

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES WILLIAM O'NEAL,

Defendant-Appellant.

UNPUBLISHED
February 26, 2009

No. 283026
Oakland Circuit Court
LC No. 06-210565-FH

Before: Donofrio, P.J., and K. F. Kelly and Beckering, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the sentence imposed on his plea-based conviction of receiving or concealing stolen property over \$1,000 but less than \$20,000, MCL 750.535(3)(a). We affirm defendant's conviction, but vacate the sentence and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with two counts of breaking and entering with intent to commit a larceny resulting from two separate break-ins on the same day at Dollar Castle and McDonald Modular Solutions in Southfield. The district court bound defendant over only on the charge involving McDonald Modular Solutions after determining that the prosecution had presented insufficient evidence that defendant committed the other offense. Defendant pled guilty to receiving or concealing stolen property in return for dismissal of the remaining breaking and entering charge.

Defendant moved for resentencing, and contested the scoring of offense variable (OV) 13 (continuing pattern of criminal behavior), which was scored five points for three or more property offenses occurring within five years of the sentencing offense. MCL 777.43(1)(f). The prosecution responded that the evidence at sentencing supported the scoring since it revealed that defendant had committed two breaking and enterings in 2006, and had a 2004 conviction for breaking and entering. The trial court denied the motion for resentencing in a written order (that included a statement that oral argument would not affect the court's decision-making process). The trial court denied the motion for the reasons given by the prosecution, and stated that, "despite the magistrate's dismissal of one count of breaking and entering, this Court found based on the PSI, and affirms (based on the briefing of the parties and the record before it), that the people have shown by a preponderance of the evidence that the Defendant did indeed commit the dismissed charge." The trial court found that, even were it to have found that OV 13 was improperly scored, a sentence departure would have been warranted due to substantial and

compelling reasons, including the fact that defendant was on parole for only a short time before he committed the instant offense, that defendant had spent most of his adult life either imprisoned or on parole, and the fact that defendant had seven convictions for breaking and entering. The trial court also found that the length of the departure (a two-month upward deviation) was proportionate under the circumstances.

Defendant maintains that the trial court erroneously denied his motion for resentencing without a hearing in his presence, erred in denying his motion, and misscored OV 13 entitling him to resentencing.

I

Defendant is mistaken in his assertion that he was entitled to a hearing on his motion for resentencing. Once a defendant has effectively challenged the scoring of a guideline, the prosecution must establish by a preponderance of the evidence that the facts are as the prosecution asserts. The sentencing court must then decide whether to entertain further proofs. *People v Walker*, 428 Mich 261, 268; 407 NW2d 367 (1987), abrogated on other grounds in *People v Mitchell*, 454 Mich 145 (1997); *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), aff'd in part and vacated in part on other grounds, 469 Mich 415 (2003). Such a decision rests within the discretion of the trial court. *Perez, supra*.

In addition, a defendant does not have a right to be present at all post-conviction motion hearings, including motions for resentencing. See *People v Ormsby*, 48 Mich 494, 495; 12 NW 671 (1882) (defendant generally has no right to be present at post-conviction motions); *People v Alcora*, 147 Mich App 326, 329-330; 383 NW2d 182 (1985); *People v Strunk*, 172 Mich App 208, 211; 431 NW2d 223 (1988) (defendant did not have a right to be present at the motion for resentencing); *People v Mouat*, 194 Mich App 482, 487; 487 NW2d 494 (1992) (indicating that when the court was merely articulating the reasons for its previous sentence, this did not amount to resentencing and the defendant did not have a right to be present).

The court may treat the contents of a presentence investigation report (PSIR) as presumptively accurate. *Walker, supra* at 267. Defense counsel at sentencing agreed that the contents of the PSIR were accurate. He also did not contest the factual accuracy of the police report, which was used as a factual basis for the plea. The sentencing court was aware at sentencing that the district court had previously dismissed one count of breaking and entering. On appeal, defendant has not provided any indication of what additional evidence, if any, he would have provided to assist the trial court in its scoring decision. He claims that the existing record provided insufficient evidence to show that he committed the Dollar Castle break in. Defendant has not shown that the sentencing judge abused its discretion in not entertaining further proofs at a hearing on the scoring issue raised by defendant. And since the trial court decided that resentencing was unnecessary, defendant cannot show that he had a right to be present during the trial court's deliberation of defendant's post-conviction motion.

II

Defendant next argues that the trial court erred in its decision that the prosecutor had shown by a preponderance of the evidence that defendant was involved in the Dollar Castle break in. We review the trial court's application of the sentencing guidelines de novo, but

review a preserved challenge to the scoring of a sentencing variable for an abuse of discretion. *People v Cook*, 254 Mich App 635, 638; 658 NW2d 184 (2003); *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). “Scoring decisions for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). See also *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006).

Both parties acknowledge that the district court’s decision to not bind defendant over on this charge is not dispositive. However, nothing presented at sentencing leads us to the conclusion that that decision was incorrect. After reviewing the evidence presented by the prosecution, we find that the defendant’s argument has merit. The prosecution showed that defendant is a serial burglar, that the break ins happened at adjacent stores within a 30-minute period, that defendant was caught with a computer from the McDonald Modular Solutions building by an officer who was speaking with the owner of the Dollar Castle about the first break in, and that the officer did not see any other individuals out on Eight Mile Road at the time. While physical evidence was found to link defendant to the McDonald break in, no physical evidence directly tied defendant to the Dollar Castle break in. Nor did the Dollar Castle owner state that he recognized defendant. The prosecution essentially relied on defendant’s penchant for burglary and his presence to justify the trial court’s scoring decision. We deem this insufficient, and find that the prosecution failed to establish, by a preponderance of the evidence, that defendant committed this second crime. We thus find the trial court’s scoring decision erroneous.

III

Both parties discuss the trial court’s decision that, notwithstanding the scoring of OV 13, it would have found sufficient reason to sentence defendant outside the guidelines due to his criminal history. However, because the trial court’s scoring error resulted in a change in the appropriate guidelines range, and defendant’s sentence fell outside this range, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 90; 711 NW2d 44 (2006). That the trial court has already listed possible reasons for exceeding the guidelines and imposing the same sentence does not affect this result. The issue was not raised below and defendant and defense counsel were not presented with an opportunity to challenge the possible justifications for exceeding the guidelines. On remand, we direct the trial court to sentence in accordance with *People v Smith*, 482 Mich 292, 299-300; 754 NW2d 284 (2008), which summarizes the statutory obligations of trial courts when departing from sentencing guidelines.

Defendant’s conviction is affirmed. We vacate defendant’s sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering