

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RYAN O. CURRY,

Defendant-Appellant.

UNPUBLISHED

August 8, 2000

No. 223902

Wayne Circuit Court

LC No. 98-004120

Before: Murphy, P.J., and Kelly and Talbot, JJ.

PER CURIAM.

Defendant pleaded guilty of first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2), armed robbery, MCL 750.529; MSA 28.797, and of being a third-offense habitual offender, MCL 769.11; MSA 28.1083. He was sentenced to serve three concurrent prison terms of five to twenty years. He appeals by leave granted, arguing that his separate habitual offender sentence must be vacated because his plea to that charge was not supported by an adequate factual basis. We remand for amendment of the judgment of sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Pursuant to a *Cobbs*¹ agreement, defendant agreed to plead guilty to one count of home invasion, one count of armed robbery, and to being a third-offense habitual offender, in exchange for dismissal of the remaining charges and the court's agreement to impose a minimum sentence of no less than five years. At the plea-taking, defendant offered a factual basis for the home invasion and robbery counts, but was not questioned regarding his prior convictions. At sentencing, defense counsel indicated that he had reviewed the presentence investigation report with defendant and that no corrections were necessary. In reviewing the sentencing guidelines and the statutory maximum sentences, the trial court indicated that Count I was home invasion, Count II was armed robbery, and it would "treat" the habitual offender charge as Count III. Reading from the presentence report, the court noted that defendant had "two prior low severity felonies." The court imposed three concurrent prison sentences

¹ *People v Cobbs*, 443 Mich 276; 505 NW2d 208 (1993).

of five to twenty years on each count. The judgment of sentence reflects three separate convictions for which three sentences were imposed. The trial court denied defendant's motion to withdraw his plea, ruling that defendant received the benefit of his plea bargain.

To the extent that defendant argues that his separate habitual offender sentence must be vacated because an insufficient factual basis was presented, we disagree. Under MCL 769.13(5); MSA 28.1085(5), the existence of a defendant's prior convictions must be determined by the trial court at sentencing, or at a separate hearing for that purpose before sentencing. *People v Zinn*, 217 Mich App 340, 345; 551 NW2d 704 (1996). The existence of a prior conviction may be established by any evidence that is relevant for that purpose, including information contained in the presentence report. MCL 769.13(5)(c); MSA 28.1085(5)(c). Here, the presentence report listed defendant's prior felony convictions, and two of those convictions were noted by the trial court in imposing sentence. Accordingly, the requirements of § 13(5)(c) were satisfied. *People v Green*, 228 Mich App 684, 699; 580 NW2d 444 (1998).

Nonetheless, because a separate conviction and sentence on the habitual offender is not supported by either the law or the plea agreement in this case, we remand for amendment of the judgment of sentence to reflect the terms of the plea agreement as set forth in the pretrial offer, which was signed and accepted by defendant. Under those terms, defendant agreed to plead to the third-offense habitual charge which could then be used for sentence enhancement purposes, i.e., potentially increasing the twenty-year statutory maximum for first-degree home invasion to forty years. These terms were consistent with the statements of the parties at the plea-taking proceeding and the 1994 amendments to the habitual offender statutes. *Zinn, supra*. Accordingly, we remand this matter to the trial court to amend the judgment of sentence to reflect that defendant pleaded guilty of being a third-offense habitual offender for sentence enhancement purposes only. The separate habitual offender sentence shall be vacated.

Remanded for amendment of the judgment of sentence as directed. We do not retain jurisdiction.

/s/ William B. Murphy

/s/ Michael J. Kelly

/s/ Michael J. Talbot