

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFONSO GIBBS,

Defendant-Appellant.

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UNPUBLISHED

July 10, 2008

No. 276611

Berrien Circuit Court

LC No. 2006-405758-FH

Before: Bandstra, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with intent to deliver less than 50 grams of cocaine, second or subsequent offense, MCL 333.7401(2)(a)(iv); MCL 333.7413(2). Defendant appeals as of right his sentence of 42 to 480 months' imprisonment. We affirm.

I. SCORING OF OFFENSE VARIABLES (OVs) 13 & 19

Defendant first challenges the trial court's scoring of OV 13, MCL 774.43, and OV 19, MCL 777.49.

A. Standard of Review

We review a trial court's scoring decision for an abuse of discretion. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005). We will uphold a scoring decision for which there is any evidence in support. *Id.* at 454.

B. Analysis

Defendant first claims that the trial court erred in scoring 25 points for OV 13. More specifically, defendant argues the trial court erred in scoring 25 points for OV 13 because there was no evidence that in the five years before October 25, 2006, the date on which the sentencing offense occurred, he was convicted of three crimes against a person. We disagree.

A trial court may score 25 points for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). While we agree with defendant that he was not convicted of three felonies that were crimes

against a person in the five years preceding October 25, 2006, a conviction is not necessary for a crime to be considered in the scoring of OV 13. In determining the number of points to be scored for OV 13, the trial court must count all crimes, including the sentencing offense, which occurred within a five-year period, without regard to whether the offense resulted in a conviction. MCL 777.43(2)(a). There is evidence in the presentence report that, in the five years preceding October 25, 2006, defendant committed three felonies that were crimes against a person. Accordingly, there is evidence in the record to support the trial court's scoring of OV 13, and we, therefore, affirm the trial court's scoring of 25 points for OV 13. *Cox, supra* at 454.

Defendant also claims that the trial court erred in scoring ten points for OV 19. Again, we disagree. A trial court may score ten points for OV 19 if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Interfering with a police officer's investigation of a crime constitutes interfere with the administration of justice. *People v Barbee*, 470 Mich 283, 287-288; 681 NW2d 348 (2004). After defendant was observed stuffing something behind the back seat of the police car, the investigating officer instructed defendant to get out of the car and to stand near the rear of the car. While the officer investigated what defendant had stuffed behind the seat, defendant walked off. Defendant, by refusing to obey the police officer's instruction, interfered with the officer's investigation of a crime. *Id.* The trial court did not abuse its discretion in scoring ten points for OV 19. *Cox, supra* at 453-454.

We further reject defendant's argument that the trial court, in scoring OVs 13 and 19, engaged in impermissible judicial factfinding. Our Supreme Court has definitively ruled that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), does not affect Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 676-678; 739 NW2d 563 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

## II. PROPORTIONALITY OF DEFENDANT'S SENTENCE

Defendant also makes several other arguments that the trial court erred when it sentenced him to 42 to 480 months' imprisonment. We reject all of defendant's arguments.

### A. Standard of Review

We review defendant's unpreserved claims of sentencing error for plain error affecting his substantial rights. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003).

### B. Analysis

Defendant first argues the trial court did not sufficiently articulate the reason for the imposed sentence because it did not say why the maximum sentence was proportionate to the offense. Defendant's argument is without merit. The trial court met the articulation requirement when it relied upon the sentencing guidelines in imposing defendant's sentence. See *People v Conley*, 270 Mich App 301, 312-313; 715 NW2d 377 (2006).

Defendant's sentence of 42 to 480 months' imprisonment fell within the recommended minimum sentence range under the legislative guidelines as enhanced by MCL 333.7413(2). See *People v Williams*, 268 Mich App 416, 430-431; 707 NW2d 624 (2005) (holding that a minimum sentence falling within the recommended range as enhanced by MCL 333.7413(2) did not constitute an upward departure). Therefore, we are required to affirm defendant's sentence unless the trial court erred in scoring the guidelines or relied on inaccurate information. MCL 769.34(10). We have already rejected defendant's arguments that the trial court erred in scoring the guidelines. We now also reject defendant's argument that the trial court, because it failed to assess defendant's rehabilitative potential through substance abuse and psychiatric treatment, contrary to MCR 6.425(A)(5), relied on inaccurate and incomplete information when it sentenced defendant.

MCR 6.425(A)(5) only requires a probation officer to include in the presentence report a description of defendant's medical history, substance abuse history, and, if applicable, a current psychiatric report, which the probation officer did. The presentence report informed the trial court that defendant had no history of substance abuse or of mental health treatment. A presentence report is presumed to be accurate, and the trial court may rely upon the report unless effectively challenged by the defendant. *People v Callon*, 256 Mich App 312, 334; 662 NW2d 501 (2003). Defendant did not challenge the accuracy of the presentence report below, nor does he on appeal. Accordingly, defendant has failed to show the trial court relied upon inaccurate information when it sentenced him. We, therefore, affirm defendant's minimum sentence of 42 months' imprisonment. MCL 769.34(10).<sup>1</sup>

In affirming defendant's minimum sentence, we reject his argument that his sentence was not proportionate and was, therefore, cruel and unusual punishment. While MCL 769.34(10) does not preclude appellate relief for sentencing errors of constitutional magnitude, *Conley*, *supra* at 316, a minimum sentence falling within the guidelines range is presumed to be proportionate, *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995). A proportionate sentence is not cruel and unusual punishment. *People v Colon*, 250 Mich App 59, 66; 644 NW2d 790 (2002). Defendant has failed to present us with any evidence to rebut the presumption of proportionality.

Defendant finally argues that his maximum sentence of 480 months' imprisonment was not proportionate to the offense because he only possessed 4.499 grams of cocaine. The principle of proportionality requires that a sentence be proportionate to the seriousness of the circumstances surrounding the offense *and* the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Defendant's extensive criminal record of three prior felonies and 11 misdemeanors before he reached the age of 30,<sup>2</sup> including two prior drug convictions,

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<sup>1</sup> Defendant's argument that, pursuant to 5K2.13 of the Federal Sentencing Guidelines, the trial court should have departed downward from the recommended minimum sentence range is without merit. In addition to the fact that defendant was not sentenced under the federal guidelines, 5K2.13 would not apply to the present case. The cited section of the federal guidelines does not apply if the reduced mental capacity was the result of the voluntary use of drugs or other intoxicants.

<sup>2</sup> The only significant period in which defendant did not commit a crime in the 12 years before  
(continued...)

demonstrates that defendant is unable to conform his conduct to the requirements of the law. Based on the circumstances surrounding the offense and offender, the trial court did not plainly impose on defendant a disproportionate sentence. *McLaughlin, supra* at 670.

Affirmed.

/s/ Richard A. Bandstra

/s/ Michael J. Talbot

/s/ Bill Schuette

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(...continued)

the instant offense was the five-year period he spent in prison.