STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 17, 2009
v	No. 287086 Muskegon Circuit Court
WILLIAM JEFFREY THOMAS, Defendant-Appellant.	LC No. 07-055766-FH

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Defendant was convicted of two counts of resisting and obstructing, MCL 750.81d(1), and sentenced as an habitual offender, fourth offense, MCL 769.12, to 46 months to 15 years in prison for each count. He appeals his sentence as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant's convictions arise from his actions while incarcerated in the Muskegon County jail annex on November 29, 2007. Deputy Gary Wilks testified that he was preparing medications for distribution in a control center that separates the annex from the work release part of the jail when he noticed defendant up against a glass window of the room. Signs posted near the office indicated that inmates were not to approach or touch the glass. Deputy Wilks motioned to defendant to move along. He did not want defendant to observe the medications because of his concern that stronger inmates might steal medications from weaker ones. Deputy Wilks turned around and continued his preparations. When he looked again, defendant again had his face up against the window. Deputy Wilks pushed the intercom and asked defendant what the emergency was. Defendant began to swear at him. Due to the need for strict compliance with the rules in an open, 80-person housing unit, Deputy Wilks told defendant that he would be moved out of the annex and to pack his belongings. Deputy Wilks then called Deputy Matt Smith, and together they went into the annex to speak with defendant. After Deputy Wilks again instructed defendant to pack, defendant jumped off of his bunk and made a lunging motion at Deputy Wilks. Defendant became belligerent, swore at Deputy Wilks again, and told the deputy not to touch him. Deputy Wilks told defendant to place his hands behind his back. Instead, defendant clenched his fists as if he was going to fight. Deputy Wilks grabbed defendant's arm, and the two officers brought defendant to the ground as defendant struggled. The physical altercation lasted approximately 20 seconds.

On appeal, defendant first argues that the trial court misscored offense variable (OV) 9 (number of victims) at ten points because two officers were involved here. Defendant maintains that this scoring is improper because each resisting and obstructing charge involved only one of the officers.

When scoring the sentencing 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 Endres (On Remand)*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id*. "The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

MCL 777.39 provides, in pertinent part:

> (1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (c) There were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss..... 10 points
>
> * * *
>
> (2) All of the following apply to scoring offense variable 9:
>
> (a) Count each person who was placed in danger of physical injury or loss of life or property as a victim.

In *People v Sargent*, 481 Mich 346, 351; 750 NW2d 161 (2008), our Supreme Court found that it was improper for a trial court to score OV 9 at ten points where the alleged second victim claimed that the defendant had sexually molested her in a separate, uncharged offense. During its discussion, the Court stated, "[W]hen scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." *Id*. at 350. In contrast to the uncharged acts in that case, the Court noted situations where scoring for multiple victims would be appropriate even where only one conviction resulted, stating, "For example, in a robbery, the defendant may have robbed only one victim, but scoring OV 9 for multiple victims may nevertheless be appropriate if there were other individuals present at the scene of the robbery who were placed in danger of injury or loss of life." *Id*. at 351 n 2. This language was consistent with the holding in *People v Morson*, 471 Mich 248; 685 NW2d 203 (2004), where the Court held that ten points were properly assessed under OV 9 when the defendant endangered two victims during an armed robbery; the woman who was robbed and another man standing nearby who was shot by the perpetrator. *Id*. at 253, 261-262. See also *id*. at 277 (Young, J., concurring in part).

The prosecutor uses the language in *Sargent* to argue that the scoring was proper in the instant case because both charged offenses deal with the same transaction. However, in *People v McGraw*, ___ Mich ___; ___ NW2d ___ (2009), LEXIS 1588, our Supreme Court narrowed the circumstances under which points for this variable can be scored. In *McGraw*, *supra* at 1, 8-9, where the prosecution sought to score points for individuals who were placed in danger during the defendant's flight after a completed breaking and entering, the Court rejected the "transactional approach" alluded to in *Sargent*. Instead, the Court held that "a defendant's conduct after an offense is completed does not relate back to the sentencing offense for purposes of scoring offense variables unless a variable specifically instructs otherwise." *Id*. at 1. The Court concurred with the language in *Sargent*, holding that the offense variables were generally "offense-specific" and that, usually, only conduct "relating to the offense" was to be taken into consideration when scoring the offense variables. *Id*. at 5. Contrasting the facts in the case from those in *Morson*, and in the example used in *Sargent*, the Court held that the defendant's flight from the police occurred "after the offense was completed for purposes of scoring the sentencing guidelines"[1] and that it could not therefore be considered in scoring OV 9. *Id*. at 24. The Court found that such conduct could, instead, be charged by the prosecution separately, or that the trial court could use this conduct to either decide what the appropriate score within the guidelines should be, or whether to exceed the guidelines. *Id*. at 16 n 31.

Here, even though defendant was convicted of a separate count of resisting and obstructing for each of the two officers involved in the incident, both officers were placed in danger of injury through defendant's resistance at the same time. Thus, both officers were arguably victims under the definition of MCL 777.39(2)(a), for each count. Despite some of the "offense-specific" language used in *McGraw*, this situation is substantially similar to that in *Morson*, which the *McGraw* Court used as a contrasting example to show when scoring multiple victims for one offense is appropriate. Therefore, we find that the trial court did not err in scoring OV 9 at ten points.

Defendant next argues that the trial court erred when it scored 25 points for OV 19 (threat to security or interference with the administration of justice). During sentencing, defense counsel argued that only ten points should have been scored for this variable. After the prosecution argued that the scoring was proper, the trial court asked defense counsel whether he challenged the narrative in the PSIR. Counsel stated that he did not. The trial court then used statements in the narrative indicating that defendant got the other inmates into an "uproar" during the incident, and that several inmates refused the officers' orders to go their bunks, to support its decision to score 25 points for this variable.

Defendant now maintains that his trial counsel provided ineffective assistance when he failed to challenge the narrative in the PSIR.

[1] The Court declined to determine precisely when the breaking and entering offense was completed, stating only that the flight was "far beyond and removed from the sentencing offense." *Id*. at 25 n 45.

> Effective assistance of counsel is presumed, and [a] defendant bears a heavy burden of proving otherwise. In order to overcome this presumption, defendant must first show that counsel's performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms. Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. [*People v McGhee*, 268 Mich App 600, 625; 709 NW2d 595 (2005) (quotations and citations omitted).]

Because no *Ginther*[2] hearing was held, this Court's review of defendant's claim is limited to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005); *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

Defendant cannot show outcome determinative error on the part of trial counsel. Defendant's prior record variable score was 115. Defendant's initial OV score, including the 25 points for OV 19 and the correctly scored OV 9 variable, was 55 points, which placed him in the F III category for his class G offense. His classification would not change even if we were to find that OV 19 should have been scored at zero points. See MCL 777.68. Because the alleged scoring error does not affect the appropriate guidelines range, defendant cannot show that he is entitled to resentencing, even if counsel acted objectively unreasonably. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006). Defendant thus cannot show that he is entitled to relief due to ineffective assistance of counsel.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).