

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EVELYN MARIE LEHNER,

Defendant-Appellant.

UNPUBLISHED

December 14, 2006

No. 263130

Macomb Circuit Court

LC No. 03-000204-FH

Before: White, P.J. and Zahra and Kelly, JJ.

MEMORANDUM.

Defendant appeals as of right from her sentence of 43 months to ten years in prison for her jury conviction of embezzlement by an agent, MCL 750.174(4)(a). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Originally, defendant was sentenced as a third habitual offender to four to ten years in prison. On appeal, defendant challenged the scoring of Offense Variables (OV) 9, MCL 777.39, OV 10, MCL 777.40, OV 12, MCL 777.42, and OV 13, MCL 777.43. In *People v Lehner*, unpublished opinion per curiam of the Court of Appeals, issued February 17, 2005 (Docket No. 251370), another panel of this Court agreed that OV 10 had been misscored, but rejected defendant's argument regarding the remaining OVs. The *Lehner* Court affirmed defendant's conviction, but remanded for resentencing.

On remand, the trial court rejected defendant's challenge to the scoring of OVs 9, 12, and 13, noting that it was required to adhere to this Court's decision that the scoring of those OVs was correct. The recalculated guidelines recommended a minimum sentence range of 14 to 43 months. The trial court resentenced defendant to 43 months to ten years in prison, with credit for 623 days.

Defendant argues that she is entitled to a second resentencing because the trial court scored the guidelines based on facts that were not found beyond a reasonable doubt by the jury as required by *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant contends that had the trial court adhered to *Blakely, supra*, when scoring the guidelines on remand, the recommended minimum term range would have been nine to 34 months.

Defendant failed to raise this issue below; therefore, review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

We affirm. In *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), our Supreme Court held that *Blakely, supra*, does not apply to Michigan's indeterminate sentencing scheme. The *Drohan* Court observed that, under *Blakely, supra*, "a defendant does not have a right to anything less than the maximum sentence authorized by the jury's verdict, and therefore, judges may make certain factual findings to select a specific minimum sentence from within a defined range. *Blakely, supra* at 308-309." *Drohan, supra* at 159. The *Drohan* Court concluded that the maximum sentence under Michigan's sentencing scheme is that set by statute. MCL 769.8(1). Therefore, a trial court's exercise of discretion to score the sentencing guidelines in order to determine a minimum sentence does not violate the Sixth Amendment. *Drohan, supra* at 160-162. No plain error occurred, and defendant is not entitled to resentencing.

Affirmed.

/s/ Helene N. White
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly