

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON JOHN COOK,

Defendant-Appellant.

UNPUBLISHED

July 13, 2010

No. 291518

Shiawassee Circuit Court

LC No. 08-007007-FH

Before: TALBOT, P.J., and FITZGERALD and DAVIS, JJ.

PER CURIAM.

Defendant pleaded guilty of second-degree home invasion, MCL 750.110a(3), and was sentenced to a term of 30 to 180 months' imprisonment. The trial court denied defendant's motion for resentencing, which was premised on defendant's claim that prior record variable ("PRV") 5 of the sentencing guidelines was improperly scored at ten points. Defendant now appeals by delayed leave granted. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The trial court's scoring of the sentencing guidelines is reviewed for an abuse of discretion. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005). Issues involving the interpretation and application of the sentencing guidelines are reviewed de novo as questions of law. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

Defendant was assessed ten points for PRV 5 based on convictions from 1996 and 1997.¹ After 1997, and before defendant committed the instant offense in October 2007, defendant had two other misdemeanor convictions involving traffic offenses. It is undisputed that the traffic offense convictions are not scorable under PRV 5. MCL 777.55(2)(a) and (b). For that reason, defendant argues that they cannot be considered for purposes of calculating the ten-year period under MCL 777.50(1). We disagree.

MCL 777.50 provides in part:

¹ Although the discharge dates for these are not specified, they can be determined by adding the term of probation or term of incarceration to the date of conviction. MCL 777.50(3).

(1) In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication.

(2) Apply subsection (1) by determining the time between the discharge date for the prior conviction or juvenile adjudication most recently preceding the commission date of the sentencing offense. If it is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and determine the time between the commission date of that prior conviction and the discharge date of the next earlier prior conviction or juvenile adjudication. If that period is 10 or more years, do not use that prior conviction or juvenile adjudication and any earlier conviction or juvenile adjudication in scoring prior record variables. If it is less than 10 years, use that prior conviction or juvenile adjudication in scoring prior record variables and repeat this determination for each remaining prior conviction or juvenile adjudication until a period of 10 or more years is found or no prior convictions or juvenile adjudications remain.

Pursuant to § 50, the relevant consideration is not whether ten years had passed between the discharge from the 1996 and 1997 misdemeanor offenses and the instant offense, “but whether, starting with the present offense, there was ever a gap of 10 or more years between a discharge date and a subsequent commission date that would cut off the remainder of [the defendant’s] prior convictions or juvenile adjudications.” *People v Billings*, 283 Mich App 538, 552; 770 NW2d 893 (2009). Given defendant’s misdemeanor convictions in 1998 and 2002, there was never a ten-year gap in which defendant remained conviction free so as to cut off the 1996 and 1997 convictions from consideration. Although the traffic misdemeanors cannot themselves be scored under PRV 5, that is not a requirement for calculating the ten-year period under § 50. Addressing the corresponding ten-year rule in the former judicial sentencing guidelines, this Court held:

We do not believe that a conviction for purposes of determining the applicability of the ten-year rule need be a conviction for an offense which may be scored under the guidelines. Rather, we hold that any criminal conviction is sufficient to establish that the defendant did not have a ten-year period free of convictions. . . . We believe that the emphasis under the ten-year rule is not on what offense was committed, but whether the defendant was able to be completely conviction-free for a period of at least ten years. [*People v Reyna*, 184 Mich App 626, 632; 459 NW2d 75 (1990).]

Therefore, PRV 5 was properly scored and the trial court did not err in denying defendant’s motion for resentencing.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Alton T. Davis