

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

ANTHONY SANDERS,

Defendant-Appellant.

UNPUBLISHED

December 21, 2006

No. 263092

Jackson Circuit Court

LC No. 04-000915-FH

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(iii). Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to 21 to 72 months' imprisonment. Because the trial court did not abuse its discretion in scoring the offense variables and did not deny defendant any constitutional right when considering facts upon which to base the scoring, we affirm.

Defendant's conviction arises out of his arrest when a police search uncovered marijuana in the car in which he was a passenger. Defendant had borrowed a car from his girlfriend, Sarah Fruth, to pick up marijuana to sell. A man named "Nigel" placed a quantity of marijuana in the glove box of the vehicle for defendant to sell, with the understanding that once the marijuana was sold, defendant would pass along some of the proceeds to Nigel, but keep the profits for himself. The vehicle was ultimately pulled over when an officer noted that despite the dark night, the vehicle had no headlights on. A subsequent search of the vehicle revealed a small amount of marijuana on the floorboard of the back passenger seat where defendant had been sitting, and a larger quantity of marijuana in the glove box of the vehicle.

Defendant first argues on appeal that the trial court erred in scoring ten points for offense variable (OV) 14, MCL 777.44, because there was insufficient evidence that he was a leader in a multiple offender situation. We disagree.

A sentencing court's scoring of points under the sentencing guidelines is reviewed for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). As long as there is some evidence of record in support, a scoring decision will be upheld. *Id.* The trial court's factual findings at sentencing are reviewed for clear error. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Offense variable 14 measures the offender's role in the crime and requires the sentencing court to assess ten points if, considering the entire criminal transaction, the offender was a "leader in a multiple offender situation." MCL 777.44; *People v Apgar*, 264 Mich App 321, 330; 690 NW2d 312 (2004), lv gtd 474 Mich 1099 (2006). If there is a multiple offender situation with three or more offenders, more than one offender can be a leader. MCL 777.44(2)(b).

MCL 777.44 does not define "offender" or "leader." When a statute does not define terms, it is proper to use a dictionary definition to construe those terms "in accordance with their ordinary and generally accepted meanings." *People v Morey*, 461 Mich 325, 330; 603 NW2d 250 (1999). Black's Law Dictionary defines an "offender" as a "person who has committed a crime" (8th ed), p 1110, and a "person implicated in the commission of a crime" (6th ed), p 1081. A leader is defined as "a person . . . that leads" or "a guiding or directing head." *Random House Webster's College Dictionary* (1997), p 745.

At sentencing, the prosecution argued that defendant should be assessed 10 points for OV 14 because Nigel and Fruth were offenders in the criminal transaction as well. According to the prosecution, Nigel provided the marijuana for defendant to sell, and Fruth loaned defendant the car, knowing that he was using it to pick up and deliver marijuana, thus facilitating the crime. Defendant objected to the scoring of ten points for OV 14, arguing that if Nigel provided the marijuana for distribution, Nigel, rather than defendant, was the leader. The trial court agreed with the prosecution that defendant was a leader, noting that he received the marijuana, sold the marijuana, and kept the profits from the sale. The court further noted that if, as the evidence indicated, Fruth were involved, then both defendant and Nigel could be leaders.

In this case, defendant was the only person charged with respect to the marijuana. Nevertheless, we agree with the trial court that Nigel and Fruth were offenders and that defendant could thus be assessed points for being a leader in a multiple offender situation. Evidence was presented at trial that Nigel fronted defendant marijuana to sell and that when defendant sold the marijuana, he kept the profits made from the sale. Evidence was also presented that Fruth provided her vehicle to defendant, knowing that defendant was using her car to pick up some marijuana and that defendant, in fact, did pick up marijuana in Ms. Fruth's vehicle. The above is sufficient to find that Nigel and Ms. Fruth were offenders with respect to the possession and intent to deliver marijuana and that defendant was a leader in the criminal act. As evidence was presented to support finding defendant a leader, OV 14 was properly scored at 10 points.

Defendant next argues that the trial court improperly engaged in judicial fact-finding when determining that defendant was a leader in a multiple offender situation. According to defendant, such fact-finding violated defendant's constitutional right to have a jury determine all of the facts used to impose punishment beyond a reasonable doubt under the rules articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree.

The Sixth and Fourteenth Amendments require that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). The relevant statutory maximum "is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*. . . . In other words, the relevant

‘statutory maximum’ is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings.” *People v Drohan*, 475 Mich 140, 153; 715 NW2d 778 (2006), quoting *Blakely*, *supra* at 303-304.

Michigan’s sentencing scheme is indeterminate, and the rules articulated in *Blakely* do not affect Michigan’s legislative sentencing guidelines. *Drohan*, *supra* at 161. Although a trial court may set the minimum sentence within the statutory range, and even depart from it, it may not impose a greater maximum penalty than that allowed by the criminal statute. As a result, the sentence never exceeds the scope of the jury’s verdict. *Id.* Thus, “[a]s long as the defendant receives a sentence within that statutory maximum, a trial court may utilize judicially ascertained facts to fashion a sentence within the range authorized by the jury’s verdict.” *Id.* at 164.

Defendant was convicted of possession of marijuana with intent to deliver, MCL 333.7401(2)(d)(iii). The statutory maximum penalty for that offense is four years’ imprisonment. If sentenced as an habitual offender, second offense, a defendant’s maximum sentence may be increased by one and one half times the maximum for a first conviction, or to six years (72 months) in this case. MCL 769.10(1)(a). See e.g., *People v Martin*, 257 Mich App 457, 459; 668 NW2d 397 (2003). As defendant was sentenced to 21 to 72 months’ imprisonment by the court, the sentence does not exceed the statutory maximum. Therefore, there was no constitutional violation.

We also reject defendant’s argument that the trial court’s fact-finding about his role in the crime violated *Blakely* because it increased his statutory maximum sentence from an intermediate sanction of 12 months’ jail time. The Michigan Supreme Court recently held that “[a] sentencing court does not violate *Blakely* and its progeny by engaging in judicial fact-finding to score the OVs to calculate the minimum recommended sentencing guidelines range, even when the defendant’s PRV score alone would have placed the defendant in an intermediate sanction cell.” *People v McCuller*, 475 Mich 176, 182; 715 NW2d 798 (2006). The Court explained that, because a defendant has no right to have his minimum sentence calculated without considering all of the statutory factors, he has no right to an intermediate sanction until all of the OVs have been scored and those OVs, in conjunction with the PRVs and the offense class, indicate that the upper guideline is 18 months or less. *Id.* at 181-182.

In this case, once his offense guidelines were scored, defendant was not entitled to intermediate sanctions. His minimum sentence range exceeded an upper range of 18 months with a lower limit of 12 months or less, so MCL 769.34(4)(c) applied. Under that section, intermediate sanctions are an option for the trial court, but they are not required to be imposed. *Id.*; *Martin*, *supra* at 259-260. Therefore, defendant’s maximum sentence was not improperly increased by judicial fact-finding beyond the statutory maximum of 72 months’ imprisonment.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot