

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARRELL JAMES WILSON,

Defendant-Appellant.

UNPUBLISHED

May 31, 2002

No. 237349

Tuscola Circuit Court

LC Nos. 00-007814-FH

01-007973-FH

Before: Fitzgerald, P.J., and Holbrook, Jr., and Doctoroff, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted his sentence of seven to twenty-two years in prison imposed on his plea-based conviction of second-degree home invasion, MCL 750.110a(3). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with one count of second-degree home invasion, MCL 750.110a(3), one count of larceny in a building, MCL 750.360, one count of receiving or concealing stolen property, MCL 750.535(3)(a), one count of possession of a firearm by a felon, MCL 750.224f, and habitual offender, third offense, MCL 769.11. In a separate case defendant was charged with three counts of resisting and obstructing a police officer, MCL 750.479, one count of felonious assault, MCL 750.82, and habitual offender, third offense. In the first case defendant pleaded guilty but mentally ill of second-degree home invasion, larceny in a building, and a reduced charge of habitual offender, second offense, MCL 769.10, in exchange for dismissal of the other charges. In the second case defendant pleaded guilty but mentally ill of two counts of resisting and obstructing a police officer and habitual offender, third offense, in exchange for dismissal of the other charges.

The applicable statutory sentencing guidelines as adjusted by the habitual offender grid, MCL 777.21(3)(c), recommended a minimum term range of 43 to 107 months for the conviction of second-degree home invasion, 5 to 28 months for the conviction of larceny in a building, and 7 to 34 months for the conviction of resisting and obstructing a police officer. The court scored Offense Variable (OV) 12, MCL 777.42, contemporaneous criminal acts, at five points for two contemporaneous felonious criminal acts. The trial court sentenced defendant as an habitual offender to concurrent terms of seven to twenty-two years in prison for second-degree home invasion, two to six years' for larceny in a building, and two to six years' for resisting and obstructing a police officer.

Defendant moved for resentencing on the ground that OV 12 was incorrectly scored at five points because there were not two other felonious criminal acts that occurred within twenty-four hours of the home invasion that did not result in separate convictions. He acknowledged that he pleaded guilty of second-degree home invasion and larceny in a building in exchange for dismissal of the charges of receiving or concealing stolen property and felon in possession of a firearm; however, he contended that he could not have been convicted of both larceny in a building and receiving or concealing stolen property without violating the constitutional prohibition against double jeopardy. *People v Johnson*, 176 Mich App 312; 439 NW2d 345 (1989).

Defendant argued that the scoring of OV 12 at one point would change the recommended minimum guidelines range for second-degree home invasion to thirty-six to eighty-eight months. In addition, defendant contended that Prior Record Variable (PRV) 5, MCL 777.55, prior misdemeanor convictions, should have been scored at two points rather than twenty points because his prior misdemeanor convictions for driving with a suspended license were not scorable. He acknowledged that a change in the scoring of PRV 5 would have no overall effect on the scoring of the guidelines. Defendant asserted that trial counsel rendered ineffective assistance by failing to object to the scoring of the guidelines at the time of sentencing.

The trial court denied defendant's motion for resentencing, concluding that defendant had waived any objections to the scoring of the guidelines when he failed to raise those objections at sentencing. In addition, the trial court concluded that the sentence was proportionate.

Defendant argues on appeal that the trial court erred in denying his motion for resentencing. A challenge to the scoring of the statutory sentencing guidelines is waived on appeal unless the party raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in this Court. MCL 769.34(10). Defendant did not raise the issue at resentencing, nor did he file a motion for remand. Further, defendant's motion for resentencing was not filed within forty-two days after entry of judgment of sentence. MCR 6.429(A)(1). Accordingly, defendant's motion for resentencing was not a proper motion.

However, defendant also contends that trial counsel rendered ineffective assistance by failing to object to the scoring of the guidelines at sentencing. "Accordingly, appellate review of the scoring issue, as it relates to the claim of ineffective assistance of counsel, is appropriate." *People v Harmon*, 248 Mich App 522, 530; 640 NW2d 314 (2001).

"To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Counsel is presumed to have afforded effective assistance, and a defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

On appeal, defendant argues that he is entitled to resentencing for the reason that OV 12 and PRV 5 were scored incorrectly for the offense of second-degree home invasion. Defendant cites no supporting authority to support his assertion that PRV 5 was scored incorrectly; therefore, we deem that issue to be abandoned. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

As for OV 12, we conclude that this variable was correctly scored. OV 12 dictates a score of five points if the defendant committed two contemporaneous felonious criminal acts. A felonious criminal act is contemporaneous if the act occurred within twenty-four hours of the sentencing offense and if it “has not and will not result in a separate conviction.” MCL 777.42(2). The offense of home invasion includes but is not limited to conduct covered by the former offense of breaking and entering a dwelling with intent to commit a felony or larceny. See *People v Warren*, 228 Mich App 336, 348; 578 NW2d 692 (1998), modified 462 Mich 415; 615 NW2d 691 (2000).

A defendant’s conviction of both breaking and entering with intent to commit larceny and receiving or concealing stolen property does not violate double jeopardy. *People v Squires*, 240 Mich App 454, 461; 613 NW2d 361 (2000). Two felonious criminal acts, receiving or concealing stolen property and possession of a firearm by a felon, were contemporaneous with the sentencing offense of second-degree home invasion. MCL 777.42(2). Because the scoring of OV 12 was correct, defendant fails to establish that his counsel was ineffective for not objecting at sentencing. *Harmon, supra* at 531 (“Counsel was not required to make a meritless objection to the scoring, and the failure to object was not objectively unreasonable and did not reasonably affect the outcome of the proceedings.”).

Defendant also argues that his minimum sentence of seven years for the conviction of second-degree home invasion violated the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Defendant’s argument, however, is moot. The minimum term was within the guidelines as correctly scored by the court; therefore, the sentence must be affirmed. MCL 769.34(10). A sentence within the guidelines is not reviewable. *Milbourn, supra*; *People v Babcock*, ___ Mich App ___, ___ NW2d ___ (Docket No. 235518, issued March 19, 2002).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Martin M. Doctoroff