STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 9, 2008
v	No. 279356 Midland Circuit Court
PETER ERNIE PFAU, Defendant-Appellant.	LC No. 06-002642-FH

Before: Whitbeck, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant pleaded guilty to resisting and obstructing a police officer, MCL 750.81d(1), possession of marijuana, MCL 333.7403(2)(d), and operating a vehicle while under the influence of alcoholic liquor (OUIL), MCL 257.625(1)(a). The trial court sentenced defendant to prison for 16 to 24 months for resisting and obstructing, to one year and one day on a one-year maximum for possession of marijuana, with credit for 195 days served, and 93 days for OUIL, with credit for 93 days served. This Court granted defendant's delayed application for leave to appeal. Because defendant was not entitled to credit for time served against the resisting and obstructing sentence, and he has not established ineffective assistance of counsel at trial we affirm defendant's sentences, but remand for correction of the judgment of sentence to reflect that his sentence for the possession of marijuana conviction was for one year. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that he was entitled to credit for time served against his resisting and obstructing sentence. The denial of credit was based on the assumption that, under MCL 768.7a(2), credit would first be assigned to time served on defendant's parole violation sentence. It is not clear whether defendant was sentenced for the parole violation. However, the Michigan Offender Tracking Information Service (OTIS) indicates that defendant was paroled on December 4, 2007. Since defendant has already been paroled, we cannot fashion any relief even if there was error and, accordingly, the issue is moot. *People v Cathey*, 261 Mich App 506, 510; 681 NW2d 661 (2004). Regardless, since defendant was being held on a parole detainer and not "because of being denied or unable to furnish bond for the [resisting and obstructing] offense of which he [was] convicted," he was not entitled to credit for time served against the resisting and obstructing sentence. See *People v Stead*, 270 Mich App 550, 552; 716 NW2d 324 (2006).

Defendant next argues that he received ineffective assistance of counsel since his attorney did not object at sentencing to the scoring of Prior Record Variable (PRV) 1 and Offense Variable (OV) 13. However, the record reveals that the trial court properly scored these variables. Defendant rightfully received a score of 50 for PRV 1 since he had two prior high severity felony convictions that did not "precede[] a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication." See MCL 777.51(1)(b); MCL 777.50(1). According to his presentence investigation report (PSIR), defendant had 16 prior convictions before this offense, which occurred on December 10, 2005. These included a series of offenses for which he was sentenced on April 18, 2001. Three of these convictions resulted in maximum sentences of more that ten years: he received 30 months to 15 years for a March 22, 2001, habitual fourth/nonsufficient funds offense; three to ten years as a habitual offender for two March 25, 2001, false pretenses offenses and a nonsufficient funds offense; and 30 months to 15 years as a habitual offender for six similar offenses that occurred on March 31, 2001. Thus, defendant had more than two prior high severity felony convictions under MCL 777.51(2)(c).

Regarding OV 13, defendant argues that it was improperly scored at ten points, averring that the conduct was also scored for OV 12. MCL 777.43(1)(c) provides for a score of ten points if "[t]he offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property. . . ." Subsection (2)(a) and (c) of this statute provide that the pattern may span a five-year period but cannot include conduct scored in OV 12. MCL 777.42(1) that deals with OV 12, directs that 10 points be scored if there are "[t]wo contemporaneous felonious criminal acts involving crimes against a person" or "[t]hree or more contemporaneous felonious criminal acts involving other crimes." Offense Variable 13 does not focus solely on contemporaneous acts, as does OV 12. It appears that the OV 12 score was based solely on the current offense, whereas the OV 13 score was for the previous crimes dating back to 2001. Since there is no indication of an overlap, there was no scoring error and coextensively, no ineffective assistance of counsel.

Finally, defendant argues that he was impermissibly sentenced to one year and one day for the marijuana possession conviction. MCL 333.7403(2)(d) provides for a sentence of one year. The trial court stated that it was sentencing defendant to one year, but that it was "easiest to say 12 months and one day." However, there is no explanation for this reasoning. The Department of Corrections asked the trial court to revisit this issue, apparently to no avail. Since the trial court stated that the sentence was for one year, indicating that it should just be recorded in a way that reflected an extra day, we conclude that there is no reason to remand for resentencing. Rather, we remand to correct the judgment of sentence to reflect that the sentence was for one year.

Affirmed and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio