

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JIMMIE RAY ROGERS, JR,

Defendant-Appellant.

UNPUBLISHED

July 24, 2012

No. 304892

Tuscola Circuit Court

LC No. 09-011196-FH

Before: TALBOT, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Jimmie Ray Rogers, Jr. appeals by leave granted the trial court's sentence of 47 months to 20 years' imprisonment for his guilty plea to operating a motor vehicle while intoxicated, third offense.¹ We remand for proceedings consistent with this opinion.

On April 18, 2009, Rogers was arrested for drunk driving. A blood alcohol test revealed that his blood alcohol content was 0.27 percent. Rogers subsequently pleaded guilty to operating a motor vehicle while intoxicated, third offense, and admitted to three previous felony convictions. The sentencing guideline range provided for a minimum sentence of 19 to 76 months' imprisonment. This range was calculated, in part, based on a score of 25 points for offense variable (OV) 9.² Under the plea agreement, Rogers was to be sentenced to a minimum term of 19 to 76 months' imprisonment consistent with the guidelines range, but the maximum term of life imprisonment was to be reduced to 20 years. At sentencing, however, the trial judge sentenced Rogers to five years of probation and one year in jail.

The prosecution appealed and challenged the sentence. Rogers cross-appealed and challenged the trial court's scoring of OV 9 at 25 points and made a claim of ineffective assistance of counsel. This Court vacated Rogers's sentence and remanded the case to give the prosecutor the opportunity to renegotiate or withdraw from the plea agreement.³ Additionally,

¹ MCL 257.625. Rogers was sentenced as a fourth habitual offender pursuant to MCL 769.12.

² Twenty-five points should be scored for OV 9 when 10 or more victims "were placed in danger of physical injury or death." MCL 777.39(1)(b).

³ *People v Siebert*, 450 Mich 500, 504; 537 NW2d 891 (1995).

this Court addressed the remaining issues on appeal, noting they would become relevant if the prosecutor “decline[d] to withdraw from or renegotiate the plea agreement.” This Court held that based on the articulated “objective and verifiable” reasons for the trial court’s downward departure from the sentencing guidelines, it was unclear whether the trial court “would have found them to be substantial and compelling enough” to justify a downward departure. As such, this Court found that reconsideration of the decision to depart below the sentencing guidelines range would be needed in the event that the prosecutor elected not to renegotiate or withdraw the plea agreement. Moreover, this Court noted that because the evidence at sentencing only established that two persons were placed in danger by Rogers’s conduct, OV 9 should have been scored at 10 points.

The prosecutor did not elect to withdraw from or renegotiate the plea agreement. The trial judge who had presided over Rogers’s plea and sentencing was out of the country for an extended period of time and a visiting judge had been assigned to cover his docket. Consequently, the visiting judge presided over the resentencing proceedings. The visiting judge heard new testimony from a witness establishing that ten or more persons were placed in danger by Rogers’s conduct. The visiting judge determined that, given the new evidence, OV 9 should be scored at 25 points. The court then concluded that no substantial and compelling reasons existed for a downward departure and sentenced Rogers to a minimum prison term of 47 months and a maximum term of 20 years’ imprisonment, in accordance with the plea agreement and applicable guidelines. When imposing the 47-month minimum sentence, the visiting judge indicated that the facts of the case warranted a sentence in the middle of the guidelines range.

On appeal, Rogers argues that he was entitled to be resentenced by the same judge who imposed his first sentence. We disagree. This Court reviews claims of due process violations *de novo*.⁴

“[A] defendant is entitled to be sentenced before the judge who accepts his plea, provided that judge is reasonably available.”⁵ Rogers claims that the original judge was scheduled to return less than two weeks after Rogers’s resentencing, thus he was reasonably available. The record demonstrates that the length of the original judge’s absence was of a longer duration. The visiting judge was assigned to preside over the original judge’s entire docket while he was away. Additionally, it was administratively concluded that the original judge’s absence was of sufficient length to warrant the assignment of a visiting judge. Accordingly, we find that the original judge was not reasonably available, thus there was no error by the trial court.⁶

Rogers contends that resentencing by a visiting judge violated his substantive due process rights because the visiting judge did not have sufficient knowledge of the case.⁷ This argument,

⁴ *People v Borgne*, 483 Mich 178, 184; 768 NW2d 290 (2009), *aff’d* after reh 485 Mich 868 (2009).

⁵ *People v Humble*, 146 Mich App 198, 200; 379 NW2d 422 (1985).

⁶ *Id.*

⁷ *People v Sleet*, 193 Mich App 604, 605-606; 484 NW2d 757 (1992).

however, lacks merit as the record establishes that the visiting judge reviewed the transcript of the plea, the original presentence investigation report (PSIR), and the updated PSIR, which is the same information that would have been available to the original judge at resentencing.

Rogers also asserts that his procedural due process rights were violated when he did not receive notice that he would be resentenced by a visiting judge. “One long-established basic guarantee of due process is the right to a hearing prior to deprivation of liberty.”⁸ Here, Rogers received a hearing when he was resentenced. Because Rogers has failed to demonstrate that he was deprived of a liberty when he was not notified of resentencing by a visiting judge, Rogers’s argument must fail. Moreover, we reject Rogers’s assertion that this Court’s previous opinion either expressly or impliedly required resentencing before the original judge. The majority opinion simply did not speak to the issue, and this Court notes that remand to a different judge for resentencing is not prohibited by statute or case law.⁹

Rogers next contends that based on this Court’s previous opinion, the resentencing court was not permitted to accept any new evidence regarding the scoring of OV 9. We disagree. “[W]hether the trial court followed this Court’s ruling on remand” is a question of law that is reviewed de novo.¹⁰

On remand, a trial court is required to act consistently with the appellate court’s decision.¹¹ Thus, the trial court must comply with any specific instructions in the appellate court’s opinion.¹² Contrary to Rogers’s assertion, we find that this Court’s previous opinion did not require that OV 9 be scored at 10 points. This Court’s opinion does indicate that “if the prosecution does not withdraw or renegotiate the plea agreement between the parties, OV 9 must be rescored at ten points.” The above statement was made, however, only after this Court discussed at length that there was “no record evidence indicating how many additional people, if any, were in or near [Rogers’s] path at the time of his drunk driving.” Thus, this Court’s conclusion regarding scoring OV 9 at ten points was based on the absence of record evidence to support scoring OV 9 at 25 points.

A resentencing court is in a “presentence posture.”¹³ As the remand did not indicate otherwise, resentencing in this case was de novo, and the court was permitted to consider new evidence.¹⁴ Therefore, because new evidence was permissibly elicited at resentencing to justify scoring OV 9 at 25 points, there was no error by the trial court.

⁸ *People v McQuillan*, 392 Mich 511, 531; 221 NW2d 569 (1974).

⁹ *People v Pillar*, 233 Mich App 267, 270-271; 590 NW2d 622 (1998).

¹⁰ See *Augustine v Allstate Ins Co*, 292 Mich App 408, 424; 807 NW2d 77 (2011).

¹¹ *People v Fisher*, 449 Mich 441, 446-447; 537 NW2d 577 (1995).

¹² *People v Canter*, 197 Mich App 550, 567; 496 NW2d 336 (1992).

¹³ *People v Rosenberg*, 477 Mich 1076; 729 NW2d 222 (2007).

¹⁴ *People v Williams (After Second Remand)*, 208 Mich App 60, 65; 526 NW2d 614 (1994).

Finally, Rogers argues that he is entitled to sentence credit for 90 days served in the Tuscola County Jail after he was sentenced on July 20, 2009, by the original judge in this matter. Because Rogers is admittedly unsure of the exact number of days served in the Tuscola County Jail, he alternatively requests remand to the trial court for a determination of the correct amount of sentence credit owed, if any. We agree that remand is necessary. We review de novo Rogers's claim that he is entitled to sentence credit for time served.¹⁵

“[T]he jail credit statute does not apply to a parolee who is convicted and sentenced to a new term of imprisonment for a felony committed while on parole because, once arrested in connection with the new felony, the parolee continues to serve out any unexpired portion of his earlier sentence unless and until discharged by the Parole Board.”¹⁶ Rogers concedes that he was not entitled to sentence credit for any time served after his April 18, 2009, arrest and before he was originally sentenced in this matter on July 20, 2009. Rather, Rogers argues that he is entitled to sentence credit for a portion of the time that he served between the original sentencing on July 20, 2009, and resentencing on May 24, 2011. “[W]hen a void sentence is set aside and a new sentence is imposed, any time served with regard to the void sentence must be credited against the sentence then imposed.”¹⁷ As such, Rogers is correct in his assertion that he is entitled to sentence credit for any jail time he served for this offense pursuant to the sentence imposed by the original judge on July 20, 2009. Based on a review of the record, however, it is unclear whether the time Rogers served in the Tuscola County Jail was related to the sentence imposed by the original judge in this matter. This Court would note that the updated PSIR is silent regarding credit for time served by Rogers for this offense for which resentencing was required. Accordingly, we find it necessary to remand the case to the trial court for a determination of what, if any, sentence credit Rogers is entitled to for this offense. The determination of the amount of sentence credit should consider any credit owed to Rogers for time spent in a qualified residential rehabilitation facility related to this offense.¹⁸

Remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Deborah A. Servitto
/s/ Michael J. Kelly

¹⁵ *People v Patton*, 285 Mich App 229, 238; 775 NW2d 610 (2009).

¹⁶ *People v Idziak*, 484 Mich 549, 562; 773 NW2d 616 (2009).

¹⁷ *People v Lyons (After Remand)*, 222 Mich App 319, 321; 564 NW2d 114 (1997).

¹⁸ *People v Whiteside*, 437 Mich 188, 202; 468 NW2d 504 (1991).