STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION June 14, 2011 9:00 a.m.
v	No. 295664 Wayne Circuit Court
ANGELO JOHNSON, Defendant-Appellant.	LC No. 09-011104-01

Before: WHITBECK, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

A jury convicted Angelo Johnson of possession with intent to deliver less than five kilograms of marijuana[1] and possessing a firearm during the commission of a felony (felony-firearm).[2] The trial court sentenced him to a prison term of five months to four years for the possession of marijuana conviction and a consecutive two-year prison term for the felony-firearm conviction. He appeals as of right. We affirm.

I. FACTS

Johnson's convictions arise from a police raid at a house in Detroit. On April 8, 2008, the police executed a search warrant at 9577 Winthrop. When the police officers entered through the front door, they observed Johnson sitting on a couch in the front room. There was suspected marijuana on the table in front of him. The parties stipulated that Officer Booker Tooles confiscated, from the table in front of Johnson, one plastic baggy containing five vials of marijuana and 21 zip lock bags of marijuana totaling 0.95 grams. The officer-in-charge, Sergeant Marcellus Bell, confiscated $256, which he thought was on the "dining room table next to the marijuana . . . ."

Officer Wade Rayford confiscated two rifles (a Mossberg .22 caliber bolt action rifle and a Marlin .35 caliber lever action rifle) from the "front room of that location," which is the first room when a person enters the house. He could not remember if the room was actually the

[1] MCL 333.7401(2)(d)(*iii*).

[2] MCL 750.227b.

dining room or the living room, explaining, "I don't know if it was a dining room that had the appearance of a living room or vice versa." Officer Rayford clarified that he was "not saying that [Johnson] was sitting next to the guns . . . ." He believed that the weapons were recovered from "[approximately the] northwest corner of that room." Officer Brian Johnson, the first officer to enter, did not see Angelo Johnson in physical possession of a rifle nor did Sergeant Bell personally see Johnson in possession of the rifles.

No latent prints of comparison value were developed from the rifles. Johnson gave a statement in which he admitted having one ounce of marijuana in his possession and that he had been selling marijuana from 9577 Winthrop for one month. He stated that he was not going to answer any questions about "the weapon."

The jury convicted Johnson, as stated above. Johnson now appeals.

II. SUFFICIENCY OF THE EVIDENCE

A. STANDARD OF REVIEW

Johnson first argues that the evidence was insufficient to support his felony-firearm conviction because the evidence failed to show that he had actual or constructive possession of the firearms. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.[3]

B. LEGAL STANDARDS

"The elements of felony-firearm are that the defendant possessed a firearm during the commission of, or the attempt to commit, a felony."[4] One must carry or possess the firearm when committing or attempting to commit a felony.[5] Possession of a firearm can be actual or constructive, joint or exclusive.[6] "[A] person has constructive possession if there is proximity to the article, together with indicia of control. Put another way, a defendant has constructive possession of a firearm if the location of the weapon is known and it is reasonably accessible to the defendant."[7] Possession can be proven by circumstantial or direct evidence and is a factual question for the trier of fact.[8]

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[3] *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

[4] *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

[5] *People v Burgenmeyer*, 461 Mich 431, 437; 606 NW2d 645 (2000).

[6] *People v Hill*, 433 Mich 464, 470; 446 NW2d 140 (1989).

[7] *Id*. at 470-471 (internal citations omitted).

[8] *Id*. at 469.

C. APPLYING THE LEGAL STANDARDS

The evidence indicated that police seized the rifles from the corner of the front room of the house, in the vicinity of where Johnson was seated behind the table that contained marijuana. Johnson admitted that he had been selling marijuana from the house for a month. He contends that there was no evidence that the weapons were in plain sight and no proof that they were his. However, the sizes of the rifles and the testimony describing their location in the corner of the front room, coupled with the fact that Johnson had admittedly been selling drugs from the house for a month, was sufficient to enable the jury to rationally find that he was aware of the rifles and that they were reasonably accessible to him. Thus, there was sufficient evidence that Johnson constructively possessed the rifles to support his felony-firearm conviction.

III. SCORING OF PRV 6

A. STANDARD OF REVIEW

Johnson argues that resentencing is required because the trial court erroneously scored five points for prior record variable (PRV) 6 of the sentencing guidelines. "This Court reviews a trial court's scoring decision under the sentencing guidelines to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score."[9] "A trial court's scoring decision for which there is any evidence in support will be upheld."[10] To the extent that a scoring challenge involves a question of statutory interpretation, this Court reviews the issue de novo.[11]

B. LEGAL STANDARDS

PRV 6 considers an offender's relationship to the criminal justice system.[12] A trial court should score five points where "[t]he offender is on probation or delayed sentence status or *on bond* awaiting adjudication or sentencing for a misdemeanor."[13]

C. APPLYING THE LEGAL STANDARDS

Johnson acknowledges that before committing the sentencing offense in April 2008, he had been charged with a misdemeanor for which he had been granted bond. However, it is undisputed that he forfeited his bond in July 2007, before he committed the sentencing offense.

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[9] *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009) (citations and internal quotation marks omitted).

[10] *Id*. (citations and internal quotation marks omitted).

[11] *People v Osantowski*, 481 Mich 103, 107; 748 NW2d 799 (2008).

[12] MCL 777.56.

[13] MCL 777.56(1)(d) (emphasis added).

Therefore, Johnson argues that he was not "on bond" when he committed the sentencing offense and that the trial court should not have scored five points for PRV 6.[14]

Under PRV 6, the trial court scores points based on the defendant's relationship to the criminal justice system when he committed the sentencing offense:[15]

> (1) Prior record variable 6 is relationship to the criminal justice system. Score prior record variable 6 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (d) The offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor . . . . . 5 points
>
> (e) The offender has no relationship to the criminal justice system . . . 0 points.[16]

The principles of statutory interpretation apply to the interpretation of the sentencing guidelines to determine if the term, "on bond," includes those defendants whose bonds have been revoked.

> [T]he primary goal of statutory construction is to give effect to the Legislature's intent. To ascertain that intent, this Court begins with the statute's language. When that language is unambiguous, no further judicial construction is required or permitted, because the Legislature is presumed to have intended the meaning it plainly expressed.[17]

In interpreting the language of PRV 6, this Court has previously affirmed a trial court's scoring of five points to an individual who did not fit squarely within the language of the statute. In *People v Endres*,[18] the offender's circumstances did not fit the criteria in the statute, but this Court determined that there was no plain error in scoring five points for PRV 6, explaining:

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[14] The record indicates that Johnson was arrested for another misdemeanor offense in December 2006, but he apparently was not arraigned on that offense until April 2009, after the sentencing offense was committed. The prosecution does not contend that the scoring of PRV 6 may be upheld on the basis of Johnson's status with respect to that offense.

[15] *People v Young*, 276 Mich App 446, 454; 740 NW2d 347 (2007).

[16] MCL 777.56.

[17] *Osantowski*, 481 Mich at 107 (citations and internal quotation marks omitted).

[18] *People v Endres*, 269 Mich App 414, 422-423; 711 NW2d 398 (2006).

> [The] [d]efendant correctly argues that he was not on probation at the time that the present offenses were committed. The record indicates that his probation for a 1999 retail fraud juvenile adjudication was completed before the offense dates of June 1, 2001, to July 27, 2001. However, the record also indicates that on May 12, 2001, [the] defendant was charged with purchasing, consuming, or possessing alcohol as a minor, to which he pleaded guilty on June 18, 2001, and was sentenced to pay $85 in fines, costs, and fees. Therefore, [the] defendant had a relationship with the criminal justice system at the time he committed the offenses in the present case, and no plain error is apparent in the trial court's assessment of five points for PRV 6.[19]

In essence, this Court determined that there was sufficient evidence to show that the defendant had a relationship with the criminal justice system. This Court determined the evidence was sufficient despite it not falling precisely within the statutory criteria.

In addition, this Court has considered PRV 6 under the former judicial sentencing guidelines in a case involving an offender whose bond was revoked before he committed the sentencing offense. Under the former judicial sentencing guidelines, a court had to score 15 points for PRV 6 if a "[p]ost-conviction relationship exists or the offender committed the instant offense within six months of termination of probation or parole[.]"[20] The court had to score five points for "[o]ther relationship exists," and the court had to score zero points for "[n]o relationship exists."[21] The instructions stated that "[a] post-conviction relationship exists if, at the time of the instant offense, the offender was: incarcerated . . . ; on parole or probation[;] awaiting sentence on a probation violation . . . ."[22] The instructions further stated that "'[a]n other relationship exists if, at the time of the instant offense, the offender was: on bond and/or bail . . . .'"[23] In *People v Lyons*, before committing the sentencing offense, the defendant was arrested and posted bond. When he did not show up at the hearing, his bond was revoked.[24] This Court concluded that PRV 6 was properly scored at five points. This Court held that a revoked bond did not constitute a "no relationship" label with the criminal justice system.

> Under these circumstances, at the time of this offense, [the] defendant had a prior relationship with the criminal justice system. In addition, the guidelines do not state that five points can be assessed *only* in the enumerated circumstances. The sentencing guidelines are interpreted in accordance with the rules of statutory

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[19] *Id.*

[20] Mich Sentencing Guidelines (2d ed), p 97.

[21] *Id.*

[22] *Id.*

[23] *People v Lyons*, 222 Mich App 319, 322; 564 NW2d 114 (1997), quoting Mich Sentencing Guidelines (2d ed), p 97.

[24] *Id.*

> construction. The primary rule of statutory construction is to ascertain the intent of the drafters. Statutes must be construed to prevent absurd or illogical results and to give effect to their purposes. It would be absurd to suggest that the drafters of the guidelines intended that a defendant would receive more lenient treatment by being, in the words of the trial court, a "runaway" from the criminal justice system. The trial court did not err in assessing [the] defendant five points for PRV 6.[25]

Endres suggests that a five-point score for PRV 6 is not improper where the defendant commits the sentencing offense while awaiting adjudication or sentencing for a misdemeanor, regardless of his bond status. The case illustrates this Court's refusal to categorize a defendant as having "no relationship" with the criminal justice system when it is obvious that such a relationship exists.

Moreover, although merely persuasive, *Lyons* is also useful to our current interpretation because it illustrates how this Court has held that a defendant had a relationship with the criminal justice system despite not being "on bond."

Here, in spite of not being technically "on bond," the trial court chose to score five points rather than classify Johnson as having no relationship to the criminal justice system. Johnson clearly had a relationship with the criminal justice system, and the trial court did not see it fit to categorize him otherwise.

Admittedly, where an offender commits an offense after his bond has been forfeited or revoked, he is not "on bond," as PRV 6 states. However, where an offender's bond is revoked, he is also not free and clear of the criminal justice system. A condition of any pretrial release (bond) is that the defendant will appear in court as required.[26] We note that even if a defendant's bond is forfeited, the condition that the defendant appear in court is still in place and is an inherent condition of any pretrial release. Forfeiting the monetary part of a bond does not relieve the defendant of the obligation to comply with the condition that he appear as required by the court.

A court does not have discretion in awarding a score under PRV 6.[27] As such, the trial court had to decide whether to score Johnson five points, in spite of his revoked bond, or to score zero points. A score of zero points is scored for a defendant who has *no* relationship to the criminal justice system.[28] This clearly is not the case with Johnson. He was granted bond, which was subsequently revoked for his failure to pay. The ramifications of the underlying

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[25] *Id.* at 322-323 (citations omitted).

[26] See MCR 6.106(C) and MCR 6.106(D).

[27] MCL 777.56(1) does not use discretionary language. It states to "score" PRV 6 and to "assign" a number of points.

[28] MCL 777.56(e) (emphasis added).

misdemeanor do not dissipate simply because his bond was revoked. If anything, the urgency of the matter was compounded when a warrant was issued thereafter. To say that Johnson has no relationship to the criminal justice system would be to ignore the reality of his previous conduct. The continued pending existence of the prior misdemeanor created a relationship with the criminal justice system that survived the revoked bond.

In summary, we find no error in the lower court's scoring of five points for PRV 6. Johnson was charged with a misdemeanor for which he was granted bond. That bond was subsequently revoked, but the ramifications for that charge remain. When Johnson committed the sentencing offense, this charge was still pending. As such, this Court cannot classify Johnson as having "no relationship" with the criminal justice system. Accordingly, the trial court did not misscore PRV 6 at five points.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Johnson argues that defense counsel's failure to object to the scoring guidelines constitutes a claim of ineffective assistance of counsel. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law."[29] "A judge must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."[30] This Court reviews a trial court's factual findings for clear error, while we review constitutional determinations de novo.[31] This Court reviews unpreserved ineffective assistance of counsel claims for errors apparent on the record.[32]

B. LEGAL STANDARDS

There is a presumption that defense counsel was effective, and a defendant must overcome the strong presumption that counsel's performance was sound trial strategy.[33] To establish ineffective assistance of counsel, "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment."[34]

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[29] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[30] *Id.*

[31] *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

[32] *Id.*

[33] *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

[34] *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

C. APPLYING THE LEGAL STANDARDS

As stated, the trial court scored five points for PRV 6. Again, a trial court is to score five points for "[an] offender [who] is . . . on bond awaiting adjudication or sentencing for a misdemeanor."[35] Because Johnson's bond was subsequently revoked, he argues that he was no longer "on bond" at the time the sentencing offense was committed, and thus should have been awarded zero points. Therefore, he contends that defense counsel was rendered ineffective by failing to object to the PRV 6 scoring.

Defense counsel's decision to not object to the scoring may have been trial strategy. A trial court may score 15 points under PRV 6 if "[t]he offender is incarcerated in jail or awaiting adjudication or sentencing on a conviction or probation violation."[36] When Johnson's bond was revoked, a warrant was issued for his arrest. It can be argued that he should have been in jail when he committed the sentencing offense and therefore should have been given 15 points, rather than five points. The trial court scored Johnson's total PRV at 25, which placed him at Level D (25-49 points) on the sentencing grid. If the trial court had given him zero points he would have shifted to Level C (10-24 points). If the trial court had given him 15 points he would have remained at Level D. Level C minimum sentence range is between 0 and 17 months, while Level D minimum sentence range is 5 to 23 months.[37] But a higher point total within the range of Level D may have resulted in a longer sentence within Level D's range.

Defense counsel may have thought that the chances of a shorter sentence within Level D constituted a better strategy than challenging the score in hopes of falling within Level C but with a risk of a higher Level D sentence if that challenge failed. Put differently, if defense counsel objected and was awarded a review of the scoring, there is a chance Johnson may have wound up in Level C, but there is also a chance that his score would have raised to a higher number in Level D. There is a strong presumption that defense counsel's actions represented sound trial strategy, and because there is a basis for defense counsel's not objecting to the PRV 6 score, Johnson cannot overcome that presumption. Furthermore, because Level C and Level D's sentence ranges partially overlap, it is possible that sentencing could have been the same regardless of whether he was within Level C or Level D. Johnson cannot prove that, but for counsel's errors, the proceedings would have resulted any differently. Because Johnson has not met his burden, his ineffective assistance of counsel claim fails.

We affirm.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell

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[35] MCL 777.56(1)(d).

[36] MCL 777.56(1)(b).

[37] MCL 777.67.