

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC THOMAS VANEVEY,

Defendant-Appellant.

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UNPUBLISHED  
September 1, 2009

No. 286170  
Branch Circuit Court  
LC No. 07-108878-FC

Before: M. J. Kelly, P.J., and K. F. Kelly and Shapiro, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted the sentence imposed after he pleaded guilty to safe breaking in violation of MCL 750.531. The trial court sentenced defendant as a habitual offender, MCL 769.12, to 15 to 40 years in prison. We conclude that the trial court erred when it calculated defendant's sentencing variables and that the errors were not harmless. For those reasons, we vacate defendant's sentence and remand for resentencing. We have decided this appeal without oral argument under MCR 7.214(E).

In pleading guilty, defendant admitted that he went through a window of a building, found a safe in a closet, pried it from the floor, and pushed it out of the window and into his truck. According to the pre-sentence investigation report, defendant admitted to the police that he had been involved in breaking into between 35 and 40 businesses. As part of the plea agreement, defendant was not charged with these other offenses.

Defendant argues that offense variables (OVs) 9 and 16 were scored incorrectly at 25 and 10 points, respectively, and that both variables should have been scored at zero points. The prosecution concedes the errors. The correction reduces defendant's total OV score from 50 points (OV Level V), to 15 points (OV Level III). The scoring corrections change the appropriate guidelines range from 50 to 150 months to 36 to 106½ months. MCL 777.64; MCL 777.21(3)(b).

An erroneous scoring of the guidelines range does not require relief if the trial court would have imposed the same sentence regardless of the error. *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003). According to the prosecution, the trial court indicated that it intended to depart from the guidelines regardless of how they were scored when, in response to the prosecutor's challenge to the scoring of another offense variable, the court commented, "We'll leave it at five at this point. And, in fact, I believe the Court can assert that it's not going

to make any impact as far as the Court's decision in sentencing anyway." To the extent that this comment may be interpreted as meaning that the court had formulated a sentence for which the guidelines range was immaterial, the court's later comments indicated that the statutory range was a consideration in the court's sentence. When the court agreed to increase the scoring of OV 16 as suggested by the prosecutor, it noted that the increase raised defendant's total OV score to 50, and then inquired, "And does that have an impact that you see, Mr. Kashian [the prosecutor]?" The prosecutor then informed the court of the change in the OV Level and the resulting increased range.

On this record, we do not agree with the prosecutor that the court's comments show that it would have imposed the same sentence regardless of the error. Although it is apparent that the court determined that the facts warranted a departure, the court is required to justify the particular departure in a case. *People v Smith*, 482 Mich 292, 304; 754 NW2d 284 (2008). Here, the court was unaware of the particular departure because it chose the sentence while operating under a misconception of the guidelines range. When the trial court sentenced defendant, it chose a minimum sentence that was 30 months, or 20 percent, higher than the 150-month maximum range that had been calculated. In actuality, the departure was 73½ months, or 69 percent higher than the correct maximum. Because we are not convinced that the scoring errors were harmless, defendant must be resentenced.

In light of our conclusion, we need not reach the issue whether the trial court failed to provide a substantial and compelling reason for the departure. On remand, the trial court shall sentence defendant within the appropriate guidelines range, or state a substantial and compelling reasoning for departing from that range in accordance with MCL 769.34(3) and *Smith, supra*.

We vacate defendant's sentence and remand for resentencing. We do not retain jurisdiction.

/s/ Michael J. Kelly  
/s/ Kirsten Frank Kelly  
/s/ Douglas B. Shapiro