

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY STEPHON MOORER,

Defendant-Appellant.

UNPUBLISHED

June 17, 1997

No. 178507

Berrien Circuit Court

LC No. 94-002133 FH;

94-002140-FH

Before: Neff, P.J., and Wahls and Taylor, JJ.

PER CURIAM.

Defendant pleaded guilty to two separate armed robbery charges, MCL 750.529; MSA 28.797, and was sentenced to concurrent terms of five to fifteen years and six to fifteen years in prison. He appeals his sentences as of right and we affirm.

Defendant first argues that he is entitled to resentencing regarding his six- to fifteen-year sentence because the sentencing guidelines for this conviction were incorrectly scored. The trial court's scoring of the guidelines led to a recommended range of two to six years for the minimum sentence. Defendant claims he was erroneously scored fifteen points under Offense Variable (OV) 25, and that if the guidelines had been properly scored, the range would have been 1 1/4 to 5 years, thus, making his six-year minimum sentence in excess of the correct guidelines' range. Defendant contends that the court might well have sentenced him to a lesser sentence if it had been aware of the correct guidelines score. After pronouncing the sentences, the court did state that "both sentences are within the almighty guidelines."

On the basis of the Supreme Court's recent opinion in *People v Mitchell*, 454 Mich 145; ___ NW2d ___ (1997),¹ we find defendant is not entitled to any relief even if he is correct. In *Mitchell*, the Supreme Court said that, to the extent that its prior decisions had been construed to authorize review and reversal for scoring errors, or errors in interpretation of the sentencing guidelines, *such relief is unavailable*. *Id.* at 176. The Court stated that because the guidelines do not have the force of law, a guidelines error does not violate the law. *Id.* at 175. The Court further stated: "There is no juridical basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how

the guidelines should be applied, or misapplication of guidelines variables.” *Id.* at 176-177. Finally, the Court stated that appellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied. *Id.* at 178.

Because we find the actual sentences imposed were not disproportionate, we hold on the basis of *Mitchell*, that defendant is not entitled to any relief even if the guidelines were misscored.²

Defendant next argues that his six- to fifteen-year and five- to fifteen-year sentences were disproportionately harsh. Defense counsel notes that defendant was only sixteen years old and argues that sentencing a “child” to such excessively long terms was disproportionate. Defendant contends that he should have been sentenced to no more than the low end of the guidelines range, i.e., 1 ~~1/2~~ to 2 years for each of his armed robbery convictions.

In exchange for defendant pleading guilty to committing an armed robbery of a gas station on April 26, 1994, and again on May 10, 1994, the prosecutor agreed that no action would be taken regarding a third armed robbery charge and an uttering and publishing charge, and further agreed that any other juvenile petitions would not be brought before the circuit court. At a motion for resentencing it came out that defendant also had been alleged to have committed a breaking and entering and an unlawfully driving away of an automobile. The probation agent recommended a sentence at the high end of the guidelines noting that defendant committed a number of felony offenses that were dismissed as a result of a plea bargain.³ Further, at the time defendant committed the armed robberies, he was on probation with the juvenile court. It is also the case that defendant used marijuana almost daily and that he indicated he committed the armed robberies because he needed money for food and marijuana.

As stated in *Mitchell*, the guidelines are a “framework for the appellate court’s inquiry into the question whether the sentence is disproportionate and, hence, an abuse of the trial court’s discretion.” *Id.* at 178. However, as has been stated ever since *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990), the “key test” of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter. Given the circumstances mentioned above, we are satisfied that the sentences imposed in this case reflect the seriousness of the matter. Thus, they were proportionate to the offense and the offender, *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995), and do not represent an abuse of the court’s sentencing discretion. *Mitchell, supra*.

Affirmed.

/s/ Janet T. Neff
/s/ Myron W. Wahls
/s/ Clifford W. Taylor

¹ The *Mitchell* opinion is binding on the Court of Appeals even though it was only signed by three of the five justices who sat on the case. *Negri v Slotkin*, 397 Mich 105, 110; 244 NW2d 98 (1976).

² Independent of *Mitchell*, we reject defendant's claim that he likely would have received a shorter sentence if the court would have adopted his scoring of the guidelines because, in denying a motion for resentencing on the basis of alleged scoring errors, the court specifically stated that, if the guidelines' range had been any lower, it probably would have had to depart from the guidelines range. Thus, defendant likely would have received the same sentence. See also *People v Hull*, 437 Mich 868 (1990) (sentencing court mooted the issue concerning the proper scoring of the guidelines by stating it was the appropriate sentence even if it were deemed a departure from the recommendation found in the sentencing guidelines).

³ See *People v Duprey*, 186 Mich App 313, 318; 463 NW2d 240 (1990).