

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DEMETRIC DONTA THOMPSON,

Defendant-Appellant.

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UNPUBLISHED

December 14, 2006

No. 266032

Wayne Circuit Court

LC No. 04-011752-01

Before: Meter, P.J., and O’Connell and Davis, JJ.

MEMORANDUM.

Defendant was convicted by a jury of three counts of armed robbery, MCL 750.529, and one count of carjacking, MCL 750.529a. He was sentenced to concurrent terms of 225 months to 60 years for each conviction. Defendant appeals as of right, challenging only his sentences. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that he is entitled to resentencing because Offense Variables (“OV”) 1 and 2 were incorrectly scored, thereby violating his right to due process. Offense Variable 1 receives 25 points if “[a] firearm was discharged at or toward a human being . . . .” MCL 777.31. Offense Variable 2 receives 5 points if “[t]he offender possessed a pistol, rifle, shotgun, or knife . . . .” MCL 777.32. Defendant argues that he was acquitted of possession of a firearm during the commission of a felony, MCL 750.227b, so his OV score cannot be premised on his possession of a firearm. He claims that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), precludes a score based on conduct for which he was acquitted.

The scoring of OV 1 was appropriate. In *People v Drohan*, 475 Mich 140, 162-164; 715 NW2d 778 (2006), our Supreme Court held that *Blakely*, *supra*, did not require a jury determination beyond a reasonable doubt of facts relied upon for sentencing where the facts were pertinent to the determination of the *minimum* sentence. Because a different burden of proof applies to the establishment of a minimum sentence, “the scoring of the guidelines need not be consistent with the jury verdict . . . .” *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446, *aff’d* in part, vacated in part on other grounds 469 Mich 415 (2003). “[S]ituations may arise wherein although the fact finder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing.” *Id.* at 713. Here, one of the witnesses unequivocally testified that defendant shot between his legs and then shot at him, but other witnesses were not sure if defendant or his accomplice was the robber with the weapon. At sentencing, defendant did not

challenge the testimony that he was armed because his attorney determined that the issue was moot. Whether defendant was the armed culprit or merely the armed man's assistant, the same number of points apply. MCL 777.31(2)(b). Accordingly, the trial court did not err in the scoring of OV 1. The scoring of OV 2 is valid for the same reason. MCL 777.32(2). The fact that the jury returned guilty verdicts on the armed robbery charges belies defendant's implied presumption that the jury found that the offenders were unarmed.

Affirmed.

/s/ Patrick M. Meter  
/s/ Peter D. O'Connell  
/s/ Alton T. Davis