

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MURRAY KEITH WARREN,

Defendant-Appellant.

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UNPUBLISHED

December 22, 2009

No. 289580

Wayne Circuit Court

LC No. 06-008908-FC

Before: Murphy, C.J., and Jansen and Zahra, JJ.

PER CURIAM.

Defendant appeals by right the sentence imposed on resentencing with respect to his jury trial conviction of manslaughter, MCL 750.321.<sup>1</sup> We affirm defendant's sentence, but remand for the ministerial task of correcting an error in the judgment of sentence. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that he was erroneously scored 25 points under Offense Variable (OV) 3, MCL 777.33 (degree of physical injury to a victim). MCL 777.33(1)(c) provides that 25 points should be scored if life threatening or permanent incapacitating injury occurred. In this case, the victim died. MCL 777.33(1) dictates that the sentencing court assign the highest number of points possible under the statute. MCL 777.33(2)(b) provides, "Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense." This does not mean, however, that zero points are to be scored for OV 3 if a homicide is involved. *People v Houston*, 473 Mich 399, 405-410; 702 NW2d 530 (2005). The *Houston* Court, which was addressing a second-degree murder conviction and sentence, explained:

Defendant argues that, because the statute governing OV 3 prohibits the trial court from scoring one hundred points on the basis of the death of the victim when homicide is the sentencing offense, the court in this case was required to

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<sup>1</sup> In *People v Warren*, unpublished opinion per curiam of the Court of Appeals, issued June 24, 2008 (Docket Nos. 276090, 276425, and 276685), this Court vacated defendant's sentence and remanded for resentencing because the trial court improperly relied on convictions occurring after the date the sentencing offense was committed for purposes of identifying defendant as an habitual offender.

assess *zero* points. Implicit in this argument is the assumption that only the “ultimate result” of a defendant’s criminal act – here, the death rather than the injury that preceded the death – may be considered in scoring OV 3. The prosecution argues, on the other hand, that the court correctly assessed twenty-five points for OV 3. Because the court was precluded from considering the victim’s death under MCL 777.33(2)(b), it could, in the prosecution’s view, consider and score the next applicable factor on the basis of the physical injury that preceded the victim’s death.

Faithful application of the plain language of MCL 777.33 demonstrates that the prosecution is correct and that defendant was properly assessed twenty-five points for OV 3 in this case. [*Houston*, 473 Mich at 405 (emphasis in original).]

*Houston* controls the issue presented here, and thus the trial court did not err in scoring 25 points for OV 3.

Defendant next asserts that he was denied his right to allocution during resentencing. Defendant failed to raise this issue below; consequently it has not been preserved for appeal. *People v Jones (On Rehearing)*, 201 Mich App 449, 452; 506 NW2d 542 (1993). We thus review this issue for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

MCR 6.425(E)(1)(c) requires the court to allow a defendant and his counsel the opportunity to “advise the court of any circumstances they believe the court should consider in imposing sentence[.]” See also *People v Lawson*, 172 Mich App 498, 500-501; 432 NW2d 354 (1988). The purpose of the right to allocution is to allow a defendant “to speak in mitigation of the sentence,” to equalize the sentencing process, and to allow the defendant to begin an atonement or healing process. *People v Petty*, 469 Mich 108, 119, 121; 665 NW2d 443 (2003).

During resentencing, the trial court discussed why defendant was being resentenced. The prosecution argued that defendant should be sentenced outside the guidelines due to the gruesome nature of the killing. Defense counsel countered that a sentence within the guidelines was appropriate and that the trial court should not consider a departure. The trial court then noted that during defendant’s initial sentencing, it had decided to sentence defendant at the top end of what it believed to be the proper guidelines range. The court again decided to sentence defendant at the top end of the range, albeit using the corrected guidelines, and stated that it would impose a sentence of 57 months to 15 years. Following this statement, the prosecutor asked to approach the bench. After a short bench conference, the trial court asked defendant whether he wished to say anything “relative to the sentence imposed.” Defendant replied, “No, sir.” The trial court then asked whether anyone sought to amend the presentence investigation report and, hearing no claims, stated that defendant was sentenced to 57 months to 15 years.

Arguably, the trial court erred in failing to allow defendant to speak before it first decided to impose a sentence at the top of the corrected guidelines. However, while allocution is an important right, reversal is not automatic when a trial court errs in failing to properly comply with MCR 6.425. “Whether failure to comply with a provision in this subrule will entitle a defendant to resentencing [now] depends on the nature of the noncompliance and must be

determined by reference to past case law or on an individual case basis.’” *People v Petit*, 466 Mich 624, 632; 648 NW2d 193 (2002), quoting MCR 6.425, 1989 Staff Comment (alteration in original).

On the facts and circumstances of this case, we conclude that a remand for resentencing is unnecessary even though the trial court did not offer defendant the opportunity of allocution until after announcing the sentence. The resentencing proceeding was defendant’s second opportunity to advise the trial court of any factors defendant believed were important for the court to consider in imposing sentence. According to the prosecutor, who quotes a passage from the original sentencing hearing, defendant availed himself of the opportunity to allocute, offering condolences to the victim’s family and asking the court for mercy. Defendant does not indicate anything to the contrary, nor has he filed a reply brief to dispute this assertion. Thus, defendant had previously received an opportunity to begin atonement or healing. Also, the trial court did, albeit belatedly, offer defendant the opportunity to speak during resentencing, and defendant decided not to do so. Defendant has not shown what additional purpose would be served by ordering resentencing to allow defendant another chance to address the court. Under the circumstances, defendant has not shown plain error affecting his substantial rights, nor that any presumed error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, 460 Mich at 763-764.

It appears that the trial court, while properly lowering the guidelines range because defendant was not an habitual offender, did not change the habitual status on the judgment of sentence prepared upon resentencing. We direct the trial court to correct the judgment of sentence to reflect defendant’s actual offender status consistent with the opinion in the previous appeal.

We affirm defendant’s sentence, but remand for the ministerial task of correcting the judgment of sentence. We do not retain jurisdiction.

/s/ William B. Murphy  
/s/ Kathleen Jansen  
/s/ Brian K. Zahra