

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACOB FREEDOM WEISS,

Defendant-Appellant.

UNPUBLISHED

June 23, 2009

No. 285709

Cheboygan Circuit Court

LC No. 07-003710-FC

Before: Owens, P.J., and Servitto and Gleicher, JJ.

MEMORANDUM.

Defendant pleaded guilty to charges of breaking and entering with intent to commit a felony or larceny therein, MCL 750.110, and larceny in a building, MCL 750.360. Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 54 months to 40 years for breaking and entering, and to 54 months to 20 years for larceny. This Court granted defendant's delayed application for leave to appeal. We vacate defendant's sentences and remand for resentencing. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant broke into a school through a window to steal computers. He was apprehended with a computer inside the building after he had already removed other computers and placed them by a shed. In scoring Offense Variable 12 (OV 12), the sentencing court determined that defendant should receive five points for the commission of two felonious criminal acts contemporaneously with the sentencing offense. MCL 777.42(1). The contemporaneous offenses were possession of burglary tools, MCL 750.116, and receiving or concealing stolen property, MCL 750.535(1).

Defendant argues that it was error to score the act of receiving or concealing stolen property in arriving at the score for OV 12. The interpretation and application of the statutory sentencing guidelines are legal questions subject to de novo review. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

We note that a thief can be charged with receiving or concealing the property that the thief stole. *People v Hastings*, 422 Mich 267, 271-272; 373 NW2d 533 (1985). Moreover, the crime of receiving or concealing stolen property is complete if a defendant possesses stolen property. MCL 750.535(1). However, we conclude that defendant did not possess the

computers that had been removed from the school and were still on school property at the time of his arrest. We distinguish *Hastings*, in which the defendant was in the process of taking the stolen items to a prospective buyer. While defendant was in the process of taking possession, unlike the defendant in *Hastings*, he had not removed the items to a place where he would have control over them. Under these circumstances, we conclude that the act of possession was not established, and that receiving or concealing the property should not have been scored as a contemporaneous felonious act.

Under MCL 777.42(1)(f), defendant should have been scored one point for one contemporaneous criminal act (the felony of possession of burglary tools, MCL 750.116). Defendant's total OV score should have been six points rather than 10 points. The crime scored was breaking and entering with intent, which is a Class D offense. See MCL 777.16f. The reduction by four points would have changed defendant's OV level from II to I. See MCL 777.65. Defendant's minimum sentencing range, unadjusted for habitual offender status, would have been 10 to 23 months. When adjusted for fourth habitual offender status in accordance with the plea bargain, the new range is 10 to 46 months. Thus, defendant is entitled to resentencing.

Sentences vacated and remanded for resentencing. We do not retain jurisdiction.

/s/ Donald S. Owens
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher