

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 14, 2012

v

HERBERT CLEVELAND DANIELS,
Defendant-Appellant.

No. 302059
Oakland Circuit Court
LC No. 2009-224913-FH

Before: STEPHENS, P.J., and WHITBECK and BECKERING, JJ.

PER CURIAM.

Following a jury trial, the trial court sentenced defendant Herbert Daniels as an habitual offender, fourth offense,¹ to 8 to 40 years' imprisonment for possession with intent to distribute more than 50 but less than 450 grams of heroin,² and 31 days for both possession of marijuana³ and refusing to obey police officer traffic orders.⁴ Following an appeal to this Court,⁵ however, the trial court resentenced Daniels as an habitual offender, third offense,⁶ to 7-1/2 to 40 years' imprisonment for possession with intent to distribute heroin, and 31 days for both possession of marijuana and refusing police traffic orders. The sentences are concurrent. We affirm.

I. FACTS

As noted above, the trial court originally sentenced Daniels as an habitual offender, fourth offense,⁷ to 8 to 40 years' imprisonment for his possession with intent to distribute heroin

¹ MCL 769.12.

² MCL 333.7401(2)(a)(iii).

³ MCL 333.7403(2)(d).

⁴ MCL 257.60.

⁵ *People v Herbert Cleveland Daniels*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2010 (Docket No. 293587).

⁶ MCL 769.11.

⁷ MCL 769.12.

conviction, and 31 days for his other two convictions. Following sentencing, Daniels moved the trial court to vacate the habitual offender sentencing enhancement and to resentence. Particularly, Daniels challenged the accuracy of prior conviction information in the presentence investigation report (PSIR). Daniels argued that, although not used to calculate the prior record variables (PRV), a misdemeanor offense from 1978 was improperly counted as a felony in concluding Daniels was a fourth habitual offender.

In addition to challenging his status as a fourth habitual offender, Daniels challenged the accuracy of some of the information relating to his past criminal convictions. In particular, Daniels denied three of the convictions reported in the PSIR (he asserted he was in prison at the time he was supposedly arrested for two of the convictions), and he noted several of the case numbers listed were in fact his federal prison number. The trial court denied Daniels' motion for resentencing, but amended the judgment of sentence to reflect Daniels' third habitual offender status.

Following denial of his motion for resentencing, Daniels appealed as of right to this Court. Daniels again challenged the accuracy of the information concerning his prior convictions contained in the PSIR. This Court remanded for further proceedings, finding the trial court abused its discretion in not considering all of Daniels' challenges to the accuracy of the PSIR.⁸ On remand, the trial court was instructed to articulate whether the disputed information was relied upon in making a sentencing determination.⁹ If the information was relied upon, the trial court was instructed to resolve the challenges and resentence Daniels.¹⁰ If the information was not relied upon, Daniels' sentence could be deemed affirmed and the trial court was instructed to correct the PSIR as appropriate.¹¹

On remand, the trial court, relying upon a corrected PSIR, calculated a recommended minimum guidelines sentence range of 87 to 217 months. The trial court resentenced Daniels within this recommended guideline range to 7-1/2 to 40 years' imprisonment for possession with intent to distribute heroin and 31 days for possession of marijuana and disobeying police traffic orders. Relevant to this appeal, in determining Daniels' sentence, the trial court scored PRV 1 at 50 points and PRV 2 at zero points.

Following resentencing, Daniels moved the trial court to correct his sentence. Daniels argued that PRV 1 should have been scored at 25 points and that PRV 2 should have been scored at five points. In particular, Daniels argued that the prosecution failed to establish the offense underlying his 1983 conspiracy conviction should have been scored under PRV 1 as a high

⁸ *People v Daniels*, unpublished opinion per curiam of the Court of Appeals, issued October 14, 2010 (Docket No. 293587), slip op at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 2-3.

severity offense. Following a hearing, the trial court denied Daniels' motion. Daniels now appeals as of right.

II. SCORING OF CONSPIRACY CONVICTION

A. STANDARD OF REVIEW

Daniels argues that his previous federal conviction for conspiracy to possess and distribute cocaine was a low severity felony that should have been scored under PRV 2 rather than PRV 1. "This Court reviews a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score."¹² A scoring decision supported by "any evidence" will be upheld.¹³ Scoring decisions involving statutory interpretation present a question of law to be reviewed de novo.¹⁴

B. LEGAL STANDARDS

Crimes classified under Michigan law as Class M2, A, B, C, or D felonies are characterized as "high severity" felony convictions.¹⁵ A defendant might also be scored for offenses committed under the laws of another state or the United States if those crimes correspond to offenses classified under Michigan law as M2, A, B, C, or D.¹⁶ Under PRV 1, a defendant should be scored 50 points if he has two prior high severity felony convictions.¹⁷

C. APPLYING THE LEGAL STANDARDS

Here, the trial court scored 50 points for PRV 1 and zero points for PRV 2, concluding that Daniels had two prior high severity felony convictions and no low severity felonies. Daniels challenges his PRV 1 score only as it relates to a 1983 federal conviction for conspiracy to possess and distribute cocaine.

Conspiracy is not categorized within a specific class,¹⁸ instead we must look to the underlying offense to determine the classification.¹⁹ In this case, we look to Michigan's classification of possession and distribution of cocaine. While the offense class varies depending

¹² *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

¹³ *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

¹⁴ *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005).

¹⁵ MCL 777.51(2)(a).

¹⁶ MCL 777.51(2)(b).

¹⁷ MCL 777.51(1)(b).

¹⁸ MCL 777.18.

¹⁹ MCL 777.21(4)(b).

upon the amount of cocaine,²⁰ we conclude that, at a minimum, the offense corresponds to a class D felony offense. Cocaine is a schedule 2 drug, described in MCL 333.7214(a)(iv), whose distribution is governed by MCL 333.7401(2)(a). Depending on the amount of cocaine, violation of MCL 333.7401(2)(a) is either a class A, B, or D felony.²¹ Accordingly, we find Daniels' federal conviction is equivalent to at least a class D felony; therefore, the offense is a high severity crime properly scored under PRV 1 rather than PRV 2.

III. EFFECTIVENESS OF COUNSEL

Having determined PRV 1 and PRV 2 were properly scored, we also conclude that defense counsel was not objectively unreasonable for not arguing Daniels' federal conviction should have been classified as a low severity felony.²²

We affirm.

/s/ Cynthia Diane Stephens
/s/ William C. Whitbeck
/s/ Jane M. Beckering

²⁰ MCL 777.13m.

²¹ MCL 777.13m.

²² *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (holding that trial counsel is not required to advocate a meritless position).