

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY RONALD BROWN,

Defendant-Appellant.

UNPUBLISHED
September 1, 2009

No. 283433
Oakland Circuit Court
LC No. 2007-213521-FH

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

PER CURIAM.

Defendant pleaded guilty to using the internet to violate MCL 750.145c(2), MCL 750.145d(2)(f), and to violate MCL 722.675, MCL 750.145d(2)(c), for which he was sentenced to concurrent prison terms of 30 months to 20 years, and two to four years, respectively. This Court denied defendant's delayed application for leave to appeal, but our Supreme Court, in lieu of granting leave to appeal, has remanded the case to this Court "for consideration as on leave granted." *People v Brown*, 482 Mich 987; 756 NW2d 62 (2008). We affirm in part and remand for further proceedings. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with child sexually abusive activity, MCL 750.145c(2) (count I), using the internet to violate MCL 750.145c(2), MCL 750.145d(2)(f) (count II), and two counts of using the internet to violate MCL 722.675, MCL 750.145d(2)(c) (counts III and IV). Pursuant to a plea agreement, he pleaded guilty to counts II and III, and the remaining counts were dismissed. In addition, the trial court agreed to impose a sentence at "the bottom of the guidelines." The trial court denied defendant's postjudgment motion to withdraw his plea or for resentencing.

Defendant first argues that the trial court erred in denying his motion to withdraw his guilty plea, which defendant maintains was not voluntarily made because it was coerced by inaccurate advice from defense counsel that he had no defense to the charges. This issue has not been preserved for appeal. Although defendant filed a motion to withdraw his plea based in part on counsel's allegedly inaccurate advice about a possible defense, the motion below was predicated on different defenses than those asserted here. See MCR 6.310(D). Because the issue has not been preserved, review is limited to plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

When considering a claim of ineffective assistance of counsel in the context of a guilty plea, the court must determine whether the defendant tendered a voluntary and understanding plea. “The question is not whether a court would, in retrospect, consider counsel’s advice to be right or wrong, but whether the advice was within the range of competence demanded of attorneys in criminal cases.” *People v Thew*, 201 Mich App 78, 89-90; 506 NW2d 547 (1993). “Defense counsel must explain to the defendant the range and consequences of available choices in sufficient detail to enable the defendant to make an intelligent and informed choice” between accepting a plea and going to trial. *People v Jackson*, 203 Mich App 607, 614; 513 NW2d 206 (1994). A guilty plea may be rendered involuntary due to ineffective assistance of counsel where defense counsel fails to explain the nature of the charges or discuss possible defenses thereto. *Id.*

In *People v Spencer*, 192 Mich App 146, 151; 480 NW2d 308 (1991), this Court held that where the defendant believed he was innocent but pleaded guilty based on counsel’s erroneous advice that there was no viable defense to the charges, he should be permitted to withdraw his plea. That case, however, involved a unique circumstance where the defendant was unable to articulate a factual basis for his plea and the parties resorted to use the preliminary examination transcript, a review of which showed that the witnesses’ testimony was inconsistent regarding the defendant’s involvement. *Id.* at 148-149. In this case, by contrast, defendant admitted to communicating over the internet with a person he believed to be a 15-year-old girl. He transmitted photographs of his genitals, engaged in discussions of a sexual nature, and arranged to meet her for sex. It is unclear what viable defense defendant believes existed to the charges. His argument appears to be directed at the manner in which the charges were set forth in the information rather than on whether his conduct came within the ambit of the statutes at issue. Because defendant pleaded guilty to the offense, did not object to the information below, and has not indicated how any alleged defect in the information prejudiced him, any alleged error must be deemed harmless. See MCR 6.112(G).

In a supplemental Standard 4 brief, defendant, citing *Cyberspace Communications, Inc v Engler*, 142 F Supp 2d 827 (ED Mich, 2001), and *American Civil Liberties Union v Mukasey*, 534 F3d 181 (CA 3, 2008), appears to argue that the statutes at issue are unconstitutional. Various provisions of the Disseminating, Exhibiting, or Displaying Sexually Explicit Matter to Minors Act, MCL 722.671 *et seq.*, including MCL 722.675, were amended by 1999 PA 33, effective August 1, 1999. In *Cyberspace Communications, supra* at 831, the court determined that the act as amended “violates the First Amendment and the Dormant Commerce Clause of the United States Constitution” and permanently enjoined enforcement of the act. However, the act was amended several times thereafter, and in *Athenaco, Ltd v Cox*, 335 F Supp 2d 773, 787 (ED Mich, 2004), the court rejected constitutional challenges to certain provisions of the act, including MCL 722.675, as amended by 2003 PA 192. Defendant has not explained why MCL 722.675 is unconstitutional in its current form. The *ACLU* case involved the constitutionality of the Child Online Protection Act, 47 USC 231, but defendant was not charged with or convicted of a violation of that act. Accordingly, we find no error justifying withdrawal of the guilty plea.

Defendant next argues that the trial court erred in denying his motion for resentencing based on an error in the scoring of OV 10, MCL 777.40. This issue was raised at sentencing and, therefore, is preserved for appeal. MCR 6.429(C).

A trial court must impose a minimum sentence within the appropriate guidelines range unless a departure from that range is permitted. MCL 769.34(2). When scoring the guidelines,

“[a] sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision “for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). This Court reviews scoring decisions to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). The interpretation and application of the sentencing guidelines present questions of law subject to de novo review on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

A violation of MCL 750.145d(2)(f) is a class B offense subject to the legislative guidelines. MCL 777.16g. Defendant was assessed ten points for OV 10, for exploiting a vulnerable victim. MCL 777.40(1)(b). That scoring decision, combined with defendant’s prior record variable score, placed him in the C-II cell of the applicable sentencing grid, resulting in a guidelines range of 30 to 50 months. MCL 777.63. We conclude, however, that the trial court erred in scoring ten points for OV 10. In *People v Russell (On Remand)*, 281 Mich App 610, 615; 760 NW2d 841 (2008), lv pending (footnote omitted), this Court held that “regardless of an offender’s subjective intent, if no vulnerable victim was in fact placed in jeopardy or exploited by an offender’s actions, OV 10 does not apply.” Thus, because defendant here did not prey upon an actual vulnerable victim, OV 10 should have been scored at zero points.

Without the ten-point score for OV 10, defendant’s guidelines range is reduced to 24 to 40 months. MCL 777.63. Although the trial court did not utilize the appropriate guidelines range, the scoring error in and of itself would not require resentencing because defendant’s sentence is within the corrected range and the trial court indicated when denying defendant’s motion for resentencing that it would have imposed the same sentence even if OV 10 had not been scored. *People v Mutchie*, 468 Mich 50, 51; 658 NW2d 154 (2003). However, defendant’s plea agreement included an agreement by the court to impose a sentence at “the bottom of the guidelines.” Defendant’s minimum sentence of 30 months is not at the bottom of the appropriate guidelines range. Therefore, we remand this case to the trial court, which shall either resentence defendant in accordance with the plea agreement or allow defendant to withdraw his plea. *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993).

Affirmed in part and remanded for further proceedings not inconsistent with this opinion. We do not retain jurisdiction.

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