 10. MCL 777.40 provides, in relevant part:

(1) Offense variable 10 is exploitation of a vulnerable victim. Score offense variable 10 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

* * *

(b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status.....10 points

(c) The offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious.....5 points

(d) The offender did not exploit a victim's vulnerability.....0 points

Defendant cites to MCL 777.40(2), which provides that “[t]he mere existence of 1 or more factors described in subsection (1) does not automatically equate with victim vulnerability.” Specifically, defendant contends the record failed to demonstrate that he “exploited” the victim, which is statutorily defined as the manipulation of “a victim for selfish or unethical purposes.” MCL 777.40(3)(b). Defendant asserts the abusive incident occurred spontaneously and was the product of frustration and, therefore, lacked any manipulative component because it was unplanned. As determined by the trial court, the alteration of the scoring of OV 10 from 10 points to zero points, reduced the minimum term range of the sentencing guidelines for the offense, resulting in defendant’s entitlement to resentencing.

Defendant cannot reasonably dispute the vulnerability of this victim. Breahna was 10 months of age and left in the sole care of defendant. She was neither sufficiently verbal nor mobile to avoid defendant’s assault or to secure help. Because defendant was entrusted with the minor child’s care, his assault constituted an abuse of his authority over the child. As such, we find that there can be no legitimate contention of error regarding a determination of Breahna’s vulnerability based on her “readily apparent susceptibility . . . to injury.” MCL 777.40(3)(c).

It is defendant’s contention that OV 10 was improperly scored because he did not “exploit” or “manipulate [the] victim for selfish or unethical purposes.” We disagree. According to the various explanations provided by defendant regarding the source or manner of the infant’s injuries as documented in the PSIR, sufficient evidence existed within the record of exploitation or manipulation by defendant to support a scoring of 10 points on this offense variable. Initially, defendant alleged that he struck the child or caused her to be injured during the night but did not seek medical attention for the child. Instead, defendant placed the child back in her crib to manipulate the situation to avoid detection of his abusive behavior or to selfishly obtain an undisturbed sleep. Even if defendant’s assertion that the minor child was accidentally injured when he dropped a weighted object on her, defendant acknowledges he did not seek medical attention despite the child’s lack of responsiveness. Instead, defendant manipulated the situation by requesting the mother return from work to deal with the child to potentially allow defendant to avoid responsibility or police involvement. Because the evidence in the record supported the scoring of OV 10 at 10 points, the original sentence imposed by the trial court fell within the properly scored guidelines range and defendant was not entitled to resentencing.

We vacate the amended sentence and remand to the trial court for reinstatement of defendant’s original sentence. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly