

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL GERMAINE DILLARD,

Defendant-Appellant.

UNPUBLISHED

March 4, 2008

No. 276768

Lenawee Circuit Court

LC No. 06-012461-FH

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

A jury convicted defendant of aggravated stalking, MCL 750.411i. He appeals as of right his sentence of 46 to 240 months in prison. We affirm defendant's sentence, but remand for correction of the calculation of the guidelines. This appeal is being decided without oral argument. MCR 7.214(E).

The statutory sentencing guidelines, as scored by the trial court and adjusted for defendant's status as a fourth habitual offender, MCL 769.12, called for a minimum range of ten to 46 months. At sentencing, defense counsel objected to the scoring of ten points for offense variable (OV) 13, MCL 777.43 (continuing pattern of criminal behavior). The trial court rejected the challenge, and the scoring of the guidelines remained unchanged. The trial court sentenced defendant as a fourth habitual offender to 46 to 240 months in prison, with credit for 80 days served in jail.

If a minimum sentence is within the appropriate sentencing guidelines range, we must affirm the sentence and may not remand for resentencing absent an error in the scoring of the guidelines or inaccurate information relied on by the trial court in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). A party may not raise on appeal an issue challenging the scoring of the guidelines or the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand. *Id.*

Offense variable 13 is properly scored at ten points if the conviction offense "was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property or a violation of section 7401(2)(a)(i) to (iii) or section 7403(a)(i) to (iii)."

MCL 777.43(1)(c). “[A]ll crimes within a 5-year period, including the sentencing offense,” are to be counted when scoring OV 13. MCL 777.43(2)(a).

Defendant argues that the trial court erroneously scored ten points for OV 13 because his prior felony convictions within the last five years—for fourth-degree fleeing and eluding, MCL 750.479a, and attempted possession of less than 25 grams of a controlled substance, MCL 333.7403(2)(a)(v); MCL 750.92—are not crimes against persons or property and are not the substance abuse offenses specified in MCL 777.43(1)(c). Defendant asserts that had OV 13 been scored correctly at zero points, the guidelines would have called for a minimum range of seven to 46 months, and that resentencing is therefore necessary. The prosecution concedes on appeal that defendant’s past felony convictions do not fall within the scope of the offenses described in MCL 777.43(1)(c), and that OV 13 should therefore have been scored at zero points.

An error in the scoring of the guidelines that would not, when corrected, result in a different recommended minimum term range does not require resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). An error in the scoring of the guidelines does not require resentencing if the trial court would have imposed the same sentence regardless of the error. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003). We review an issue regarding the proper interpretation and application of the sentencing guidelines de novo. *Francisco*, *supra* at 85.

We affirm defendant’s sentence, but remand for correction of the calculation of the guidelines. Correction of the scoring of OV 13 from ten points to zero points would result in a recommended minimum range of seven to 46 months rather than the range of ten to 46 months relied on by the trial court. However, under the particular facts of this case, it is evident that correction of the scoring error would not change the trial court’s decision regarding an appropriate sentence. The trial court sentenced defendant as a fourth habitual offender to a minimum at the high end of the guidelines range. Nothing on the record supports a conclusion that defendant would have received a different sentence had the trial court scored the guidelines correctly at seven to 46 months. We conclude that the scoring error did not alter the sentence imposed, and did not result in a miscarriage of justice.

We decline to order resentencing, but remand this case for correction of the calculation of the guidelines. *People v Melton*, 271 Mich App 590, 596; 722 NW2d 698 (2006).

Affirmed but remanded for correction of the calculation of the guidelines. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Alton T. Davis