

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

UNPUBLISHED
January 12, 2012

v

MICHAEL ALLISON REYES,
Defendant-Appellee.

No. 300856
Kalamazoo Circuit Court
LC No. 2010-000319-FH

Before: HOEKSTRA, P.J., and MARKEY and BORRELLO, JJ.

PER CURIAM.

Defendant pleaded guilty to operating or maintaining a methamphetamine laboratory, MCL 333.7401c(2)(f), and was sentenced as a second offender under the Public Health Code, MCL 333.7413(2), to six months in jail with credit for one day. The prosecutor appeals by leave granted defendant's sentence. Because we conclude that the trial court erred by failing to consider defendant's prior record variable (PRV) score when calculating his minimum sentence, we vacate defendant's sentence and remand for resentencing.

Defendant pleaded guilty pursuant to a *Cobbs*¹ agreement on March 15, 2010. The trial court placed the *Cobbs* agreement on the record before defendant entered his plea. The trial court explained that it previously informed defendant it would sentence him as a second offender under the Public Health Code, and that it would place defendant in the A grid regardless of defendant's actual prior record variable score for purposes of calculating defendant's minimum sentence. The trial court specifically stated that it interpreted *People v Lowe*, 484 Mich 718; 773 NW2d 1 (2009), as supporting its decision to disregard defendant's actual PRV score when calculating his minimum sentence range because defendant was being sentenced pursuant to the Public Health Code. The trial court also agreed to permit defendant to enter a boot camp program. The prosecution agreed to dismiss a second count charging defendant with possession of methamphetamine in exchange for a guilty plea to the first count charging defendant with

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993). A *Cobbs* agreement is an agreement where a defendant pleads guilty in reliance on the trial court's preliminary evaluation of the sentence; however, the defendant is permitted to withdraw the plea if the trial court determines that it must exceed its preliminary evaluation. *Id.* at 283.

operating or maintaining a methamphetamine laboratory. The prosecution objected to the trial court's determination that it did not have to consider defendant's PRV score. Before defendant pleaded guilty, the trial court informed him that the prosecution "may oppose" the PRV scoring and "may even appeal." Defendant confirmed that the trial court's recitation of the agreement was also his understanding of the agreement, and the trial court accepted defendant's guilty plea.

Defendant was sentenced on May 10, 2010. The trial court again noted that it believed it had discretion to set the PRV level in the A grid regardless of the actual PRV score, which was 95 points and would have placed defendant in the F grid. See MCL 777.13m (class B offense); MCL 777.63 (sentencing grid for class B offenses). The prosecution objected during sentencing to the trial court's failure to consider defendant's PRV score when determining defendant's minimum sentence. Defendant's offense variable score was one point, and accordingly, his minimum sentence would have been 72 to 120 months' imprisonment if his PRV score was properly considered; however, because the trial court used the A grid, defendant's minimum sentence was 0 to 18 months' imprisonment. MCL 777.63. The trial court sentenced defendant to six months in jail, and to 36 months' probation. The trial court explained that after serving his six months in jail, defendant was required to enter and complete the Michigan Department of Corrections Special Alternative Incarceration (SAI) Boot Camp program, and that failure to complete the program would constitute a violation of defendant's probation.

On appeal, the prosecutor argues that the trial court erred when it disregarded defendant's PRV score and placed defendant in the A grid for purposes of calculating defendant's minimum sentence. We agree.

We must affirm a minimum sentence that is "within the recommended guidelines range, except when there is an error in scoring the sentencing guidelines or inaccurate information was relied on in determining the sentence." *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009); MCL 769.34(10). The interpretation of the statutory sentencing guidelines is a question of law that we review de novo. *Steele*, 283 Mich App at 490.

The calculation of a minimum sentence range is addressed by MCL 777.21; the statute describes generally how a defendant's recommended minimum sentence range should be calculated, and instructs that all PRVs should be scored. MCL 777.21(1)(b). The statute applies to certain violations, including MCL 333.7413(2), and provides direction regarding the scoring of offense variables (OVs) and the offense class. MCL 777.21(4).

The issue raised by the prosecutor in this case, whether scoring PRVs when calculating a defendant's recommended minimum sentence range under the statutory sentencing guidelines is required when a defendant's minimum and maximum sentences may be enhanced pursuant to MCL 333.7412(2), was recently addressed by our Supreme Court in *People v Peltola*, 489 Mich 174; 803 NW2d 140 (2011). The Court held that a sentencing court must score PRVs when calculating defendant's recommended minimum sentence range under the sentencing guidelines when the defendant's sentence may be enhanced pursuant to MCL 333.7413(2). *Id.* at 176-177. We are bound by this decision. *People v Mitchell*, 428 Mich 364, 369; 408 NW2d 798 (1987). Accordingly, the trial court erred when it did not score and consider defendant's PRVs when calculating defendant's recommended minimum sentence range under the sentencing guidelines.

Consequently, we vacate defendant's sentence and remand for resentencing in accordance with this opinion.

Defendant also raises an issue on appeal. Defendant argues that the prosecutor waived the right to object to the trial court's scoring method because the prosecution ultimately agreed with the end result. During the sentencing hearing, the prosecution stated that it had no objection to the defendant being placed in SAI boot camp, and the trial court accordingly sentenced defendant to completion of SAI boot camp. Consequently, defendant argues that the prosecution expressed agreement with defendant's sentence and accordingly waived the right to object on appeal. We disagree.

Waiver is "the intentional relinquishment or abandonment of a known right." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). There is nothing in the record that supports defendant's argument that the prosecution intentionally relinquished or abandoned its right to object to the trial court's disregard of defendant's PRV score. The prosecution specifically objected to the trial court's determination that defendant's PRV score should not be considered at the sentencing hearing. Further, the prosecution specifically maintained that defendant's minimum guidelines range should be 72 to 120 months based on an accurate PRV score, and it requested that defendant be given a prison sentence. The fact that the prosecution also stated that it did not object to defendant being placed in SAI boot camp did not constitute waiver of the right to appeal the trial court's disregard of defendant's actual PRV score.

Defendant's sentence is vacated and the matter is remanded for resentencing. We do not retain jurisdiction.

/s/ Joel P. Hoekstra

/s/ Jane E. Markey

/s/ Stephen L. Borrello