

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

v

THOMAS LEE JACKSON,  
  
Defendant-Appellant.

FOR PUBLICATION  
February 17, 2011  
9:05 a.m.

No. 294964  
Livingston Circuit Court  
LC No. 05-015001-FH

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Before: HOEKSTRA, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant pleaded guilty to two counts of second-degree home invasion, MCL 750.110a(3), and one count of conspiracy to commit second-degree home invasion, MCL 750.157a and MCL 750.110a(3). The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 106 months to 30 years for each conviction. Defendant appeals by delayed leave granted, raising issues related to his sentencing. We affirm.

**I. FACTS AND PROCEDURAL HISTORY**

At the plea hearing, defendant admitted that he participated with another person in the breaking and entering of two different houses. He indicated that he was aware that his co-defendants were going to go into the houses without permission with the intent to steal and that he was the “look out” and stayed in the car. He also indicated that items were in fact stolen from the houses. Defendant further admitted that he made an agreement with another person to break into the houses to steal items and that he would be the look out. The trial court found that the plea was given understandingly, voluntarily, and accurately, and accepted the plea. The court subsequently sentenced defendant as a third habitual offender to concurrent sentences of 106 months to 30 years, with zero days credit, to be served “consecutive to a sentence for which you are on parole.” The court denied defendant sentencing credit because of defendant’s status as a parolee.

**II**

Defendant argues that the trial court based its minimum sentence on facts not proven to a jury beyond a reasonable doubt, in contravention of *Blakely v Washington*, 542 US 296; 124 S ct 2531; 159 L Ed 2d 403 (2004). He also argues that the trial court improperly scored offense

variables (“OV”) 13 and 16, and that he is entitled to sentence credit for the time spent in jail between his arrest and sentencing.

#### A. THE DECISION IN BLAKELY

Our Supreme Court has held that *Blakely* does not apply to Michigan’s indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). Accordingly, defendant’s argument that the trial court violated *Blakely* in scoring the guidelines is without merit.

#### B. OV 13

Defendant challenges the scoring of 10 points for OV 13. The version of MCL 777.43<sup>1</sup> in existence at the time of defendant’s February 14, 2006, sentencing provided for a score of 10 points if the “offense was part of a pattern of felonious criminal activity involving a combination of 3 or more crimes against a person or property . . .” MCL 777.43(1)(c). Additionally, MCL 777.43(2)(a) instructs that “all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.”

Here, defendant pleaded guilty to participating in a home invasion of a residence located at 15580 Graves Road, to participating in a home invasion of a residence located at 17900 Dexter Trail, and to conspiring with another individual to commit the home invasions. Defendant does not dispute that the two second-degree home invasion convictions may be used to score OV 13 because those convictions are for crimes against persons. See MCL 777.16f. He asserts, however, that the conspiracy conviction cannot be used to score OV 13 because conspiracy is a public safety offense under MCL 777.18, not an offense against person or property. Defendant further asserts that, if the conspiracy offense is not counted, there are no other offenses against persons or property committed by defendant within 5 years of these offenses that may be combined with the two home invasion convictions in order to establish the three convictions necessary to sustain a 10-point score under 777.42(1)(c). We review this issue involving the interpretation and application of the statutory guidelines de novo. *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

A review of the presentence information report reveals that defendant did not engage in any other criminal activities that were directed against persons or property within the 5 years preceding the present convictions. The question, therefore, is whether defendant’s conspiracy offense constitutes a separate crime against a person or property for purposes of scoring OV 13. There is no published authority on the question whether a conspiracy conviction may be used to score OV 13.

Conspiracy is designated as an offense against the public safety in MCL 777.18. At the time of defendant’s sentencing, MCL 777.21(4) provided, “If the offender is being sentenced for

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<sup>1</sup> MCL 777.43 was amended by 2008 PA 562, effective April 1, 2009.

a violation described in Section 18 of this chapter [MCL 777.18], determine the offense class, offense variable level, and prior record variable level *based on the underlying offense.*” 2000 PA 279, § 21 (emphasis added). The command of MCL 777.21(4) to determine the offense variable level “based on the underlying offense” reflects the intent of the Legislature that the nature of the underlying offense (and not the fact that a conspiracy had been committed) controls when and how an offense variable is scored. Reading MCL 777.18, MCL 777.21(4) and MCL 777.43(1)(c) together as a harmonious whole, see *The Cadle Co v City of Kentwood*, 285 Mich App 241, 249; 776 NW2d 145 (2009), the command of MCL 777.21(4) is sufficiently sweeping in scope to have required the trial court to look to the nature of the conspiracy for which defendant was convicted in this case when scoring OV 13.<sup>2</sup> Defendant was convicted of conspiring to commit home invasions. A home invasion is a crime against persons. Because the underlying nature of the conspiracy involved a crime against persons, the conspiracy conviction was properly used to score OV 13 in this case.<sup>3</sup>

### C. OV 16

In light of our conclusion that the trial court properly scored, OV 13, any error in the scoring of OV 16 is harmless. The trial court scored 5 points for OV 16. If those five points are subtracted from the 15-point OV total, the remaining ten points assigned to OV 13 are sufficient to maintain the OV level at II, MCL 777.64, and, therefore, the point reduction would not trigger a need to rescore the guidelines. An erroneous score that would not, when corrected, result in a different recommended range does not require resentencing. *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

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<sup>2</sup> We note that this Court previously held in three unpublished cases decided on the same day by the same panel that conspiracy convictions are not properly scored under OV 13 because they are classified as crimes against public safety. See *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued March 10, 2005 (Docket No. 253299); *People v Barker*, unpublished opinion per curiam of the Court of Appeals, issued March 10, 2005 (Docket No. 253403); *People v Johnson*, unpublished per curiam of the Court of Appeals, issued March 10, 2005 (Docket No. 253943). In addition to not being binding precedent, MCR 7.215(C)(1), we also find these cases to be of limited persuasive value because the impact of MCL 777.21(4) on the resolution of the claim that conspiracy convictions cannot properly be scored under OV 13 was not raised or discussed.

<sup>3</sup> We note that because all 3 offenses involve crimes against persons, the trial court could properly have scored 25 points for OV 13 under MCL 777.43(1)(b).

#### D. JAIL CREDIT

The trial court declined to award defendant sentence credit in light of defendant's status as a parolee. Any sentence credit must be applied to the sentence which defendant was still serving while on parole. *People v Idziak*, 484 Mich 549, 552, 565-567; 773 NW2d 616 (2009); *People v Filip*, 278 Mich App 635, 640-643; 754 NW2d 660 (2008). In *Idziak*, the Court rejected arguments identical or similar to those now raised by defendant – i.e., that sentence credit is required by MCL 769.11a, and the due process, equal protection, and double jeopardy clauses. *Idziak*, 484 Mich at 568-570, 572-574. Thus, this argument is without merit.<sup>4</sup>

Affirmed.

/s/ Joel P. Hoekstra  
/s/ E. Thomas Fitzgerald  
/s/ Jane M. Beckering

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<sup>4</sup> Two of the remaining issues raised by defendant relate to arguments raised by defendant in support of granting the delayed application for leave to appeal and, therefore, need not be addressed on appeal. Additionally, the issue regarding ineffective assistance of counsel appears to have been raised to avoid the issue preservation requirements with regard to defendant's challenge to the scoring of the guidelines. Thus, this issue need not be addressed on appeal.