STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 5, 2008
v	No. 276594 Wayne Circuit Court
MARCUS WINDLESS, Defendant-Appellant.	LC No. 06-010340-01

Before: Owens, P.J., and Meter and Schuette, JJ.

PER CURIAM.

Defendant was convicted by a jury as an accessory after the fact, MCL 750.505. The jury acquitted defendant of assault with intent to commit murder, MCL 750.83, carjacking, MCL 750.529a, armed robbery, MCL 750.529, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to two to five years in prison for the accessory after the fact conviction. Defendant appeals as of right. We affirm.

I. FACTS

This case arises out of a shooting and carjacking in Detroit, Michigan, on August 12, 2006. Defendant drove a car with four passengers: Cortland Brown, Laporian Davis-Stone, Michael Powell, and Devon Peterson. Defendant saw Davis-Stone and Powel exit the vehicle each with a gun. After running through a parking lot, Davis-Stone and Powell robbed Officer Karl Paul, who was exiting his car. Paul was shot in the shin, and Davis-Stone and Powell drove away in Paul's car. Defendant and the other passengers could not see the event. Defendant followed Davis-Stone and Powell. After realizing that the vehicle belonged to a police officer, Davis-Stone and Powell burned the stolen vehicle. Defendant then drove Powell and Davis-Stone to Cassandra Davis's home, where Powell discussed the shooting.

After leaving Davis's home, defendant drove with Davis-Stone and Powell to burn police paperwork that was also stolen from the car. Then, after defendant dropped Powell off, a high-speed chase occurred with police. Defendant subsequently abandoned the vehicle, but he was followed and arrested.

Defendant offered conflicting testimony at trial. He claimed that after Davis-Stone and Powell left the vehicle to rob Paul, he jumped into the driver's seat and drove to Davis's home.

Later, Powell and Davis-Stone arrived at the house and there was a discussion of a stolen police car and possible shooting. Later, defendant saw Davis-Stone and Powell burn the stolen car.

A jury convicted defendant as an accessory after the fact, and he was sentenced to two to five years in prison. Defendant now appeals his sentence.

II. STANDARD OF REVIEW

This Court reviews preserved challenges to the scoring of the sentencing guidelines for an abuse of discretion. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

III. ANALYSIS

A trial court determines a defendant's minimum sentence by assigning points to various factors—offense variables (OVs) and prior record variables (PRVs)—under a preponderance of the evidence. See *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). The trial court may consider all record evidence when making scoring decisions, and the trial court's scoring need not be consistent with the jury's verdict. *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), vacated in part on other grounds 469 Mich 415 (2003).

Defendant first argues that the trial court erred in scoring 25 points for Offense OV 1. We disagree.

An accessory after the fact is '"one who, with knowledge of the other's guilt, renders assistance to a felon in the effort to hinder his detection, arrest, trial or punishment."' *People v Perry*, 460 Mich 55, 62; 594 NW2d 477 (1999) (citation omitted). In scoring OV 1, the trial court is required to score 25 points if "'[a] firearm was discharged at or toward a human being or a victim . . . .'" *People v Morson*, 471 Mich 248, 256; 685 NW2d 203 (2004), quoting MCL 777.31(1)(a). Under a preponderance of the evidence, when defendant rendered assistance to Davis-Stone and Powell to hinder their detection and arrest, he had knowledge that they discharged a firearm at or toward a human being. Davis-Stone and Powell exited the car that defendant drove to rob Officer Paul. Defendant observed that both men had guns. While he waited for Davis-Stone and Powell, he heard gunshots. Then, he followed Davis-Stone and Powell to Lillibridge Street, where they burned Officer Paul's car. Next, defendant drove Davis-Stone and Powell to Cassandra Davis's home. There, Powell told defendant that Officer Paul had been shot in the leg. He also said, "I think I killed somebody." With this knowledge, defendant continued to assist Davis-Stone and Powell. He asked Cassandra Davis to hide the bulletproof vest, he helped burn the police paperwork found inside Officer Paul's car, and he drove with Davis-Stone at a rapid speed during a subsequent police chase. Therefore, we conclude that the trial court did not abuse its discretion when it scored 25 points for OV 1.

Defendant also argues that the trial court improperly scored OV 3. However, at sentencing, when the prosecutor urged the trial court to score 25 points for OV 3, defendant's trial counsel said, "We're not going to dispute that." Trial counsel affirmatively approved the scoring of the sentencing guidelines; therefore, any error was waived. See *People v Dobek*, 274 Mich App 58, 65-66; 732 NW2d 546 (2007).

Defendant next argues that he is entitled to resentencing because, in departing from the minimum sentencing guidelines range, the trial court relied on facts that were neither admitted to by defendant nor found beyond a reasonable doubt by the jury. Defendant relies on *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), for the argument that *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), requires a jury to find all facts underlying sentencing beyond a reasonable doubt. However, our Supreme Court has determined that *Blakely* does not apply to Michigan's sentencing scheme. *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007); *Drohan*, *supra* at 164. Therefore, this argument must be rejected.

Finally, defendant argues that he is entitled to resentencing because the trial court relied on facts from the underlying offenses for which he was acquitted to score 25 points for OV 1 and OV 3, where the probation department recommended that both variables be scored zero in the presentence investigation report. Consequently, defendant claims that the trial court unconstitutionally increased his sentencing guidelines range in violation of *Blakely*. Again, we disagree.

In *McCuller*, *supra* at 689-690, our Supreme Court held that a defendant does not gain a legal right to any guidelines range until all of the statutory factors have been considered. The trial judge determines a defendant's eligibility for a sanction only after the scoring of the PRVs and OVs. *Id.* Therefore, "[a] sentencing court's fact-finding in scoring the OVs does not increase the defendant's statutory maximum under *Blakely*." *Id.* at 677. Thus, in this case, the trial court's fact-finding in the scoring of OV 1 and OV 3 did not violate defendant's constitutional rights.

Affirmed.

/s/ Donald S. Owens
/s/ Patrick M. Meter
/s/ Bill Schuette