

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DALE J. WIGGINS,

Defendant-Appellant.

UNPUBLISHED

May 20, 2010

No. 290017

Gratiot Circuit Court

LC No. 08-005583-FH

Before: SHAPIRO, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

This case has been remanded for consideration as on leave granted. Defendant challenges the sentence imposed on his no contest plea-based conviction of child sexually abusive material or activity, MCL 750.145c(2). We vacate defendant's sentence and remand for resentencing. This appeal has been decided without oral argument. MCR 7.214(E).

During sentencing, defendant argued that offense variable (OV) 12 (contemporaneous felonious criminal acts) should be scored at ten points, rather than at 25 points. MCL 777.42. Defendant argued that OV 12 had been misscored because only one of the other three initial charges, the additional charge of child sexually abusive material or activity, was designated as a crime against a person in the sentencing guidelines, while the other charges of disseminating sexually explicit matter to a minor were designated as crimes against public order. The trial court disagreed, finding that all three of the additional charges involved crimes involving other persons, namely the minor children involved. Defendant now challenges that decision.

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). “Where effectively challenged, a sentencing factor need be proved only by a preponderance of the evidence.” *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991); see also *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006). We review 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). Any statutory interpretation concerning the application of the sentencing guidelines presents a question of law subject to de novo review on appeal. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

The primary goal of statutory interpretation is to ascertain and effectuate the intent of the Legislature. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). When construing a statute, we first examine the language of the statute. *Id.* Where the language of the statute is clear and unambiguous, further construction is unnecessary and unwarranted, and the statute will be applied as written. *Id.* If the statute defines a term, that definition controls. *People v Schultz*, 246 Mich App 695, 703; 635 NW2d 491 (2001). In addition, provisions must be read in the context of the entire statute so as to produce a harmonious whole, *People v Couzens*, 480 Mich 240, 249; 747 NW2d 849 (2008), and identical language in various provisions of the same act should be construed identically, *People ex rel Simmons v Munising Twp*, 213 Mich 629, 633; 182 NW 118 (1921).

In calculating the appropriate guidelines range, a court must determine the offense category and which offense variables apply, score the offense variables, total the points, and then assess points for the prior record variables. MCL 777.21(1)(a); MCL 777.21(1)(b); *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004). The court must then use the resultant offense variables score and prior record variables score with the sentencing grid to determine the recommended minimum sentence range. MCL 777.21(1)(c); *Morson*, 471 Mich at 255.

MCL 777.5 provides:

The offense categories are designated [in MCL 777.11 *et seq.*] as follows:

- (a) Crimes against a person are designated “person”.
- (b) Crimes against property are designated “property”.
- (c) Crimes involving a controlled substance are designated “CS”.
- (d) Crimes against public order are designated “pub ord”.
- (e) Crimes against public trust are designated “pub trst”.
- (f) Crimes against public safety are designated “pub saf”.

MCL 777.6 provides:

The offense descriptions [in MCL 777.11 *et seq.*] are for assistance only *and the statutes listed govern application of the sentencing guidelines.* [Emphasis added.]¹

MCL 777.42 provides in pertinent part:

¹ The “offense descriptions” are contained in a separate column from the category designations in MCL 777.11 through MCL 777.18.

(1) Offense variable 12 is contemporaneous felonious criminal acts. Score offense variable 12 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:

(a) Three or more contemporaneous felonious criminal acts involving crimes against a person were committed..... 25 points.

* * *

(c) Three or more contemporaneous felonious criminal acts involving other crimes were committed..... 10 points.

Pursuant to MCL 777.5, two of the crimes used to score OV 12 in the instant case, disseminating sexually explicit matter to a minor, MCL 722.675, are specifically designated as “crimes against public order.” MCL 777.15g. Under the plain statutory language, the trial court should not have used those crimes as concurrent “crimes against a person” offenses when scoring OV 12. The trial court erred when it found that it was free to look at the substance of the crime rather than the class designations under the guidelines themselves because the Legislature used the term “involving crimes against a person” instead of “categorized as crimes against a person” in MCL 777.42. The trial court essentially read MCL 777.42 as requiring the scoring of 25 points for three contemporaneous “criminal acts involving a person” or “criminal acts against a person,” and not, as the statute states, “criminal acts involving crimes against a person.” “Crimes against a person” is a technical term, at least as used in the guidelines, and MCL 777.5 is essentially a definition section. In addition, under MCL 777.6, the designations used in MCL 777.11 to MCL 777.18 govern the application of the sentencing guidelines, including MCL 777.42. Given that identical language in various provisions of the same act are to be construed identically, *People ex rel Simmons*, 213 Mich at 633, we find that only crimes designated as “person” crimes under MCL 777.11 to MCL 777.18 can be scored as “crimes against a person” under OV 12, or OV 13 pursuant to MCL 777.5 and MCL 777.6. Consistent with the relevant statutory language, the trial court erred when it scored OV 12 at 25 points. Offense Variable 12 should have been scored at 10 points, using defendant’s three other “crimes” against the victims.

The trial court’s scoring placed defendant in a C-V grid for his class B offense, with a corresponding minimum sentence range of 51 to 85 months. With ten points scored for OV 12, defendant’s total OV score of 40 points places defendant into the C-IV sentencing grid, with a recommended minimum sentence range of 45 to 75 months. MCL 777.63. Accordingly, defendant must be resentenced because the scoring error altered the appropriate guidelines range, and defendant’s sentence lies outside that range. *People v Francisco*, 474 Mich 82, 89-91; 711 NW2d 44 (2006).

We vacate defendant’s sentence and remanded for resentencing. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Kathleen Jansen
/s/ Pat M. Donofrio