

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ANDREWS,

Defendant-Appellant.

UNPUBLISHED

December 27, 2002

No. 236332

Wayne Circuit Court

LC No. 00-011625

Before: Bandstra, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his convictions, following a bench trial, of armed robbery, MCL 750.529, assault with intent to commit robbery while being armed, MCL 750.89, assault with intent to do great bodily harm less than murder, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to thirteen to twenty-five years' imprisonment on the armed robbery and assault to commit armed robbery convictions, three to ten years' imprisonment on the assault to do great bodily harm conviction, and two years' imprisonment on the felony-firearm conviction. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's appeal only regards issues concerning sentencing. Defendant claims that the trial court incorrectly scored offense variable seven (OV 7), that the trial court had an obligation to address defendant's competency at the time of sentencing regardless of the lack of any request to do so by defendant, and that defendant was denied the right of meaningful allocution due to a lack of competency.

The crimes for which defendant was convicted occurred on March 30, 2000; therefore, the legislative sentencing guidelines are applicable. MCL 769.34(2). MCL 769.34(10) provides, in part, that this Court shall affirm a sentence that is within the appropriate guidelines range "absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." The trial court has discretion in determining the number of points to be scored on any particular variable provided there is evidence on the record that adequately supports the score. *People v Cain*, 238 Mich App 95, 129-130; 605 NW2d 28 (1999).

Pursuant to MCL 777.37(1)(a), OV 7 is to be scored at fifty points where "[a] victim was treated with terrorism, sadism, torture, or excessive brutality." Terrorism is defined as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense." MCL

777.37(2)(a). The trial court scored OV 7 at fifty points, and defendant, after properly preserving the issue below, challenges the score as not being reflective of the facts because his actions were only taken in furtherance of completing the robbery and not designed to increase fear and anxiety in the victim. We disagree.

The evidence presented at trial established that the victim was shot while he was pumping gas after he refused to turn over his car keys to defendant. The victim then fled through the surrounding neighborhood, and defendant followed him. The victim tried unsuccessfully to hide under a car in the neighborhood, and he then attempted to simply hide behind the car. The victim saw defendant approaching and reloading his gun, so the victim threw his keys and money in defendant's direction. Defendant then ordered the victim to undress, but he could not comply because of the pain from the gunshot wound. Defendant retrieved the keys and money and left the scene. The victim testified that he was terrified and fearful of being killed, and that the chase itself took fifteen minutes.

The trial court scored OV 7 at fifty points because not only was the victim shot at close range, defendant proceeded to stalk him, which resulted in a terrifying ordeal for the victim. The evidence supported the trial court's finding that defendant's conduct was designed to substantially increase the fear and anxiety the victim suffered during the offense. It matters not that the victim suffered the extreme fear and anxiety while defendant was acting in an effort to complete the robbery.

Defendant next argues that the trial court was obligated to sua sponte address defendant's competency at the sentencing hearing. Directly related to that argument, defendant also asserts that he was denied a meaningful right to allocution because of his incompetence. Defendant's arguments lack merit.

We initially note that defendant cites no Michigan authority concerning his competency argument in the context of a sentencing hearing as opposed to competency to stand trial. The only alleged support for defendant's claim is that the presentence investigation report (PSIR) included a request that there be a psychiatric evaluation before sentencing based on hearsay comments by defendant's adoptive mother concerning defendant's erratic behavior and a history of mental illness. The references in the PSIR concerning defendant's mental state related almost exclusively to defendant's life prior to the crime. However, defendant was found competent to stand trial following a competency examination.

In *People v Whyte*, 165 Mich App 409, 412; 418 NW2d 484 (1988), this Court stated that where facts are brought to the court's attention which raise a bona fide doubt as to a defendant's capacity to stand trial, it is the trial court's duty to raise the issue of competency. Even if we were to apply *Whyte* to a sentencing hearing, there were insufficient facts to create a bona fide doubt about defendant's competency.

Defendant had earlier been ruled competent, and he in fact chose to allocute at the sentencing hearing, wherein he stated:

I would just like to say that I just obtained my GED in '99. I was about to start community college. If you can sentence me to the lower end of the

guidelines, I would appreciate it, and I'll try to straighten my life up so I can get back on track.

I got my family supporting me that wants to see me get back out there so I can get my life back together. I guess that's pretty much it.

These statements do not reflect that defendant was incapable of allocating pursuant to the requirement in MCR 6.425(D)(2)(c) that he be allowed the "opportunity to advise the court of any circumstances [he] believe[s] the court should consider in imposing sentence[.]" Nor does a review of the transcript for the entire sentencing hearing reflect any unusual or inappropriate conduct or statements by defendant that might give rise to an issue of competency. Moreover, defendant fails to cite any additional information that might have been presented to the trial court that could have affected the court's sentencing decision.

Affirmed.

/s/ Richard A. Bandstra

/s/ William B. Murphy

/s/ Richard Allen Griffin