Court of Appeals, State of Michigan

ORDER

People of MI v Patrick Scott Gajos

Docket No. 281344

LC No. 06-210018-FH

Jane M. Beckering
Presiding Judge

Stephen L. Borrello

Alton T. Davis
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued November 13, 2008 is hereby VACATED. A new opinion will be issued.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JAN 20 2009
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK SCOTT GAJOS,

Defendant-Appellant.

UNPUBLISHED
November 13, 2008

No. 281344
Oakland Circuit Court
LC No. 06-210018-FH

Before: Beckering, P.J., and Borrello and Davis, JJ.

PER CURIAM.

Defendant pleaded no contest to charges of breaking and entering with intent to commit a larceny or felony, MCL 750.110, and possession of marijuana, MCL 333.7403(2)(d), and was sentenced as a fourth habitual offender, MCL 769.12, to serve concurrent terms of incarceration of 19 months to 25 years for the breaking and entering conviction, and 67 days for the marijuana conviction. Defendant appeals by delayed leave granted, challenging his sentence for the breaking and entering conviction. We conclude that resentencing is not required, but remand this case to the trial court for correction of the scoring of offense variable (OV) 19. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arises from a breaking and entering that took place at a store in Berkley in August of 2006. The presentence investigation report indicates that defendant used a screwdriver to break into the store, and was attempting to pry the cash register open when he saw the police arriving at the premises. Defendant ran out of the back of the store, stole a bicycle and rode away, saw the police, abandoned that bicycle, stole another and rode further, but then, as the police closed in on him, attempted to flee on foot. Defendant was caught, and was "arrested and booked without incident." While at the police station, the police found a small quantity of marijuana in defendant's possession.

The trial court's scoring of ten points for OV 19 resulted in raising the low end of the recommended range for defendant's minimum sentence under the sentencing guidelines from 12 months to 19 months. Defendant's sole issue on appeal is whether the trial court correctly scored the variable. We agree that it did not.

As an initial matter, we note that defendant has already served his 19-month minimum sentence, and so this issue is moot insofar as defendant requests resentencing. See *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994) ("Where a subsequent event

renders it impossible for this Court to fashion a remedy, an issue becomes moot."). However, a criminal defendant has a due process right to be sentenced on the basis of accurate information. *People v Hoyt*, 185 Mich App 531, 533; 462 NW2d 793 (1990), citing US Const, Am XIV, § 1, and Const 1963, art 1, § 17. Even where resentencing is not required, because "a scoring error may still affect a defendant through such things as its effect on the calculation of parole eligibility," where such error is identified the case should be remanded to correct it. *People v Melton*, 271 Mich App 590, 593 (Davis, P.J., joined by Fitzgerald and Markey, JJ.), 597 (Neff, J., concurring in pertinent part); 722 NW2d 698 (2006). For these reasons, we do not deem this issue moot.

The trial court assessed ten points for OV 19, which MCL 777.49(c) prescribes where the offender "interfered with or attempted to interfere with the administration of justice." Our Supreme Court has noted that, "[l]aw enforcement officers are an integral component in the administration of justice," and so concluded that providing law enforcement with a false name constitutes interference with the administration of justice. *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). In this case, however, there is no allegation that defendant provided any false information, or otherwise interfered with the police response to his crime, but for his attempt to flee in the first instance.

If merely attempting to evade discovery or capture constituted interference with the administration of justice, OV 19 would have to be scored for virtually every criminal conviction. In this case, the alternative to running away upon sighting the police would have been to stand still and await capture. We do not deem such uncharacteristic submission and surrender necessary to avoid a penalty for interfering with the administration of justice. There is no indication that, in the course of his flight from the police, defendant in fact disobeyed a command to stop. In the absence of a lawful such command, merely running from the police is no more pernicious an activity than running from anyone else, or for any other reason.

Because the evidence indicates that defendant merely ran away, without disobeying any commands to the contrary, then surrendered without incident when caught, we conclude that the trial court erred in scoring any points for OV 19.

As noted, defendant has already served the minimum sentence that resulted from the trial court's scoring of OV 19, thus rending moot defendant's demand for resentencing. But we hereby remand this case to the trial court for the ministerial task of transmitting to the Department of Corrections a sentencing information report amended to reflect a score of zero for OV 19. See *Melton, supra*.

Resentencing denied as moot, but case remanded for the ministerial task of correcting the sentencing information report consistent with this opinion. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Stephen L. Borrello
/s/ Alton T. Davis